



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

**Criminal Appeal 134 & 147 of 2008**

**(From original conviction and sentence in Criminal Case No.906 of 2006 of the Principal Magistrate's court at Molo – J. OSEKO, SPM)**

**PETER MAINA KABUTU.....1<sup>ST</sup> APPELLANT**

**PETER GITONGA MATU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**PETER MAINA KAVUTU** and **PETER GITONGA MATU**, the appellants, were upon trial on capital robbery, being in possession of a firearm and ammunition contrary to **Section 22** of the **Firearms Act** convicted and sentenced to death on the capital robbery charged and ten years imprisonment on each of the counts of being possession of a firearm and ammunition. The two imprisonment terms were ordered to run concurrently. They have appealed against all those convictions and sentences.

**Section 22** of the **Firearms Act** does not create an offence. In any case neither the firearm nor the ammunition was found in their possession. They were said to have been next to the vehicle near which the appellants were found. We therefore agree with both the state and appellants' counsel that the convictions on being in possession of a firearm and ammunition cannot stand. We therefore quash those convictions and set aside the sentences thereon.

The basis of the appellants' conviction on the capital robbery charge was that they were found next to the get away car which had crushed and landed in a ditch. Their protestations that they had stopped to find out the cause of the car crush were not heeded. PW3 and PW4 who purported to identify them did not say whether they identified them at the time of robbery or later on when they had been arrested. That identification cannot be relied upon.

Taking all these factors into account we agree with the learned state and accused's counsel that none of the convictions of the appellants cannot be allowed to stand. Consequently we allow their appeals, quash all the convictions and set aside the sentences. The appellants shall be set free forthwith unless otherwise lawfully held.

**DATED and delivered this 20<sup>th</sup> day of November, 2009.**

**D. K. MARAGA**

**JUDGE.**

**W. OUKO**

**JUDGE.**