



(From original conviction and sentence in Criminal Case No. 1464 of 2003 of the Chief Magistrate's Court at Nakuru – H. M. Nyaga {S.R.M})

JOHN MUIRURI GACHERUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, John Muiruri Gacheru was charged with two counts of **robbery with violence** contrary to **section 296(2) of the Penal Code**, one count of **being in possession of a firearm without a firearm's certificate** contrary to **section 4(1) as read with section 3(2) of the Firearms Act**, a third count of **being in possession of ammunition without a firearm's certificate** contrary to the same provisions of the said Act. He was tried in the Chief Magistrate's Court at Nakuru and was, on the 9th January, 2006 convicted on all counts by the Hon. H. M. Nyaga, Senior Resident Magistrate and was sentenced accordingly. For the two robbery with violence charges, the appellant was sentenced to death. In respect of counts 3 and 4 the appellant was sentenced to 5 years imprisonment but with an order that the prison term stays in abeyance in view of the death sentence.

Aggrieved by both the conviction and sentence, the appellant then filed this appeal citing the following grounds:

1. That the learned trial magistrate erred in relying on the evidence of identification by PW1 and 2 which, according to the appellant was obtained in difficult circumstances and therefore not free from error.
2. That the identification parade at which the witnesses identified the appellant was flawed since the witnesses had seen the appellant soon after his arrest.
3. That there was a break in the chain of events between the time the robbery was committed and the appellant's arrest.
4. That the appellant's defence, in which he explained his presence at the scene of the arrest was not properly considered, leading to an erroneous conviction of the appellant who maintained he was an innocent bystander (*a stranger*).

The appeal is opposed by the state on the ground that the appellant was positively identified having been arrested after surrendering himself as he and his accomplices were being pursued by the police. The particulars of the charge under **count 1** were that, on 27th June, 2003, at Tipis Trading Centre, Mau Narok in Nakuru District, the appellant, jointly with others not before court, robbed Stephen Mbaabu Kinoti of a Nissan Motor Vehicle, registration number KAK 748 G, a jacket and Kshs.505/= all valued at Kshs.1.2 million and threatened to use personal violence to the said Kinoti in the course of the robbery.

Count 2 of the charge sheet stated that on the same date and at the same place the appellant, jointly with others not before court robbed one Duncan Onyango Okech of Kshs.95,175/= under threat of

personal violence. In counts 3 and 4 of the charge sheet the appellant was stated to have been found in possession of a pistol, S/No.154961 and 5 rounds of 4.5 calibre ammunition, without a valid firearms certificate. The said two offences were said to have been committed at Purko Farm, Mau Narok in Nakuru District.

The appellant filed written submissions in arguing his grounds of petition. The same, together with the state response thereto have been duly considered. As in required of us, being the first appellate court, we have analysed and re-evaluate all the evidence adduced at the trial and have arrived at our own independent conclusion. The evidence of both robbery victims, who testified as PW1 and PW2 was similar in all material respects. They told the court that they were attacked at 12.30 p.m. as they distributed their employer's products (*super match brand cigarettes*) in the Mau Narok area of Nakuru District on 27th June, 2003. Both of them were then working for Mastermind Tobacco Company. They had just delivered two cartons of cigarettes to **Charles Mwangi Ndungu (PW3)**, a retailer at Tipis Trading Centre.

PW1 the driver of the delivery van, registration number KAK 748 G, testified that PW3 offered him a soda but he had to give him an empty bottle in exchange. As PW1 was picking the bottle from the vehicle, where PW2 had already returned, two men appeared, one carrying a gun. The armed man asked for the car keys. His partner took the keys and hit PW1 with the soda bottle. Two other thugs joined from behind the van. The four thugs then bundled both PW1 and 2 into the back of the van where two of them entered to guard them. The other two sat in front of the vehicle which was then driven away. After a while the vehicle came to a stop and the thugs came out. They locked PW1 and 2 from the outside and then left. PW1 and 2 remained in the vehicle for 2 ½ hours after which they were rescued by the police. They recorded statements two days later. Under cross-examination by the appellant PW1 testified that he did not give the police any description of the attackers but that he could identify them if he saw them. He stated that after he and PW2 were rescued, they stayed at the scene until some other officers brought the appellant to the scene but that he was not asked whether the appellant was among the persons who attacked them. He later attended an identification parade where he was shown people of mixed height and complexion and identified the appellant as one of the robbers.

PW2, a salesman testified that PW3 was a regular customer of his at Tipis Trading Centre. PW1 had requested him to retrieve an empty soda bottle from behind the seat of the vehicle when suddenly he (PW2) heard PW1 being ordered to surrender the car keys. On looking up PW2 saw PW1 sandwiched between two people holding guns, similar to the ones exhibited before court. The guns were pointed at PW1. PW2 stated that the appellant was one of the two armed thugs. When the PW1 hesitated in surrendering the keys he was hit on the head with the soda bottle. A third man appeared and took the keys from the PW1 while a fourth one appeared and grabbed K.Shs15,250/= and a receipt book that PW2 held in his hand. PW1 and 2 were then dragged out of the cabin and pushed into the back of the van where they were guarded by the appellant and the second armed gangster as the vehicle was driven away for about 10 to 15 minutes. The appellant's accomplice threatened to shoot PW2 but after the vehicle stopped he alighted, leaving the appellant guarding the victims. PW2 heard some rummaging in the cabin. Soon after the appellant alighted and locked the van from the outside using a padlock. After two hours police officers and the area chief broke the padlock and rescued the victims. PW1 and 2 then drove to Mau Narok Police Station and reported the incident. PW2 stated that he lost his house keys to the robbers, in addition to the K.Shs.15,250/= grabbed from him and a further K.Shs 89,925/= which was at the front of the vehicle. On 28th June, 2003 PW1 and 2 recorded statements with the police. Later, on 3rd July, 2003 PW2, accompanied by PW1 attended an identification parade where he identified the appellant out of 9 parade members. He had told the police that he could recognize the attackers if he saw them. Under cross-examination by the appellant, PW2 testified that he had described the appellant to the police immediately prior to the parade. He testified also that the members of the parade were of mixed height and complexion and that he could not tell how many of them had scars on their faces but that he recognized the appellant's scar. He testified further (*still under cross-examination*) that he had not seen the appellant prior to the identification parade except at the time of the robbery, where he had seen the appellant as he approached PW1 and also when he followed the two into the back of the van to guard them.

The arresting officer, PW4 (*an administration police corporal named Richard Okumu*) testified that he received a report of the 27th June, 2003 robbery while on duty at Tipis Administration Police Post at around 12.30 p.m. He was informed that the robbers had carjacked a Mastermind Tobacco Company vehicle. In the company of his colleagues PW4 pursued the carjacked vehicle as it drove towards Mau Narok. They saw it as it turned to the left into a private compound about 100 meters away. The vehicle stopped and four men alighted and began to flee. PW4 and his team stopped a Land Rover that was passing by and used it to pursue the fleeing men. They ordered them to surrender, whereupon the appellant complied and a gun was recovered from him, together with K.Shs. 8,100/=. PW4 identified the gun (MFI.2) as the one recovered from the appellant. It had five rounds of ammunition. The appellant was arrested and handcuffed while his three companions continued to flee. The police however caught up with two of them and shot them dead in an exchange of fire. One thug escaped.

Under cross-examination by the appellant PW4 testified that no description of the attackers was given to him when the robbery was reported except that they were four in number. He also testified that the appellant dropped the gun which he (PW4) then picked up and that he had seen the appellant start to flee from a distance of 100 metres.

The parade officer, I.P. James Karanja testified as PW6. He stated that he conducted the parade at which the appellant was identified by PW1 and PW2 from amongst 9 suspects of similar appearances, in terms of looks, ages and status. Some were said to have scars, two of them on their heads. PW6 further testified that the witnesses remained at the traffic offices and did not see the appellant prior to identifying him, which he did by touching him on the shoulder. The appellant stated he did not desire to have legal representation at the identification parade and did not raise any objection to the same.

In his defence, the appellant testified that he was a resident of Kihugo in Njoro and a livestock dealer. He told the court that on the material date he was at Tipis Trading Centre, where he had gone to see one Mzee Longisa from whom he used to buy goats for sale. Not finding longisa at his home, DW1 decided to search for him. On the way he heard an explosion and saw 2 people running away. Fearing for his life he fled into hiding. Police officers then ordered him to come out of hiding and to surrender. Upon his compliance, he was and was searched and found in possession of Kshs. 8,100/=:, an identify card, notes and a notebook. He was arrested and charged with this offence which he knew nothing about. During cross-examination by the prosecutor, appellant denied having been found with any gun.

In his judgment, the learned trial magistrate analysed the evidence adduced before him and considered the question of the appellant's identification by the witnesses. He found as a fact that the offence was committed in broad daylight, thereby providing a suitable environment for the victims to see their attackers clearly. He found that despite their fear and apprehension, the conditions were favourable for PW1 and PW2 to identify their attackers. The learned trial magistrate found that since the incident was reported immediately it happened and the vehicle in which the victims were carjacked pursued until the attackers alighted from it and fled within sight of their pursuers, who pursued them as they fled on foot and the appellant having surrendered in the same sequence, then the chain of events remained unbroken. The arrest of the appellant by PW4 having been in the course of that sequence, then he could safely be found to have been among the robbers who attacked and robbed PW1 and 2 as stated in their sworn testimonies. The learned trial magistrate found PW4 forthright in his testimony and had no reason to doubt him. He also found that the defence offered by the appellant was not strong enough to rebut the evidence of PW1 and 2 or to raise any doubt in regard to his involvement in the robbery. The learned trial magistrate dismissed the appellant's contention that the identification parade was flawed on the basis that he found nothing in the evidence of PW1 and 2 that they had seen the appellant prior to attending the parade.

Both PW1 and PW2 identified the appellant as one of the people who had a gun during the robbery. He entered the back of the delivery van and guarded them as the vehicle drove away. He remained with them as the accomplice who was with him alighted after the vehicle stopped. They saw him lock them in the vehicle. We see no reason to doubt their testimonies and do agree with the learned trial magistrate in his finding that their identification of the appellant was positive. Moreover, we find that PW4's testimony is corroborative of the testimonies of PW1 and 2. He was among the pursuers of the carjacked motor

vehicle and he too saw the appellant alight and flee with the rest. He arrested him when he surrendered and dropped the gun he had. In our view, the appellant's defence that he was in the locality of the robbery scene to buy goats carries no weight. According to PW5's unchallenged evidence, a Mololine bus receipt was found on the appellant which clearly indicated that he had come from Nairobi on the day of the robbery.

We have noted a minor contradiction in the evidence adduced by PW1 and 2 on the one hand and PW6 in that whereas the later stated that the parade members were of similar appearances, PW1 and 2 stated that they were of mixed height and complexion. In our view, this contradiction is not material given the evidence of PW4 and the circumstances under which the arrest was made.

The upshot of our findings is that although the evidence adduced against the appellant was mainly circumstantial, the same was weighty enough to prove, beyond doubt, that the appellant was among the robbers who attacked PW1 and PW2 on 27th June, 2003 and was, in the circumstances, properly convicted on the robbery with violence charges. As regards the offences under the Firearms Act, we are not satisfied that the charges against the appellant were proved in the absence of finger print evidence to prove that the gun and ammunition exhibited in court were found in the appellant's possession.

In the premises, we uphold the conviction and sentence on the 1st and 2nd counts. We acquit the appellant in regard to counts 3 and 4 of the charge and set aside the 5 year sentence passed in that regard.

Dated signed and delivered at Nakuru this 23rd day of October 2009.

M. KOOME

M. G. MUGO

JUDGE

JUDGE