REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 179 & 188 of 2006

JAMES MAINA MAGARE.....1ST APPELLANT
JOHN KABANYA MAINA..... 2ND APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

JUDGEMENT

The two Appellants **JAMES MAINA MAGARE** (hereinafter referred to as he 1st Appellant) and **JOHN KABANYA MAINA** (hereinafter referred to as the 2nd Appellant), have both filed appeals against their convictions and sentences before the Senior Resident Magistrate sitting at Taveta Law Courts. The two Appellants had been charged jointly with a first count of **ATTEMPTED ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.** The particulars of the offence were that

"On the 13th day of August 2005 at about 5.30 p.m. at Taveta Township in Taita Taveta District within Coast Province, jointly being armed with dangerous weapons namely Beretta Pistols S/Nos. E-28554 and C-6548, attempted to rob MOHAMED AHMED OMARI his mobile phones and at or immediately before and immediately after the time of such attempted robbery threatened to shoot the said MOHAMED AHMED OMARI with pistols"

In addition each Appellant faced counts 2 & 4 of BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4(1) AS READ WITH 4(3) OF THE FIREARMS ACT and Counts 3 and 5 of BEING IN POSSESSION OF AMMUNITION WITHOUT A FIREARM CERTIFICATE CONTRARY TO SECTION 4(1) AS READ WITH SECTION 4(3) OF THE FIREARMS ACT CAP 114 LAWS OF KENYA.

Both Appellants entered *'not guilty'* pleas to all the charges they faced and their trial commenced on 30th November 2005 at which the prosecution led by **INSPECTOR MUASYA**, called a total of eight (8) witnesses. The facts in brief were that the complainant who is a businessman running a shop selling mobile phones in Taveta Town was at the said shop at 5.30 p.m. on 13th August 2005 in the company of his wife **ANNE MOHAMED PW2.** A customer **FLORENCE AUMA ORWA PW7** came in to purchase a scratch-card. The complainant told his wife to sell her the card. Two men then entered the shop and one posed as a customer saying he wished to buy credit. The men then whipped out pistols and the 2nd man pulled the complainant into the shop. They were all ordered to lie down. The 1st Appellant produced a paper bag and ordered the complainant to put into the paper bag all the mobile phones in the shop. The complainant refused to obey the order and pushed the 1st Appellant out of the shop all the while screaming for help shouting ***'Thief'***. Members of public gathered at the shop. The 2nd Appellant then got out of the shop and both men ran off. The complainant rushed to report the incident at the nearby Taveta Police Station. The crowd meanwhile pursued the two men. The 1st Appellant was found hiding in a store in the homestead of a lady **SOFIA DANSON MWASHUKE PW3** where he had sought refuge; whilst the 2nd Appellant was arrested by the crowd. Both were taken to the police station and charged. Upon the completion of police investigations the two were charged in court.

At the close of the prosecution case both Appellants were found to have a case to answer and were placed on their defence. They each gave unsworn statements denying the charges against them. On 22nd February 2006 the learned trial

magistrate delivered his judgement in which he convicted both Appellants on the first charge of Robbery with Violence. In addition the learned trial magistrate convicted the 1st Appellant on Counts 2 and 3 for possession of Firearm and Ammunition whilst the 2nd Appellant was convicted of Counts 4 and 5 for Possession of Firearm and Ammunition. After listening to their mitigation the trial court sentenced each appellant to Death on the first count. He further sentenced the 1st Appellant to serve 10 years imprisonment for Counts 2 and 3 to run concurrently and also sentenced the 2nd Appellant to serve 10 years on Counts 4 and 5. The sentences for Counts 2, 3, 4 and 5 were directed to be held in abeyance in view of the death sentence imposed for Count No. 1. The appellants being dissatisfied with both their convictions and sentences filed their appeals in the High Court.

Being a court of first Appeal we are mindful of the decision of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81** that:-

> ***"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"***

[See also **OKENO –VS- REPUBLIC [1972] E.A.L.R. 31**]

MR. MAGOLO Advocate represented both Appellants during the hearing of this appeal whilst **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State indicated that he was conceding the appeals. Since it is our duty as a High Court sitting on appeal, to re-examine and re-evaluate the evidence adduced before the lower court, we shall proceed to do exactly that.

With respect to the first charge of Robbery with Violence contrary to S. 296(2) of the Penal Code the complainant and his witnesses told the court that the incident occurred at 6.00 p.m. It was still daylight and visibility was good. The complainant stated that the two appellants came into his mobile shop posing as customers who wished to buy credit. Once they came in the two men whipped out a pistol each and ordered the complainant, his wife **PW2** and the other customer in the shop **PW7** to lie on the ground. **PW2** and **PW7** complied immediately but the complainant bravely (some would say unwisely) refused to comply with the order to lie down and instead put up a struggle to protect his life and his shop. Even when the 1st Appellant ordered the complainant to put all the mobile phones in the shop into a paper bag he had, the complainant stubbornly refused to comply. Instead the complainant held on to the 1st Appellant and pushed him out of his shop. The 2nd Appellant probably realizing that they had bitten off more than they could chew also ran out of the shop. In our view this engagement must have taken at the very least several minutes. As we have stated earlier the incident occurred during daylight hours. The complainant certainly had ample time and opportunity to see and identify his attackers. The fact that he saw each appellant well is buttressed by the fact that the complainant gave to the court a very detailed account of the events of that evening, and he stated with clarity and precision the role that each appellant played in the robbery. Under cross examination by the 1st Appellant at page 6 line 5 the complainant states with certainty

"You are the one who pointed a pistol at me"

On the same page at line 16, the complainant responds under cross-examination by the 2nd Appellant

> ***"I have told the court what happened. You are the one who ordered me to lie on the floor but I refused"***

It is clear from these responses that the complainant is very certain about the identity of the two appellants.

The complainant's evidence on identity of the two appellants is corroborated by both his wife **PW2** and the customer **PW7** who were both in the shop when the incident occurred and witnessed the events as they unfolded. Both **PW2** and **PW7** positively identify the two appellants as the men who robbed them on the material day. They both confirm that the men came into the shop posing as customers only to whip out pistols once inside the shop. **PW2** in her evidence at page 6 line 29 says

> ***"The 2nd accused asked for mobile phone credit of Kshs.100/-. I gave him a scratch card for***

Kshs.100/-. He pretended to fetch his mobile phone from his pockets but instead he produced a pistol and pointed it at me"

Under cross-examination by the 2nd accused at page 7 line 19 **PW2** confirms her evidence when she states

"I saw you very clearly. You pretended to be removing your mobile phone from your pockets but you produced a pistol"

There is no inconsistency between what **PW2** stated in her examination in chief and what she asserts under cross-examination. Likewise **PW7** is firm and consistent in her evidence regarding the identity of the two appellants. In her evidence in chief **PW7** describes that one of the robbers was a ***"tall man"*** and the other was a ***"short man"***. In cross-examination by the 1st Appellant **PW7** confirms her evidence in chief when she states at page 14 line 16

"You are the tall young man I saw at the mobile phone shop belonging to MOHAMED. You pointed a pistol at me. You ordered me to lie on the floor"

Under cross-examination by the 2nd Appellant **PW7** again confirms her evidence in chief when she states at the same page line 20

"You are the short man who was holding a pistol in MOHAMEDs shop".

Just like the complainant and **PW2**, the witness **PW7** gave a clear and concise narration of what she saw. She remained unshaken under cross-examination. The incident took several minutes and the appellants had not made any effort to disguise their appearances. It cannot be the case that all three witnesses are mistaken in who they saw. The conditions were favourable for a clear and positive identification.

As if this evidence was not sufficient on its own we find that there exists yet more credible evidence linking the two appellants to this crime. After the complainant fought off and repulsed the robbers they ran out of the shop being chased by a crowd since the complainant had raised an alarm. **PW3 SOFIA DANSON MWASHUKE** tells court that on the evening in question she was seated outside her house together with her son **PETER MWAKIU PW5** when a man whom she identifies as the 2nd Appellant approached her homestead. He was holding a pistol. He ordered them not to reveal where he was and entered a store in her homestead to hide. The crowd in hot pursuit arrived a few minutes later and asked **PW3** if she had seen a strange man. She pointed out the store where the 2nd Appellant had gone to hide. The crowd flushed him out and apprehended him. **PW5** went to call police who came and arrested the 2nd Appellant. The complainant who had been following the crowd came up and identified the 2nd Appellant to police as one of the men who had attacked him. This evidence from **PW3** is corroborated in all material respects by her son **PW5** who was with her when the 2nd Appellant came to their homestead seeking a place to hide. Once again it was not dark and conditions were favourable for a positive identification. **PW3** states at page 8 line 13

"It was dusk when the 2nd accused entered my store. I could see him very well"

She states further down the same page at line 25

"I saw the 2nd accused very well when he entered the store. He had a black pistol. I also saw him when police removed him from the store"

The evidence of **PW3** and **PW6** is corroborated by **PW6 INSPECTOR JOSEPH CHESIRE**. He told court that he went to the home of **PW3** where he found a crowd had detained a man in a store. The crowd wanted to set the store on

fire but **PW6** restrained them. He forced open the door to the store and removed from therein a man whom he identifies as the 2nd Appellant. He confirms that upon searching the 2nd Appellant he recovered on him a Beretta pistol hidden inside his pants. This pistol was produced in court as an exhibit **Pexb1**. It cannot be a mere coincidence that the complainant is robbed by a man wielding a pistol and minutes later a man wielding a pistol goes to hide in a store in the home of **PW3**. That same pistol-wielding man is eventually forced out of the store by police. The chain of evidence is clear and unbroken. The 2nd Appellant after attacking the complainant's shop and being chased by an angry mob sought to hide himself in a store. Unfortunately **PW3** revealed his hideout and he was apprehended. It is very unlikely that there were several men armed with pistols wandering around Taveta Town on that material day. It is not the wild west! All the witnesses have identified the 2nd Appellant and more importantly the complainant places him at the scene of the crime.

With respect to the 1st Appellant he was no luckier than his comrade. **PW6** Inspector Chesire, told the court that after he had placed the 2nd Appellant in the cells, he was informed by the public that they had caught a suspect and beaten him in the Korongoni area. **PW6** went and rescued the man whom he identifies as the 1st Appellant from the mob. He took 1st Appellant to Taveta Hospital for treatment and then placed him in cells. It could be argued and indeed counsel did argue that the 1st Appellant could well have been an innocent victim of mob justice. However **PW6** told court that the following day the 1st Appellant led him and **CORP. OMARI PW8** to a thicket where he had thrown his pistol as the mob chased him. The police searched the thickets and lo and behold they recovered a pistol. This pistol was also produced in court **Pexb2**. Meanwhile the complainant had already identified the 1st Appellant upon his arrest by police. Evidence of **PW6** with respect to the arrest of the two appellants and recovery of the exhibits is corroborated in all its material aspects by **PW8** Corporal Omari who together with **PW6** effected the said arrests and recovery.

Based on our analysis above we are satisfied that there has been a clear, reliable and positive identification of the 2 appellants as the men who robbed the complainant's shop. We are frankly quite puzzled by the decision of the learned State Counsel to concede this appeal in the light of the weight of evidence adduced before the lower court. No less than seven (7) witnesses have identified the two appellants. We are in agreement with the finding of the learned trial magistrate at page 14 line 20 of her judgement that

> ***"On evaluation of the evidence on record it is notable that the prosecution witnesses gave credible, detailed and generally consistent testimonies as to what they witnessed"***

Mr. Magolo counsel for the appellants argued that failure to call any of the members of the crowd who chased the Appellants from the complainant's shop to the point of their arrest weakened the evidence of identification. With respect we do not agree. The complainant himself provides this crucial link as he identifies both Appellants as the ones who attacked him in his shop and he is present to confirm this identification at the point of arrest of each Appellant. At the scene of incident the complainant's evidence on identification is corroborated by **PW2** and **PW7**. At the point of arrest of the 2nd Appellant his evidence is corroborated by **PW3** and **PW5** whilst in the case of the 1st Appellant it is corroborated by **PW6** and **PW8**. There can be no doubt at all that the men who attempted to rob the complainant's shop armed with pistols are the very same men who were arrested with pistols a few minutes later.

Mr. Magolo also took the issue with the fact that no identification parade was mounted by police. In our view in the circumstances, the complainant having seen and identified both appellants at the point of their arrest and in the case of the 1st Appellant at the police station, a parade was unnecessary as he had already seen the appellants. All in all our finding is that the evidence on identification is water-tight.

The complainant and his witnesses told court that the appellants did not manage to steal anything because the complainant fought them off and defied their order to hand over his stock of mobile phones. However this failure to succeed in their nefarious mission was not for lack of trying. The two appellants clearly entered the complainant's shop armed with pistols and ready to commit the offence of robbery. Their actions amounted to an attempted robbery which was thwarted by the complainant's courage in repelling them. As such we are satisfied that this charge of Attempted Robbery has been sufficiently proved. The trial court did consider the defences raised by the appellants but dismissed the same as being without merit. We find that the conviction of the two appellants on this first count was indeed sound and we have no hesitation in upholding the same.

With respect to Count Nos. 2, 3, 4 and 5 we have carefully perused the charges as framed and we do agree with Mr. Magolo, learned counsel that these charges were fatally defective. The charges were brought under S. 4(1) and S. 4(3) of the Firearms Act, Cap 114, Laws of Kenya. S. 4(1) provides

"4(1) Subject to this Act, no person shall purchase acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time"

This section is merely descriptive and does not create any offence. S. 4(3) is the section that provides for the penalties applicable upon conviction. The section creating the offence is S. 4(2) of the Cap 114, which was not mentioned at all in any of the charges. This renders the charges fatally defective as no offence is revealed by the charges as framed. A conviction based on a defective charge is null and void and cannot stand. We therefore quash the convictions of both appellants on Count Nos. 2, 3, 4 and 5.

Finally and in summary we confirm and uphold the appellant's convictions and sentences on Count No. 1 of Robbery with Violence contrary to S. 296(2) of the Penal Code. We do however allow their appeals in respect of Counts 2, 3, 4 and 5 and quash their convictions on those counts. The sentences for Counts 2, 3, 4 and 5 are also set aside.

Dated and Delivered in Mombasa this 20th day of July 2010.

F. AZANGALALA **M. ODERO**
JUDGE **JUDGE**