



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

**Criminal Appeal 135 of 2008**

**SAMUEL MWANGI KIBARO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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**JUDGEMENT**

This is the appeal of Samuel Mwangi Kibaro (hereinafter referred to as “*the Appellant*”) against the conviction and sentence imposed upon him by the learned Chief Magistrate Mombasa in **CMCC NO. 1553/2005 REPUBLIC -VS- SAMUEL MWANGI KIBARO**. The Appellant who appeared in person filed written submissions which he opted to rely on wholly. Mr. Ondari learned State Counsel who appeared for the Respondent State gave oral submissions in support of the conviction and sentence.

The basic facts of the case before the lower court are as follows. By way of a charge sheet filed in court on 16<sup>th</sup> October 2006 the Appellant was charged with two counts.

“**COUNT NO. ONE: Robbery with violence contrary to S. 296(2) Penal Code**, the particulars being that on the 29<sup>th</sup> of April 2005 at Multiple Hauliers Yard at Mikindani in Mombasa District within Coast Province jointly with others not before court while armed with dangerous weapons namely pistols, robbed **ROTICH BOIT** of one mobile phone make Nokia 1100 valued at Kshs.6,000/- and cash Kshs.135,000/- and at or immediately before or immediately after the time of such robbery beat the said **ROTICH BOIT**.”

**COUNT NO. TWO: Being in possession of ammunition without a firearm contrary to section 4(2) as read with S.3(3) of the Firearms Act (Cap. 114 Laws of Kenya)**, the particulars being that on 29<sup>th</sup> April 2005 at Multiple Hauliers Mikindani in Mombasa District within the Coast Province was found in possession of seven rounds of 7-62mm caliber ammunition without a Firearm Certificate.”

The prosecution called a total of six (6) witnesses in support of their case which was that on the material day of 29<sup>th</sup> April 2005 **PW2 KIPKOSGEI ROTICH BOIT** a Supervisor at Multiple Hauliers drove upto the gate of company premises at about 4.00 p.m. with cash Kshs.135,000/- on him. As **PW4 KWERENTEIN LETEREIWA** the gate-keeper was opening the gate to let **PW2** in four men two of whom were armed with pistols suddenly emerged and surrounded the vehicle. They ordered **PW2** to remove the money which was inside a rucksack. **PW4** then picked a stone and threw it at one of the robbers hitting him on the head. The

robber who the witnesses identify as the Appellant fell down on the spot. The other three robbers drove off with **PW2** inside the vehicle. They later abandoned him some distance away and he drove back to the company premises. Meanwhile the security alarm had been activated and KK Security Guards led by **PW1 SOYA IHA WANJE** responded. They rushed to the scene and found the Appellant lying on the ground being subjected to a lynching by the crowd. Next to the Appellant was a black bag and a firearm magazine both of which were produced as exhibits in the case **Pexb1** and **Pexb5** respectively. **PW5 PC JACOB NJERU** happened upon the scene at that point. He apprehended the Appellant, took possession of the exhibits and took them all to Changamwe Police Station where he booked in the case for further investigations. The firearm magazine was examined by **PW3 SP. MWONGERA** a Firearms Examiner based at CID Nairobi who certified it to contain ammunition as defined by the Firearms Act Cap 114 Laws of Kenya. He prepared his report which was produced as an exhibit in the case **Pexb4**.

The learned trial magistrate ruled at the close of the prosecution case that the Appellant had a case to answer and he was put to his defence. The Appellant elected to give a sworn defence in which he claimed to have been merely a passerby who was unfortunately caught up in the fracas. He totally denies both charges.

On 5<sup>th</sup> May 2008 the judgement was read out in which the learned Chief Magistrate convicted the Appellant on both counts and sentenced him to Death on the first count and to ten (10) years imprisonment on the second count. It is against this conviction and sentence that the Appellant being dissatisfied now appeals.

Being the court of first appeal we are mindful of our duties in determining this appeal. In **Ajode -vs- Republic [2004]2 KLR 81** the Court of Appeal held that:-

***“In law it is the duty of the first appellate court to weigh the same conflicting evidence and made its own inferences and conclusions but bearing in mind always that it has neither seen or heard the witnesses and make allowance for that”***

In the case of **CHEMAGONG -VS- REPUBLIC [1984] KLR 611** the Court of Appeal also held that -

***“A court of appeal will not normally interfere with a finding of fact by a trial court, whether in a civil or criminal case, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finds he did”***

We will be guided by these laid down principles as we proceed to consider the merits or otherwise of this present appeal.

We have carefully perused the Appellant's grounds of Appeal as well as his written submissions and note that he raises three broad grounds as a basis of this appeal. Firstly that the charge sheet was defective rendering his whole trial a nullity ab initio. Secondly that the identification of the Appellant by the witnesses was wanting. Thirdly that the evidence adduced was insufficient to support a conviction due to the several contradictions and inconsistencies therein. We shall now consider each of the three grounds on an individual basis.

The Appellant in his written submissions states that the charge sheet is defective for its failure to indicate the time when the offence is alleged to have occurred. We have looked at the charge sheet filed in court on 16<sup>th</sup> October 2006 and note that indeed the particulars of the offence do not indicate the time of the offence. Is this a defect and if so is such defect fatal to the prosecution of this charge? S. 137(a) of the Criminal Procedure Code deals with ***“Rules for the framing of the charges and informations.”*** S. 137(a)

(ii) provides that -

**“the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.”**

This section makes no mention of time as one of the crucial elements to be mentioned in the particulars of the offence. S. 137(a)(iii) which relates directly to the facts of the offence provides that -

**(iii) after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary”**

This same question was address in the case of MOSES MATHU KIMANI -VS- REPUBLIC CRIMINAL APPEAL 212 of 2004 in which it was held that -

**“The particulars of the charge indicate the date of the offence. That date is sufficient particulars to enable the Appellant to know when it is alleged that he committed the offence. The actual time of the offence need not be shown in the charge”**

We find on the basis of the above that failure to include the time the alleged offence was committed does not amount to a mis-description of the offence. Further such an omission is not fatal and does not in our view negate the charge.

In his submissions the Appellant also raises issue with the charge sheet in particular the description of Count No. 2 which was that of **“Being in possession of a Firearm without a Firearm Certificate.”** That part is in order. However the section of the law alleged to have been contravened is cited in the charge sheet as **S.4(2) as read with S.3(3) of the Firearms Act Cap 114, Laws of Kenya.** The correct citation should have been **S. 4(2)(a) as read with S. 4(3)(a) of the Firearms Act.** As such the charge sheet was wrongly framed in relation to Count No. 2. Does this render the whole charge sheet a nullity as alleged by the Appellant? The learned Chief Magistrate did address this issue at page 13 of his judgement line 6 when he says -

**“The discrepancy is not such that has caused the accused any injustice as there is nothing to suggest that the accused did not know the nature of the charges facing him. For my part I am satisfied that the discrepancy was not fatal and does not amount to a miscarriage of justice.”**

We could not agree more. The wrong citation notwithstanding the charge as framed met the requirements as provided by S.137 Criminal Procedure Code as all the essential elements were included in the particulars. The Appellant was fully able to comprehend the nature of the charge against him and indeed pleaded to the same. We would like to reiterate the learned Chief Magistrate’s words of warning to the prosecution on this issue -

***“I must however remind the prosecution of the need to draft their charge sheets with utmost care and with due regard to the penal provisions as they appear in the statute as failure to do so in some cases could be fatal to their case”***

All said and done our finding is that the omission to include the time, and the mis-framing of the charge sheet were not defects which could be said to have been fatal to the prosecution case. This ground of appeal in our view has no merit and the same is dismissed.

The Appellant’s second ground of appeal was that he was not properly nor positively identified by the prosecution witnesses as one of the robbers who participated in the crime. Out of the six prosecution witnesses at least two were eyewitnesses to the incident. These were **PW2** the supervisor with Multiple Hauliers who was driving the vehicle which was car-jacked and **PW4** who was on guard at the gate of the company premises where the robbery occurred. Both have identified the Appellant as one of the robbers. The incident occurred at 4.00 p.m. in broad day light and we find that there was sufficient light to enable the witnesses see the culprits. In addition **PW4** picked up a stone aimed at the Appellant, threw it and struck him on the head causing the Appellant to fall flat on the ground. The Appellant does not anywhere dispute having been hit on the head by a stone. **PW4** himself is quite categorical and insists under cross examination by the Appellant -

***“You were one of those robbing the complainant and I hit you using a stone.”***

The evidence of **PW2** and **PW4** is given strength and corroborated by **PW1** a K.K. Security Guard who responded to the alarm and **PW5** PC. Jacob Njeru both of who arrived at the scene within minutes of the robbery incident. They both positively identify the Appellant as the man they found lying on the ground having been hit by a stone. In his defence the Appellant claimed to be an innocent passer-by who was going about his own business. However it is notable that none of these four witnesses knew the Appellant before. They also did not know each other very well and there is no evidence of a pre-existing grudge between them and the Appellant. The learned trial magistrate deals with this point at page 8 of his judgement when he states at line 13 -

***“I am satisfied that they were honest and reliable witnesses who spoke the truth and I did not detect any reason why they would want to form themselves into a group of liars to give false evidence against the accused who was a stranger to them.”***

Indeed the Appellant himself appears to concede to this fact when under cross-examination by the prosecution he states -

***“All the witnesses were strangers to me.”***

We note that no process of an identification parade was carried out but in our view this was not necessary as the Appellant was apprehended at the scene, having literally been caught in the act. We do concur with the sentiments of the learned trial magistrate at page 7 line 5 -

***“According to the evidence the robbery occurred at about 4.00 p.m. i.e.***

***during day time. There is nothing to suggest that it was dark or conditions were not favourable to enable the witnesses to see the assailants."***

We are convinced that the witnesses were well able to see and identify the Appellant at the scene. **PW4** threw a stone at the one of the assailants. The stone hit the Appellant who fell down and lay there until the police officer **PW3** came and arrested him. **PW4** was emphatic under cross-examination by the Appellant that -

***"It is me who hit you using a stone and you fell down and your accomplices left you. It is not true that you were a passer-by. You were part of the gang of four who were robbing the complainant. I saw you because I was opening the gate for him when you robbed him"***

This is very clear and concise testimony. We note that the trial magistrate made a note regarding the demeanour of the several of prosecution witnesses thus -

***"Demeanour - reliable"***

We have no reason to doubt or disagree with this observation. The trial magistrate observed the witnesses as they testified and was therefore imminently qualified to comment on their demeanour. On the whole we are satisfied from the evidence that the Appellant has been properly and positively identified by no less than four witnesses as one of those who robbed the complainant. As such we are satisfied that this evidence on identification passes muster. We find no possibility of mistaken identity. This second limb of the appeal also fails and we do hereby dismiss the same.

The third and last ground which the Appellant relies upon is that the evidence adduced against him was so contradictory as to be insufficient to support a conviction. As stated earlier we have carefully and anxiously perused the record of the lower court proceedings and are unable to detect any of these "**contradictions**". On the contrary our view is that the prosecution witnesses were consistent and concise in their testimony. They corroborated each other on all major aspects of evidence and they each remained unshaken under intensive cross-examination by the Appellant. The witnesses all narrate a similar sequence of the events of that day. **PW2** was robbed, **PW4** threw a stone and hit one of the robbers on the head, **PW5** and **PW1** arrive at the scene within minutes and find the Appellant lying injured on the ground. They arrest him and take him to the police station together with the exhibits recovered at the scene, a black bag and a firearm magazine. There is a clear and credible thread of evidence in the prosecution case. The evidence in our view was reliable, consistent and weighty. The learned trial magistrate put it best in his judgement at page 10 line 9 when he states (no doubt tongue in cheek) -

***"clearly, it was not the accused's day. The evidence against him can only be described as overwhelming. As the saying goes, he was caught (or was it hit) red-handed at the scene of the robbery and he cannot claim to know nothing about this robbery as he suggests."***

He goes on to state that -

***"The evidence on record further shows that not only were the robbers armed with guns but also, they were four in number thus establishing***



judgement for 11<sup>th</sup> March 2008. The judgement was written dated and signed by Hon. Boaz Olao on 22<sup>nd</sup> April 2008 when he indicated that -

***“To be sent to the Chief Magistrate Mombasa for delivery on a date to be fixed by that court”***

This indicates that Hon. Olao having been transferred to Kisumu wrote the judgement then sent it to his successor Ms. C. Mwangi the new Chief Magistrate in Mombasa for delivery. Ms. Mwangi did deliver the judgement on 5<sup>th</sup> May 2008 in the presence of the Appellant. This is wholly in compliance with S. 200(1)(a) Cap 75. The only complaint the Appellant raises is that C. Mwangi who delivered the judgement did not write the words -

***“I am delivering this judgement under S.200(1)(a) CPC”***

There is no requirement in S.200 that these words must be endorsed by a magistrate delivering a judgement under that section. The deed of delivering the judgement of her predecessor suffices to fulfill the provisions of this section. Once again we find that this is a mere technicality and has no impact on the actual trial. The case was heard and determined by the same magistrate. The mere delivery of judgement by another magistrate does not prejudice the Appellant at all. This again in our view is a non-issue and we hereby dismiss it as a ground of appeal.

Finally and based on the foregoing we find no merit at all in this present appeal. The same is dismissed in its entirety. We do hereby confirm the convictions and sentences as issued the lower court.

**Dated and Delivered at Mombasa this 16<sup>th</sup> day of November 2009.**

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**F. AZANGALALA**

**JUDGE**

Read in open court in the presence of:-

Mr. Ondari for State

Appellant in person

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**M. ODERO**

**JUDGE**

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**M. ODERO**

**JUDGE**

**16/11/2009**

