



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 127 & 133 of 2009

1. HARANGA MWAMBIRO NDAIGWA
2. STEPHEN WAKOMBA.....APPELLANTS
=VERSUS=
REPUBLIC.....RESPONDENTS

JUDGEMENT

Haranga Mwambiro Ndaigwa (1st appellant) and Stephen Wakomba Napende (the 2nd appellant) were convicted on three counts of robbery with violence contrary to section 296 (2) Penal Code and sentenced to death.

They were also convicted on another count of attempted robbery with violence contrary to section 297 (2) which also carries a mandatory death sentence. They were also convicted on five counts of being in possession of a firearm without a firearms certificate contrary to section 4 (2) as read with section 4 (3) of the Firearm Act No.114 of Laws of Kenya but the sentences were held in abeyance. The robbery and attempted robbery took place on 30th October 2004 at Timboni in Malindi District and involved four different individuals, namely Kivuti Nzai, Pc John Kyalo, Pc Haji Mwamasu, Wilfred Gichohi Waigwa. The appellants were alleged to have been armed with dangerous weapons, name AK 47 assault rifles and pistols when they committed the robbery – all the aforementioned victims except one, were shot dead and robbed of cash, where the two police officers were also robbed of their AK 47 rifles and thirty rounds of ammunition each. In addition Wilfred Gichohi Waigwa was robbed of his motor vehicle make Toyota Ceres worth Kshs.600,000/-. The only victim who survived was Kenneth Nzai, who was wounded at or immediately before or immediately after the time of such robbery.

The appellants were also found within Majengo Estate of Mombasa District, on 7th November 2004, to jointly have in their possession an AK 47 Assault rifle serial No.794317, AK 47 Assault Rifle Serial Number 769945, AK 47 Assault rifle Serial Number 56-1 *18052333, sixty eight rounds of 38mm caliber ammunition without a firearm certificate contrary to section 4 (2) as read with section 4 (3) of the Firearms Act.

The appellants pleaded not guilty to all the charges. Nzai Kenneth (Pw 1) worked as a cashier at Temple Point Hotel in Watamu. On 30/10/04, he was given a cheque to go and collect salaries that is cash from Barclay Bank, Malindi. They used the hotel van and he was accompanied by the driver Waigwa, and two police officers(now deceased) and whom he refers to as “Haji and a Kamba policeman”. Incidentally, the hotel cashier had called the bank the previous day and given them a breakdown of the denomination of cash required. However on arrival the bank claimed that the breakdown had been misplaced, and this resulted in a long wait at the bank while the cash was being prepared. PW1 Collected a sum of Kshs. 1,118,219.90 and a copy of the cheque which he had presented was produced in court as exhibit. PW1 placed the money inside a dark blue bag belonging to the hotel. All this time, the driver and the two police officers were waiting for him outside. He got out of the bank at about 11.4am and entered the car, sitting on the back left with Pc Haji. It was his evidence that the officers were in uniform and were armed with guns, while the other police officer sat at the front with the driver. They started the journey back to the hotel and when they reached the bump at Timboni, PW1 heard a noise which he thought was a tyre burst. He lost consciousness and woke up four days later in

Mombasa with gun shot wounds on the left shoulder blade, right ear, right jaw, left leg – two bullets were stuck on his upper arms and another bullet had passed through his right shoulder and exited at the back. His colleagues at the hotel informed him that he had been shot by

robbers. Police who visited him at the hospital told him that the two police officers who had accompanied him in the motor vehicle died, as did the driver – the money he had withdrawn was all taken. He never saw the robbers. Sgt John Bosco Mwangi who was at the time in charge of the armory at Watamu Police Station confirmed that on the morning of 30-10-04 he issued guns to Pc John Kyalo and Pc Haji Mwambaji and he recorded this in the arms movement register (ex. 13). The guns issued as per entry SN 1655 after 30th October 2004 shows that Pc Haji Mwambaji was issued with AK 47 body No. 794317. It had 30 bullets of 7.62 mm caliber special – description of duty escort. They were to escort money from the bank to Temple Point Hotel. The 2nd entry was AMR SN 1656 for 30-10-04 issued to No. 29434 Pc John Kyalo – AK 47 SN 769945 which also had 30 rounds of ammunition caliber 7.62mm – special escort from bank to Temple Point. The two officers signed the Arms Movement Register.

While at the Watamu Police station, PW2 heard a gunshot at around 1.00pm. He rushed to the scene at Timboni area which was about 2.3km from the police station. Upon arrival, he found the two officers dead and their guns had been taken away. He observed that Pc Haji was inside the vehicle, on the front seat, while the driver was also dead on his seat. Pc Kyalo was dead, by the roadside, and the vehicle was in the middle of the road. The guns were missing. A week later, PW2 learnt that Mombasa Flying Squad had recovered the guns, but he did not go to

Mombasa to identify them. He however was able to identify them in court and confirm that they were the same guns he had issued to the same police officers. He never saw the people who had executed the crime Pc Vincent Wabwire (PW3) was from a bonding exercise at Kakuyuni and was on his way to Watamu – he was accompanied by Pc Driver Kalume. When they got to Timboni area, they saw a vehicle belonging to Venta Club, drive past them towards Watamu. Shortly, another vehicle (a saloon) passed them, following the Venta Club vehicle at a high speed. Timboni area has bumps – so the Venta Club Motor vehicle slowed down to go over the bumps and the other motor vehicle caught up with them. PW3 was going in the same direction as the other two motor vehicles, and while about 50 metres away, he saw a gun pointed from the saloon car which had been following the hotel car. There was a gun in front and another one behind. Then the persons in the saloon car started gazing at the hotel vehicle. Driver Kalume braked and both PW3 and the driver jumped out. PW3 stood on the bonnet watching what was happening. He noticed that the Venta Club vehicle stopped while the other passing vehicle passed it, then turned to face Gede direction. The passengers came out of the saloon vehicle with two people armed with AK 47 rifles. One stood guard in front of their vehicle – he was standing in the middle of the road. He wore a sleeveless shirt and a trouser with large pockets. He was bald and well nourished. Shortly he saw Kyalo who was in the Venta Club vehicle and whom PW3 recognized as his colleague. PW3 saw Pc Kyalo jump out of the vehicle and stand outside. He started firing at the people – they exchanged fire, then Pc Kyalo staggered and fell down. After he fell down, a man who was armed with a pistol approached the body of the late Pc Kyalo and took away his AK 47 gun. The man who was in the middle of the road was like the commander, kept firing in the air. By now PW3 was hiding beside the landrover and he was about 30 metres away, so he could see clearly what was going on.

The man standing guard also opened the hotel vehicle door and removed Pc Haji's gun. He identified the man as the 2nd appellant and the one who had a pistol as 1st appellant.

There was another man who was armed with an AK 47, who upon seeing PW3 begun firing towards him, so PW3 hid and did not get to see his face clearly. When 1st appellant took away the gun from Pc Kyalo, 2nd appellant was holding Pc Haji's gun while firing his own gun indiscriminately, so people around Timboni area ran away. The 1st and 2nd appellant got into their vehicle and drove away with the doors open. PW3 then ran towards the Venta Club vehicle and on checking inside, he found Pc Haji dead, with his eyes open – he also noticed that the Venta Cashier lay on the floor of the vehicle in a pool of blood. The driver was dead in the car.

Pc Kyalo was lying on his belly, outside the car – he had killed one of the thugs. PW3 remained at the scene until police officers came – when the dead thug lifted, PW3 realized he had been lying on a Ceska pistol.

The cashier was rushed to

Malindi Hospital, while the dead were taken to the mortuary.

Once the suspects were arrested PW3 attended an identification parade at Makupa Police Station and he identified the 1st and 2nd appellant.

It was PW3's evidence that he clearly saw the robbers, including the driver of the get-away car – as none of them was masked.

On cross-examination by the 2nd appellant PW3 stated:

“The incident occurred on 30-10-04 at around 10.00am.....it was a scary incident. I did not run. I shielded myself from bullets you were in the middle of the road...you were well built at the time ...one was yourself, accused 2 was slim.... I was crouching as the bonnet of the vehicle observing the incident. There was a wall near the place we had stopped the vehicle”

On further cross-examination PW1 clarified that the incident took place after 10.00 and it may have even been 1030 or even 10.50am, but it was during the morning hours.

Isaac Mwawa Rodrot (PW4), the manager of Temple Point/Venta Club told the trial court that he had prepared cheques for salaries and Kshs. 1,118,219/90cts was to be drawn from Barclays Bank, Malindi by the cashier. He confirmed that the cashier left in the hotel's pool car accompanied by the driver and two police officers at about 11.00am – he expected them to return after two hours. Later he was called and informed that a robbery had taken place at Timboni, near the bump and the cashier had been taken to hospital. He went to the scene and found bodies of the two police officers and the hotel's driver PW1 (IP Nickson Charo) (then the OCS at Watamu Police Station) recalls receiving information from Sgt Mwathi who was in charge of the armory, that a gun shot had rent the air at Timboni. PW7 proceeded to Timboni accompanied by other police officers and when he got to the bumps he saw motor vehicle registration KAR 599X property of Temple Point Hotel at the scene. He recognized the motor vehicle as it used to be given police escort to collect money. The vehicle was after the bump and inside the motor vehicle he saw Pc Haji and the motor vehicle driver dead – both had been shot. Beside the motor vehicle lay Pc Kyalo also dead. A crowd which had gathered informed him that they had been shot by thugs. IP Charo saw a thug who had been shot dead, lying on his stomach. He lifted him and saw that he was lying on a Ceska pistol SN 2797 – it had a magazine and two bullets had been fired from it. The civilians informed him that the other thugs had fled in another motor vehicle registrar KAL 690V, Toyota Lexus Metallic in colour. They had fled toward Dabasso – so IP Charo and his deputy IP Nyaga gave chase and upon reaching Gede, they were informed that the vehicle had gone towards Mombasa. The officers followed up to Matsangoni area and into the forest but failed to trace it. Meanwhile, the officers who had been left at the scene collected the cartridges and ammunition. He then handed over the investigations to officers from Flying squad Mombasa. He observed that the dead officers did not have the guns which had been issued to them. He also observed that a police motor vehicle belonging to Watamu police station and which was being driven by Pc Kalume and in which PW3 had been a passenger, was at the scene.

On cross-examination he stated:

“Pw3 told me he saw the incident from a distance ...I relied on information from the civilians.”

The civilians told him that the thugs were three in number although he recorded them as 8, in his statement but later he says he was given both the figure 3 and 8 by members of the public.

When Chief Inspector John Nzau (PW 10) of Mombasa Flying Squad was informed about the robbery he took with him Cpl. Ngeno, Pc Chiringo, Pc Njuki and other police officers to Watamu and at the scene he observed that the motor vehicle were the officers had been slain had 30 bullet holes. He gave its registration as KAR 599X Toyota Lexus. From his investigations, he learnt that some of the robbers were from

Mombasa and that two of them were at Saba Saba area in Mombasa city. He proceeded to Saba Saba area where he arrested 1st and 2nd appellant – they were found standing at a junction near Saba Saba Police Lines. He searched 2nd appellant and recovered a bunch of keys (Produced as exhibit) while 2nd appellant had a receipt for rent written Mr. Aranga. The receipt which was produced as exhibit showed a payment of Kshs. 5000/- being two months rent. The two men were interrogated and they named the two other culprits.

On 7th November 2004, the two appellants took the police officers to Kingorani area within Makupa Police Station area, and showed them a house where they had kept the guns. The house was locked and 2nd appellant opened it using the very key which had been recovered from him. He confirmed that they had both rented the house PW10 got to speak to the caretaker who confirmed that appellants had rented the

house, but they had wanted it repainted, so they had kept their goods in another room. A man came and asked the caretaker to open the door and give him a bag, but the caretaker refused. The caretaker gave PW10 a receipt book for rent (produced as exhibit). The receipt which was recovered from 1st appellant was the last one in that book and it tallied with the duplicate copies. Once inside the house, the police officers found a new black bag, and inside it were three AK 47 rifles – two of them being the very ones which had been stolen from the two dead police officers – each had its own magazine. As at the time of giving evidence PW 10 was able to read the SN 794317 which had been issued to Pc Kyalo, but he was not able to read the Serial Number of the other two in court as the guns had rusted and so the numbers were not clear. There were 68 rounds of 7.62mm and two were 38mm caliber. There were 70 rounds of ammunition in total. Police also recovered 2 number plates KAS 508T (white and yellow) KAR 923 L (two back and front) KAR 923 L (two back and front). The rifles and ammunition were then taken for examination by the ballistic expert, then kept at the firearms safe and eventually produced as exhibit. He was also given the Ceska pistol which was recovered at the scene, and informed was found on the gangster who was killed at the scene. Incidentally, that Ceska pistol had been stolen from a police inspector at Casablanca in Mombasa city. The stolen money was not recovered.

Pc Benjamin Some (PW6) of Flying Squad Mombasa, told the court that he was in the team which interrogated the two appellants. His evidence corroborated that of IP Nzau (PW 10) with regard to the recovered items.

Edwin Kinyua who was the caretaker referred to confirmed he was taking care of rental houses belonging to his mother in Majengo, Mtopanga and Mtwapa. While at Majengo, two men approached him looking for a room to rent. They were Haranga and another whom he identified as the 2nd appellant. They were accompanied by the 3rd accused (who was not among the appellants before this court).

They liked room No. 8 – which the appellant paid Kshs. 5000/- for and was issued him with a receipt in the name of Mr. Haranga. However because it needed to be painted, the appellants kept their property in room 5 which was then vacant – the appellants locked the door and left with the keys.

The caretaker confirmed the receipt recovered by police from 2nd appellant as the receipt he had issued.

After three days, he learnt that there were some people who wanted to break the door and remove the appellants' property since they had no key, and their friend was in custody – the caretaker instructed the reportee not to allow such action and by the time he got home, the people had left. On 7-11-04, police went to the premises early in the morning accompanied by the appellants. 2nd appellant opened the door and the police officers entered and conducted a search while the caretaker stood by the door. He observed that, among the items in the room No. 5 was a black bag which on being opened was found to contain three rifles wrapped in plastic paper two sets of two number plates whose numbers he could not recall.

On cross-examination he was categorical that 1st appellant and 2nd appellant are the men who went to rent a room and brought in their property.

George Murithi Wainaina confirmed seeing the 1st appellant on 1-11-04 when he had gone to seek a room to rent and on 2-11-04 when he came with his property and kept in room 5. He next saw him in the company of 2nd appellant and police officers and he told police that room 5 had property belonging to the person who had rented room 8.

He watched the police search the room and recovered a black bag and he saw them remove the three rifles from that bag, ammunition and number plates for different vehicles.

PW 12 (Dr. Hussein Ali) who produced the postmortem forms on behalf of Dr. Wasike confirmed that Pc John Kyalo's entire body was riddled with gunshot wounds resulting in a fractured skull, brain laceration, brain hemorrhage, perforated lung and the cause of death was the head and chest injury due to gun shot wounds.

With regard to Pc Haji's body, he had multiple gunshot wounds on the trunk, upper limbs, lower limbs – internal examination was not

carried out, at the request of the relatives – the cause of death was due to the multiple gun shot wounds.

He also produced postmortem form on behalf of Dr. Wambengo who carried out post mortem on the body of Wilfred Gichohi Waigwa – he had gun shot wounds on the neck, head, trunk, upper limbs had multiple wounds lower limb – no external examination was carried out, on request by relatives – the cause of death was established as being the multiple gun shot wounds.

Meanwhile at the recovery site in Majengo Chief Inspector Raphael Muriuki Mukua, (PW5) a scenes of crime officer was called to join IP Nzau at Majengo – Kingorani in Mombasa. He got into the house where guns had been found and IP Nzau showed him three AK 47 rifles which had three magazines and 68 bullets 7.6mm and 38special bullets. He was also shown the three nylon (paper bags) one black bag, four motor vehicle number plates – he was requested to take photographs of the items – which he did, and he produced the same as exhibits. He also confirmed that the two appellants were present in that house.

An identification parade was conducted by inspector Said Bweta and the two appellants were identified by PC Vincent Wabwire. The recovered firearms were examined by PW11 Chief Inspector Lagat and found to be firearms within the meaning of the Act.

In his defence, which was sworn, the 1st appellant confirmed he had rented a room No. 8 in Majengo but was asked to keep his property in room 5, as room 8 was being repainted. He confirms taking police to the said premises, but denies that the guns were recovered from there, saying the police only recovered his utensils. He denied having known 2nd appellant before, saying he only met him for the first time at the police station where they were being interrogated.

When he was next taken to the rented Majengo room by police, he found a strange bag there and suggested that it was the police who planted it there. He disputed the ballistics officer's role in this matter, saying that he recorded his statement before receiving the guns and that the guns produced in court were more than what was stated in the charge sheet.

He also took issue with the prosecution for failing to call one Mary Waithera who had seen police opening the room No. 5 where the guns were recovered and he adapted Waithera's statement as a defence exhibit.

The 2nd appellant in his sworn testimony stated that he was arrested on his way to make purchases for his tailoring work. He led police to his house which was searched, but nothing was recovered and he told police he knew nothing about guns. However police insisted that he was a robber and that he had killed three police officers and stolen guns. Then he was taken to a room in Kingorani near Mombasa Maize Millers, a crowd gathered inside the room, and on the ground lay guns and ammunition – basically his defence is that police planted the guns and ammunition there. He contested the identification by Pc Vincent Wabwire at the identification parade saying the officer had seen him earlier before the parade and mentioned that nothing stolen during the robbery was recovered from him.

The trial magistrate in her judgment considered the issue of identification and found that visibility was clear as the offence was committed in the late morning hours, she described PW3, who was the sole eye witness, as credible and held that his description of the appellants, coupled with the fact that he identified them at the identification parade, confirmed that he witnessed the incident. The trial magistrate duly warned herself of the dangers of relying on the evidence of identification by a sole witness but was certain that PW3 identification was free from possibility of error or mistake, noting that PW3 properly described the appellant and what role each played during the robbery, further that his evidence was subjected to cross-examination and remained unshaken.

They also took into account that the conditions for identification prevailing at the scene were favourable. She took into account the evidence of the ballistics expert PW11 and was satisfied that the firearms recovered from the house in Majengo were firearms within the meaning of the Act and that the appellant had not shown the court any certificate issued to them to possess the same, further that there was sufficient evidence to show that the appellants had rented the said room and the time lapse between the robbery and the recovery was not such that it would be unreasonable to hold that the appellants had possession of the same and were the very persons who had participated in the robbery. She also noted that appellants never offered any acceptable explanation as to how they ended up being in possession of the stolen firearms.

The spent cartridges recovered from the scene were presented to the ballistics expert, and his report considered the trial magistrate held that this confirmed, **“the firearms recovered were used during the robbery”**

The trial magistrate noted that from the 30 bullet holes on the body of the motor vehicle, the deaths of Pc Kyalo, Pc Haji and Wilfred Gichohi Waigwa and the injuries by the sole survivor Kenneth Nzai clearly demonstrated that violence had been used.

In the amended grounds of appeal, which we hereby combine, the applicants challenged the findings of the trial court on grounds that:

- 1) The charge sheet was defective as there was no indication as to what the alleged offence committed was.
- 2) The trial magistrate erred in basing the final decision on identification of a single witness without considering that the same was flawed because:
 - (a) the ordeal was shocking and terrifying
 - (b) the assailants were strangers to the victims and PW3 never gave description of the assailant in his initial report.
- 3) PW3 was cross-examined without adhering to the provisions of section 1 of the Criminal Procedure Code.
- 4) The evidence of PW 10, PW 12 and PW13 was contradictory as relates to what transpired on 7th November 2004 at the place of recovery.
- 5) (a) investigations were shoddy as no dusting was done
- 6) Essential witnesses were not called by the prosecution
- 7) That there was no evidence of any demand made to the complaint in count IV and the alleged motor vehicle was not produced as exhibit.

Both appellants filed written submissions where 1st appellant submitted that the charge sheet did not disclose when the offence was committed and that such failure rendered the entire proceedings flawed under section 137(IV)f of the Criminal Procedure Code, and they should be acquitted. Further that there was variance on the amount of money involved in Count 1 – 1.1 or 1.7 or 1.118 million. He takes issue with the evidence of PW3 saying that from what he narrated, he does not appear credible especially because he refers to a time around 10.00- 10.50am while PW1 says by the time he left the bank it was 11.45am.

Further that despite saying that he had gone to

Kakuyuni Primary School to guard exams, there is evidence that he had left for Mombasa’s dog section. This is argued, displays the witness as someone who is not credible and that his evidence is doctored.

The appellants also contest the fact that the police informer was not called to testify, citing the case of **Kigecha v R 1965 EA 773** which held that:

“The police informer who led the police to arrest the accused, if not called to testify, his evidence shall be treated as hearsay evidence and such facts shall be disregarded”

It is further argued that some of the prosecution witnesses PW 10, PW 2, PW 13, seem to contradict each other as to who opened the door to the room from where recovery was made, and the appellants urge this court to resolve that contradiction in their favour. It is also the appellant’s contention.

The appeals are opposed, and Mr. Kemo (the State Counsel) submitted that the evidence clearly proved the offence for which the appellants were convicted. He pointed out that the evidence was watertight both on the robbery and recovery of the two guns stolen from the two police officers. With regard to identification, Mr. Kemo submitted that the circumstances obtaining at the scene of the robbery were favourable for PW3 to identify the attackers. He pointed out that the distance was close – being 30 metres apart, the robbery took about six minutes and PW3 had an opportunity to study the features and even gave a detailed description of the appellants.

He urged the court to be guided by the conditions set out in Archibold's Criminal Pleadings and Practice 2003 Edition pg 1319 under what is known as The Turnbull Guidelines. This is to the effect that:

“First whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications to the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for a caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them the reason for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one, and that a number of such witnesses can be mistaken. Provided that is done, in clear terms, the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstance in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen he accused before? How often....how long elapsed between the original observation and subsequent identification to the police by the witness when first seen by them and his actual appearance? ... when the identification is made after a long period of observation...the jury can safely be left to assess the value of the identity evidence even though there is no other evidence to support it, provided always, whoever, that an adequate warning has been given about the special need for caution?”

It is Mr. Kemo's contention, that the facts in this case fits in very well with the Turnbull Guidelines and he urges the court to find that PW3 sufficiently identified the attackers. From the evidence that was adduced by the prosecution witnesses, and from the trial magistrate's analysis of that evidence, we have no doubt that she properly found that a robbery did take place on the material date. It has also been demonstrated that cash and firearms were stolen – as supported by the evidence of PW1, PW4 (the Hotel's manager) and evidence as to issuance of the firearms, and their subsequent absence from the possession of the two police officers whose bodies were found at the scene. As to whether the sum involved was shs. 1.1 million, shs. 1.7million or 1.118,219/90 – that does not negate the fact that some cash was stolen during the robbery and the victims were treated to maximum violence. That finding clearly supported count 1, 2 and 3. The trial magistrate also considered the issue of identification – the prevailing circumstances – taking note that it was in the late morning, the distance between PW3 and the assailants, indeed PW3 had time to observe and note the physical features of the attackers which he consistently mentioned, the trial magistrate noted that he was even able to state with clarity what role each individual played during the attack. From our own analysis and evaluation of the evidence, this was not just a fleeting glance by the witness, he had ample time and was within close proximity to see and observe the assailants, and he had taken strategic cover between the landrover in which he had been using and the wall next to the scene.

There is no evidence to suggest that his view was obstructed by anything such as a crowd of people or a passing motor vehicle.

The trial magistrate duly warned herself of the dangers of relying on the evidence of a sole witness. We also take note that PW3 was not just your ordinary run of the mill passerby, he was a trained officer who benefited from good survival and observation skills, by virtue of his profession.

Indeed the trial magistrate aptly ruled out that under the circumstances, there was no possibility of error.

Closely linked with that is the identification parade which was carried out on 12-11-04, in just about two weeks after Pw3 had first seen the appellants – the trial magistrate noted that the time lapse was not so great as to have impacted on Pw3's ability to identify/recall the faces he had seen during the attack. We cannot fault that reasoning. Also close at the heels of this, Mr. Kemo submits is the recovery of the guns and ammunition – that it cannot be sheer coincidence, that the very guns which were issued to Pc Kyalo and Pc Haji, were stolen from them on the day of the robbery and a week later were recovered from the room which had been rented by the appellants and this brings into operation the doctrine of recent possession to demonstrate that the two appellants were involved in the robbery. Reference is made to the case of Gachuiri v R KLR 2005 vol 1 688 and 689, which judges of Appeal namely Omolo, Githinji and Waki (JJA) held that:

“Where an accused person is found in possession of items which had been stolen a short while back the doctrine of recent possession applies...”

We agree with that limb of the learned State Counsel's submission. Even without the police informer's testimony, there was sufficient evidence.

What about the question as regards PW3's credibility – regarding where he was from and what time he was at the scene, we think whether he had come from Malindi, Kakuyuni or whatever other section, the bottom line is that at the time the incident was taking place, he was at the scene. What about the time issue? It is not disputed that the incident took place in the late morning hours and indeed on cross-examination PW3 said it would even have been 11.00am – that variance in time (especially because there is no evidence that he actually looked at his watch) to our minds is not fatal, it was within the time range when the incident took place. Our finding is that the finding of the trial magistrate as regards counts 1, 2 and 3 were safe on that limb.

However with regard to count IV on the attempt to rob the deceased Wilfred Gichohi Waigera of the motor vehicle, there wasn't a scintilla of evidence that the robbers made such an attempt, indeed the evidence demonstrates that their target was the money and the guns belonging to the officers – they seemed totally disinterested with the car and they abandoned it with their victims at the scene, using their own car to get away. The conviction on count IV was unsafe and is quashed.

The appellants also took issue with the evidence regarding recovery of the firearms – we have already re-evaluated the evidence in that regard. The trial magistrates properly analysed the chain of events, the different individuals – all of whom confirmed that the two appellants had rented the room, kept their belongings, returned with police and all witnessed recovery of the guns and ammunition from the black bag – indeed 1st appellant confirmed he had rented that room. The appellants' mischief in attempting to derail recovery is demonstrated amply by the fact that before police got to the scene, their sympathizers attempted to access the room so as to take away their property in vain. Whether it was 1st appellant or 2nd appellant who opened his door to the room, the material content i.e the recovery of those guns and ammunition remained consistent.

Mr. Kemo has urged this court to consider the definition of possession under section 4 of the Penal Code which is to this effect.

“possession”

- (a) ***“be in possession or “have in possession” includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person***

- (b) ***If there are two or more persons and any one or more of them with the knowledge and consent of the rest, has not have anything in his or their custody or possession, I shall be deemed and taken to be in the custody and possession of each and all of them”***

We need not go beyond this – the definition clearly captures the scenario in this case and supports the prosecution case and therefore the finding by the trial magistrate that counts V, VI, VII, VIII and IX were proved – the convictions on these counts is upheld.

It is not clear to us what defect the appellants detected in the charge sheet, our perusal of that charge discloses that it meets the minimum expectations of section 137 Criminal Procedure Code and the appellants suffered no prejudice – indeed the date and place and nature of offence was properly indicated in the charge sheet, and the failure to mention the time occasioned no prejudice. It is also not clear to us what error there was when PW3 was being cross-examined and the section cited i.e section 1 Criminal Procedure Code is irrelevant as that is the citation of the Act's Title.

It is not demonstrated how failure to call certain witnesses weakened the prosecution case. Our findings are that the conviction on counts 1, 2 and 3 were safe and we uphold them. The sentence was legal and we confirm the same.

The conviction on count IV was unsafe and we do hereby quash it.

The convictions on count V to IX were safe and we uphold them.

Delivered and dated this 21st day of **September 2010** at Malindi.

H. A. Omondi

JUDGE

M. Odera

JUDGE