REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 178 of 2006

NICHOLAS KIMANZI KAKUTI .....1ST APPELLANT

MUTUA MULI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1112 of 2005 of the

Principal Magistrate's Court at Machakos by E.K. Makori – Senior Resident Magistrate)

JUDGMENT

NICHOLAS KIMANZI KAKUTI and **MUTUA MULI** were the first and fifth accused persons during their trial.

The first appellant, Nicholas Kimanzi Kakuti, was convicted on two counts of robbery with violence contrary to section 296 (2) of the penal code. He was then sentenced to death.

The second appellant, Mutua Muli, was convicted for the offence of being in possession of a firearm without a firearm certificate contrary to section 4(1) of the Firearms Act as read with section 4(3) of the Firearms Act. He was then sentenced to 10 years imprisonment.

When the appeals came up for hearing, the same were consolidated.

The learned state counsel conceded the 1st appellant's appeal. He did so because there had been only dock identification of the 1st appellant. He decried the failure of the police to conduct an Identification Parade, for purposes of ascertaining whether or not the alleged eye-witnesses had positively identified that appellant.

It was the understanding of the learned state counsel that just because the incident lasted about 10 minutes, in a well-lit shop, did not mean that there was positive identification. He noted that the trial court did give to three of the appellants' Co-Accused, the benefit of doubt on the issue of identification, resulting in their acquittal shortly after the prosecution closed its case.

But in relation to the 2nd appellant, Mutua Muli, the learned state counsel opposed the appeal. The main reason for opposing the appeal was that the 2nd appellant was the one who led the police to recover the firearm from the place where the said appellant had hidden it. After the firearm was recovered, it was

examined by a ballistics expert, who verified that it was indeed a firearm, within the meaning prescribed in the Firearms Act.

Being the first appellate court, we are obliged to re-evaluate all the evidence on record.

First, it is clear that the arrest of the appellants was not effected because of the descriptions, if any, which the prosecution witnesses provided to the police. The first appellant was arrested on the same night when the robbery with violence took place.

Curiously, after he was arrested, **PW 1** went to the police to identify the 1st appellant. However, the said identification was not done at an Identification Parade. That conduct was extremely prejudicial to the 1st appellant. It should not have been done by the police.

Secondly, as none of the prosecution witnesses led to the arrest of the 2nd appellant, and as the firearm which was allegedly recovered which the assistance of the 2nd appellant had no connection with the robbery in question, we find no good reason for lumping the particular count (of possession of a firearm without a firearm certificate), together with the other charges.

As soon as the Ballistics expert ascertained that the pistol which the 2nd appellant is said to have had, was not connected to the shooting incident during the robbery in question, the 2nd appellant ought to have been charged separately in respect thereto.

The learned trial magistrate appears to have been uncertain as to whether or not the alleged identification of the appellants was only done when they were in the dock.

On the one hand, whilst setting out the issues for determination, the trial magistrate said;

"***4. That it is quite clear from the record the eyewitnesses only came to identify the accused in the dock and not at police. Why this happened like that or why no parades were ever conducted at hand albeit the incident happened during day is also quite clear." (sic!)***

Yet, later when resolving the issue, the learned trial magistrate said;

"***It will be quite clear in my mind that he was positively identified. The identification was not only at the dock or at the trial only but that he was seen that day."***

Obviously, if the appellants or either of them was only identified when they were on trial, and as they were in the dock, that can only be described as dock identification. And it is now well settled, that dock identification is not of much evidential value.

In the event, we do accept the concession by the state, as being founded on a sound legal basis.

Meanwhile, as regards the 2nd appellant, **PW 6**, **PC COSMAS KATINDI,** testified that his arrest was attributable to an informer. The informer led the police to Kalimani area, within Matinyani, where the police found the 2nd appellant.

The police had gone to the area because they had been told;

"***that the fellow was wanted in connection with the murder of one prominent businessman."***

When they got to Kalimani, the police arrested the 2nd appellant, and they told him the reason for his arrest.

According to **PW 6**, it is then that the 2nd appellant volunteered to take the police to his home, where

there was a gun which he had hidden in a fence.

As we have already said, the gun which the 2nd appellant allegedly had, was not at all connected to the robbery incident. It could not even be fired, as the ballistics expert verified. We therefore find it somewhat strange that a person who was only arrested in connection with the murder of a prominent businessman, would then volunteer to lead policemen to recover a pistol which had no connection with the said murder.

Secondly, we find it strange that after the police recovered the pistol, they decided not to search the house of the 2nd appellant, yet the sum of Kshs.1,000,000/- which had been stolen from the complainants, had not yet been recovered.

It is even more disturbing that **PW 6** readily conceded that some police officers had known the home of the 2nd appellant, but the home was never searched.

During cross-examination **PW 10, PC BAKARI SAID OMAR**, said that he could not tell the court whether or not the informer who led the police to the arrest of the 2nd appellant had been at the scene of crime. That would lead to the question as to how reliable the information from the said informer was, especially when it is borne in mind that the air pistol allegedly recovered from the 2nd appellant was not used in the murder of a prominent businessman.

It is our considered view that it would be unsafe to sustain the conviction of the 2nd appellant.

We therefore allow the appeal, quash the convictions of both the appellants; and set aside the sentences meted out against them. We order that the appellants be set at liberty forthwith unless they are otherwise lawfully held.

Dated, Signed and Delivered at Machakos, this 24th day of September, 2009.

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ISAAC LENAOLA **FRED A OCHIENG**

JUDGE **JUDGE**