**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 354 & 374 of 2007**

**ELIJAH MITHAMO MUTAHI……..... APPELLANT**

***Versus***

**REPUBLIC…..... RESPONDENT**

***CONSOLIDATED WITH***

**Criminal Appeal 374 of 2007**

**EPHANTUS MUTAHI KAREGI……...……APPELLANT**

***Versus***

**REPUBLIC……..RESPONDENT**

***(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No.921 of 2005 by E.J. OSORO – SRM)***

**J U D G M E N T**

These two appeals were consolidated for ease of hearing and since they arose from the same trial in the subordinate court. The request for consolidation was made by **Ms Mwai**, learned counsel for the 1st appellant and supported by the 2nd appellant who was unrepresented and **Ms Ngalyuka,** learned state counsel.

In the court below the 1st appellant was the second accused whereas the 2nd appellant was the first accused. They were all arraigned before the Chief Magistrate's Court, Nyeri on 14th March, 2005 with one joint account of robbery with violence contrary to *section 296 (2)* of the Penal Code. Particulars given were that on 4th June, 2004 at Muhito location, Ngoru village in Nyeri District of the Central Province they jointly while armed with dangerous weapon namely pistol robbed **David Wachira Magechi** cash Kshs.1,200/=, one mobile phone make Erickson T20, one Safaricom credit card all to the total value of Kshs.10,450/= and at or immediately after the time of such robbery used actual violence to the said **David Wachira Magechi**.

The 2nd appellant alone phased two counts under the Firearms Act to wit, being in possession of a

firearm and live ammunition without valid licences in force issued by Licensing Officer contrary to *Section 4 (1)* of the firearms Act. The particulars in respect of those two counts were that on 4th June, 2004 at Ngoru village in Nyeri District of the Central Province he was found being in possession of Ceska pistol S/No.00661 and one round of 9mm ammunition without valid certificates in force issued by a Firearm Licensing Officer.

Both appellants entered a plea of not guilty on the charges preferred against them. After a full trial before the learned Senior Resident Magistrate at Nyeri (***E.J. Osoro presiding***) the appellants were all found guilty and convicted on all the charges preferred against them. In other words, the appellants were jointly found guilty on count one of robbery with violence and the second appellant alone was found guilty on the two counts preferred against him under the Firearms Act. Having been convicted on the first count of robbery with violence they were all sentenced to death as prescribed by the law. In respect of counts two and three counts facing the second appellant, he was sentenced to serve imprisonment for 3 years in respect of each count. However, owing to the nature of the sentence imposed in respect of count one, the learned magistrate correctly ordered the sentence in respect of counts two and three to be held in abeyance.

The facts as accepted by the trial court in respect of those counts were as follows:- On 4th June, 2004 at about 10.30 p.m, **David Wachira Magachi** (PW1), the complainant in the case drove home in his motor vehicle registration number KAC 147H Toyota saloon from Kiahungu shopping centre. When he reached the gate to his house, he got out of the vehicle and opened the same. He thereafter drove in the vehicle and stopped so as to close the gate behind him. As he was doing so, he suddenly saw 2 people approach him. He took to his heels towards the farm as he was pursued by those people. In the process he heard gunshots. He fell down and those two people caught up with him. They ordered him to sit down at gun point. He was thereafter robbed of his Erickson phone and Ksh.1000/=. His pockets were ransacked too. The robbers threatened to kill him. In the meantime his wife (PW3) heard the commotion and set off the alarm system. They ordered him to tell his wife to switch off the alarm system. The trio then went towards the house and PW2 called out his wife and asked her to turn off the alarm and she complied. PW2 was then taken to his car so that he could give those people another phone. Apparently PW2 was aware that only one of them had a gun and that the one holding him was not armed. Instantly PW2 hit the robber holding him with the elbow and entered his vehicle whose engine he had left running. He reversed into the gate and the robber who was next to the gate took off. PW2 pursued them and hit one of the robbers with the motor vehicle running over him in the process. He thereafter drove on to Mukurweini police station and reported the incident. In the company of the police officers with a sniffer dog they came back to the scene. The police dog picked up the robbers scent and traced one of them about 30 metres away fromwhere he had been hit by PW2's motor vehicle. Apparently he had somehow managed to drag himself there. The police also recovered a ceska pistol at the scene.

PW2 testified that he positively identified the appellants at the scene with aid of security lights which were on and the motor vehicle lights as well. The person he hit with his motor vehicle as aforesaid turned out to be the 2nd appellant.

PW3 the wife of the complainant testified that at the material time she was resting in the bedroom when she heard commotion outside. She peeped through the kitchen window and saw 3 men one of whom was her husband (PW2). However she did not know the other two. She sensed danger and switched on the alarm twice. She was ordered to switch off the alarm and she complied. Later she heard a bang and her husband's motor vehicle was driven off at a high speed. She called a friend immediately and asked her to contact the police as she suspected that her husband had been carjacked. Her friend called back and informed her that PW2 was infact at the police station. After 10 minutes police arrived with her husband and a sniffer dog, drove to the farm road and after a short while came back with a man who had been injured on the legs. That man was the 2nd appellant.

PW1 was among the police officers who came to the scene on the material night. His testimony was that on 4th June, 2004 at 10.30 p.m he was on patrol within Gikindu area with a police dog and handler. He was recalled to the station where he received a report of robbery with violence. He proceeded to the

scene and with the help of police dog and its handler they tracked down 2nd appellant and found him lying in a sweet potatoes farm 50 metres away from where he had been hit with fractured lower limbs. He could not walk. PW1 combed the area and recovered 1 ceska pistol which had 1 live ammunition 5 metres from the point of impact. He arrested the 2nd appellant. According to PW1 he interrogated the 2nd appellant who agreed to take him to the home of the 1st appellant but they never found him in the home.

PW4 Inspector **Amon Siagi** conducted an identification parade in respect of the 1st appellant. He told the court that he conducted the parade fairly and in accordance with the police standing orders and that PW2 managed to pick the 1st appellant from the parade.

**Inspector John Ruto** (PW5) testified that on 4th June, 2004, he received a report of robbery at Mukurweini, and mobilized his men and went to the scene where he found the 2nd appellant had been arrested and lying in the vehicle. He received information that the other suspect **Elijah Mithamo** resided within Karatina town. He started looking for him. On 23rd February, 2005 he received information that the 1st appellant was in Karatina town shinning his shoes. He proceeded there and arrested him and thereafter handed him over to Nyeri CID Officers.

PW6 the firearm examiner, produced a firearm examination report in respect to the ceska pistol and the live ammunition. He confirmed that the ceska was a firearm and the ammunition was alive ammunition within the meaning of the Firearms Act. The evidence of PW6 was that the ceska pistol had been used in a spade of 11 robberies that he enumerated.

PW7 prepared the exhibit memo for the pistol and ammunition for the ballistic expert. He also received the report of the ballistic expert. PW8 testified with regard to the arrest of both appellants and the recovery of the pistol and ammunition as well as the police identification parade.

Upon being placed on their defence both appellants gave sworn statements of defence. The 2nd appellant in his defence said that on 4th June, 2004 at 9 p.m. he was from a bar at Kiahungu trading centre walking home when the vehicle hit him fracturing both his legs, that he screamed and people gathered at the scene. Just then police officers arrived. They however left him saying that they were pursuing thieves. After 1 ½ hours they came back put him in the motor vehicle and took him to hospital and later charged him with the offence herein. He told the court that he was framed in this case by PW2.

The 1st appellant on his part stated that he was arrested on 23rd February, 2005 while shinning his shoes in Karatina town. Later he was transferred to Nyeri. He told the court that PW4 conducted an identification parade where PW2 picked him out. He challenged the fairness of the identification parade saying that PW2 had seen him earlier at the DCIO's office.

The appellants advanced more or less similar grounds of appeal in their home drawn petitions of appeal. They all revolve around identification, insufficient unreliable and uncorroborated evidence, unjustified rejection of their alibi defences and finally the 2nd appellant blamed the learned magistrate for failing to find that he had been kept in custody in excess of 14 days before he was arraigned in court.

When the appeal came up for hearing, the 1st appellant had instructed **Messrs Lucy Mwai & Company Advocates** to canvass the appeal on his behalf. **Ms Mwai** submitted that the 1st appellant was said to have been identified in the robbery by PW1 at night. He was however arrested 7 months later and identification parade conducted. She questioned that value of the identification parade. The offence was committed at night. PW1 was attacked as he drove into his compound but was able to identify the assailants because of the 10 security lights in the compound. Learned counsel questioned how that would have been possible. PW2 did not also give a description of the 1st appellant that enabled him to identify him. There was no inquiry undertaken with regard to the light available at the scene of crime in terms of **Maitanyi V Republic (1986) KLR 194**. The parade was not free from possibility of error. If anything it was worthless. For these submissions counsel referred to the case of **Lusweti Bindo V R CR. APP.**

**NO.82 of 2001.** (UR) Police knew the 1st appellant's home but did not arrest him until after 8 months and no explanation was given for the delay. Though the learned magistrate warned herself of the dangers of relying on the evidence of a single identifying witness to find a conviction, that warning came much later. According to counsel, the warning should have been at the commencement of the judgment.

The 2nd appellant tendered written submissions in support of his appeal which we have carefully read and considered.

The state opposed the appeal. Through **Ms Ngalyuka**, learned senior state counsel, the state submitted that there was sufficient light at the scene of crime. PW2 sated that his compound had 10 security lights which provided sufficient light that would have enabled PW2 to positively identify the assailants. He also relied on the head lights of his vehicle to identify the appellants. He walked with them to the vehicle. They were close to him. The identification parade was therefore free from error, much as it was held 8 months later, the events were still fresh in the mind of PW2. The court considered the fact that the identification was by a single witness and duly warned itself as required. Nonetheless the court found the evidence safe to rely on. The 2nd appellant was arrested close to the scene of crime and a few metres away from the home of PW2. PW2 explained how he had pursued the 2nd appellant and knocked him down. Much as the road was public, PW2 had testified that there were no other people on the road. As he chased him, he never lost sight of him. There was therefore no possibility of mistaken identity. The pistol was recovered near where the appellant was hit. He was therefore in possession of the same.

In a first appeal such as this one the appellate court is under a duty to consider all the evidence tendered and statements read at the trial, re-evaluate the same draw its own conclusions of course without over looking the findings of the trial court and also bearing in mind that it, unlike the trial court, did not see or hear the witnesses testify as to be in a position to fully assess their credibility. It is a duty the court must perform an appellant is entitled to such an analysis and re-evaluation of the evidence and statements. It will be considered a denial of justice if such a duty is not performed. See **Okeno V Republic (1972) EA 32** and **Jacinta Njoki Ndirangu V R, C.A. CR. APP. No.262 of 2007** (UR).

In convicting the appellants, the trial court stated:

"….. **It is obvious that the robbery took place at night, the evidence of PW2 is that the security lights were on and also that the lights of his vehicle were on. The court is satisfied that there was sufficient lights for positive identification. I do find that the circumstances of identification were favourable…. However PW1 (sic) was the only identifying witness and I proceed to warn myself of the dangers of relying on his evidence. From the above I am satisfied that the prosecution has managed to prove its case against the 1st and 2nd accused as charged in court……"**

From the above it's clear that the conviction of the appellant turned on their identification by PW2 during the robbery. The robbery took place at night and in difficult circumstances. PW2 was confronted by the two robbers as he returned to close the gate of his home after he had driven in. He ran towards the farm with the two thugs in hot pursuit. He then heard gunshots and he fell down. The thugs got up with him, pointed a gun at him and ransacked his pockets and took his phone, money, hedex tablets and a handkerchief. They then engaged him in a discussion regarding a person who had been killed in the neighbourhood and that hey had been sent to kill him. They then walked him back to the vehicle. In the meantime they asked him to tell his people to switch off the alarm. They also asked him whether his wife had a phone. They went with him into the car to look for another phone. It was then that PW1 gained courage and hit one of the robbers who according to him should be the 1st appellant, with the elbow and he fell down. As he had left the engine of his motor vehicle running, he reversed the vehicle and chased the two thugs and after 300 metres or so knocked down one of the thugs and crushed his limbs. That thug according to PW2 was the 2nd appellant. He thereafter reported the incident to the police. It was this further evidence that his compound was at the time well lit with 10 security lights and his motor vehicle too had lights on.

From the foregoing much as the circumstances obtaining may have been difficult for positive identification of the thugs, however due the duration of time that the thugs took with PW2 it was possible for PW2 to identify them. According to PW2; "….**..the two people were not in hurry and they were not fearing."** There is no denying that PW2's compound was well light with 10 security lights. Further it is not in dispute that the lights of his vehicle were on. His wife PW3 was in the house. Because of the security lights, he was able to see through the kitchen window that her husband was in the company of two strangers. That would not have been possible unless there was sufficient light outside the house. The light must have been the one provided by the security lights. PW2 spent some time with the thugs in close proximity when they were frisking him in the farm and talking to him about the death of another person in the village. They never ordered him not to look at them. Nor were they disguised as to make their identification difficult. They then walked with him to the car as they asked him about his wife's mobile as well as ordering him to tell her to switch off the alarm system. As they walked back to the car, its lights were on. Again they spent some time with PW2 as one of them entered the car to look for the extra phone. It was when one of them failed to get the phone that he was ordered to get into the vehicle to look for the same. It would appear that the thugs had thrown caution to the wind and they did not care whether or not they could be identified. They did not care that an alarm had been set on twice and switched off. They went about their business as if nothing mattered. To our mind therefore, the situation obtaining though difficult nonetheless enabled PW2 to identify the thugs. He was the only identifying witness though.

Of course a conviction resting entirely on identification invariable causes a degree of uneasiness as sated by **Sir Clement de Lestang V P in Roria V R (1967) EA. 58**. Because of that, there is need for caution as has been stated in many cases, for instance; **Abdalla Bin Wendo and another V R (1953) 20 EACA, Roria V R (supra), R V Turnbull (1976) 3 ALL E.R 549 Kiarie V Republic (1984) KLR 739** and **Maitanyi V Republic (1986) KLR 198.** In the case of **Kiarie** (supra) the court of appeal made it clear that before a conviction can be entered against a suspect on account of visual identification, such evidence must be watertight as it is possible for even a honest witnesses to make a mistake. The law is thus settled that there is need to exercise extra and utmost care before an accused can be convicted on the evidence of a single identifying witness. The trial magistrate was satisfied just as we are that there was sufficient light in the compound of PW2 that would have enabled him identify the thugs. We would also add that because of the lengthy period of time that the thugs spent with PW2 in close proximity, he was in a position too to identify them as they had not masked and or disguised themselves at all.

The case of **Maitanyi** (supra) casts a duty on the trial court in such circumstances to conduct an inquiry to ascertain the nature of the light available, its size and its position relative to the suspect. These are all important matters helping to test the evidence of visual identification with greatest care. Much as the learned magistrate did not literally carry out the inquiry as required, we have no doubt at all that he had those considerations at the back of her mind and that is why she stated in her judgment that there was sufficient lights for positive identification. Besides and we have already stated the appellants spent a considerable period of time with PW2.

Though identification of the appellants was by a single witness, the court of appeal in the case of **Abdullah Bin Wendo** (supra) confirmed that a fact may be proved by the testimony of a single witness. Again in **Roria** (Supra) the same court held "……**while it is legally possible to convict on the uncorroborated evidence of a single witness identifying and connecting him with the offence, in the circumstance of this case it was not safe to do so….."** All that the trial magistrate is required to do is to warn himself / herself of the dangers of relying on such evidence. In this case the learned magistrate did warn herself as required. However, **Ms Mwai** has taken issue with such warning. That it came too late in the judgment. According to her it should have come at the very commencement of the judgment. She cited no authority for that proposition. Neither are we aware of any. We think that where the warning should come depends on the style of writing of a judgment by a particular judicial officer. We all have different styles and mannerism of writing judgments. There can be no hard and first rule as to how a judgment should be written so long as it complies with the requirements of section 169 of the Criminal Procedure Code. It matters not therefore that the learned magistrate warned herself towards the end of the judgment. What is important is that the learned magistrate duly warned herself.

Much as PW2 managed to identify his assailants during the attack, is it possible, that 8 months later he may have been able to mistakenly identify the 1st appellant in the identification parade? We are not persuaded that this possibility is remote. We say so because the police identification parade was carried out 8 months later. PW2 had not given to the police in his first report any description of the 1st appellant. Such description is absolutely necessary if the police identification parade is to be held to have been conducted validly and fairly. The parade at which the 1st appellant was identified having been conducted 8 months after the robbery, we are unable to tell whether PW2 would still have been able to recall the appearance of the 1st respondent. There is no doubt at all that with the passage of time people tend to forget the images or appearance of people particularly if those people are strangers and who as was the case herein were seen once and in difficult circumstances. The court of appeal in the case of **Ngumbao Lusweti Bindo** (supra) frowned upon an identification parade carried out some 3 months after the robbery. How about in this case in which it was carried out after 8 months!

It is also on record that when the 2nd appellant was arrested and interrogated, he volunteered the name of the 1st appellant as his accomplice. This information was extracted from the 1st appellant soon after his arrest and whilst in pain and had not even been taken to hospital. Mark you his limbs had been crushed. That being the case, nothing could have stopped him from blurting out any name so as to safe himself from further agony. In any event his evidence was coming from an accomplice. Such evidence requires corroboration and the court can only and in appropriate circumstances convict without corroboration if it is satisfied that the accomplice witness is telling the truth and upon the court duly warning itself on the dangers of doing so. See **Kinyua V Republic (2002) 1 KLR 256**. That is not the situation obtaining here. Upon being mentioned as aforesaid by the 2nd appellant, the police visited his home. However they were unable to arrest him. If the police knew the 1st appellant's home, why did it then take them 8 months to arrest him. No explanation was proffered for this delay. There is no evidence that the 1st appellant went under soon after the commission of the offence.

Having anxiously considered the evidence as laid against the 1st appellant, we entertain some doubts as to his culpability and subsequent identification at the police parade.

However we entertain no such doubts as against the 2nd appellant. Apart from being identified at the scene by PW2, he was pursued by PW2 in his vehicle when he ran away after the robbery and knocked down about 300 metres or so from the scene of crime. The 2nd appellant has not disputed the fact that he was knocked down as aforesaid by PW2. Infact he admits that much. However, it is his defence that PW2 knocked him down not because he was the robber but as a result of a traffic accident as he walked home on a public road. Fearing that the 2nd appellant would sue him for compensatory damages, PW2 rushed to the police station and framed him with the case to avoid liability. The trial court was thus called upon to determine which among these two versions of events were plausible. The trial court settled for PW2's story and we agree.

There is unchallenged evidence that PW2 pursued the robbers in his motor vehicle so soon after robbery. There is also unchallenged evidence that as he pursued the robbers he never lost sight of them more particularly the 2nd appellant. There is uncontroverted evidence that the 2nd appellant was knocked down by PW2's motor vehicle about 300 metres from the scene of crime. The 2nd appellant was knocked down so soon after the robbery that PW2 could not have failed to immediately recognise him as a person who had just robbed him. The robbery was still fresh in his mind having been committed some minutes ago. PW2 had no business framing the 2nd appellant with the case. There is no evidence that PW2's motor vehicle was not insured so that PW2 would have been compelled to frame the 2nd appellant to avoid personal liability and or compensation in the event that he was sued by the 2nd appellant. The 2nd appellant's assertion on this score is merely speculative.

In this case there is uncontroverted evidence that the 2nd appellant was pursued by PW2 after the robbery and knocked down. There is no suggestion that during the chase PW2 lost sight of the appellant at any given time. There was therefore no brake in the links in the chain regarding the chase and eventual

knocking down of the appellant. This evidence was sufficient to find a conviction. See **Ali Ramadhani V Republic CR. APP. No.79 of 1985** (UR). Further the chase was for hardly 300 metres. It was a short chase and on a public road. It cannot therefore be said that PW2 could have lost sight of him or mistaken him for another road user after such a short chase.

Further when the police came to the scene with a police dog it picked up the scent of the appellant and led the police to where the appellant was in the potato farm. The police dog could not have picked the scent of a wrong person.

There is evidence that during the robbery, one of the robbers was armed with a gun. A few metres from where the appellant had been hit with PW2's motor vehicle a gun was found. It matters not that what was found was a pistol and not a gun. To a common man, a gun connotes even a pistol. That pistol had alive ammunition. PW2 was very clear in his testimony that it was this appellant who was in possession of gun during the robbery. Is it therefore a mere coincidence that a gun is found near where the 2nd appellant is hit and the same appellant was said to have been in possession of the gun during the robbery? We do not think so. Secondly, during the robbery, 2 hedex tablets were taken from PW2's pockets. Those tablets were again found at the scene where the 2nd appellant was knocked. Is it also a mere coincidence? We do not think so! The 2nd appellant did not dispute the finding of the pistol and the hedex tablets near where he was lying. Nor did he claim them as his own.

The 2nd appellant has challenged the evidence relating to the gun on the basis that the pistol sent to ballistic expert was different from the one allegedly recovered at the scene. This is on the basis of differences in the serial numbers. PW1 stated that he recovered pistol serial No.40661 whereas the appellant was charged with being in possession with a pistol serial No.0661 whereas the pistol that was examined by PW6 was said to G0661. We think that nothing much turns on this submission. We have looked at the original record and we are satisfied that the alleged difference in serial numbers if at all was as a result of typographical error. What is important is whether the 2nd appellant was found in possession of the pistol and ammunition. PW1 and PW2 confirm that fact. PW1 had no bone to pick with the 2nd appellant as would have compelled him to frame him with the case. The 2nd appellant himself did not dispute the finding of pistol. His defence was that it was not found in his possession. He understood the term possession to mean physical possession of the pistol. In other words because the pistol was found some metres away fromwhere he was, he could not therefore have been physically in possession of the same. His understanding of the word possession cannot faulted. Afterall he is a layman. However in law possession connotes physical as well as constructive possession. In the circumstances of this case much as the 2nd appellant was not physically in possession of the pistol, he was nonetheless in constructive possession since he had been seen with the same a few minutes before he was knocked down. It was a result of the impact of the accident that perhaps he parted with physical possession of the same. Thus he was still in possession of the pistol though not physically. The pistol had alive ammunition. It was subjected to ballistic examination by PW6 who returned a verdict that the pistol and ammunition were indeed a firearm and ammunition respectively as defined under the Firearms Act. The 2nd appellant's conviction on the two counts relating to possession of the firearm and ammunition cannot therefore be faulted. Of course this appellant has raised the issue of finger prints. That indeed if he had been in possession of the pistol, it would have had his finger prints on. The answer to that submission was provided by PW6 under cross-examination by the appellant. He stated "….**It is not easy to get good finger prints from a firearm as it is at times oily and after fireing the blow ball destroy the finger prints…."** That answer is sufficient to dispose off that complaint.

The 2nd appellant has also raised the issue of having been detained in police custody for a period in excess of that permitted by our constitution. We are certain that the 2nd appellant is referring to the provisions of *section 72 (3)* of the constitution. However by his own admission, having been injured by PW2 when he was knocked down he was hospitalised for a period in excess of one year as his limbs had been crashed. Indeed even during the hearing he was still on crutches. The prosecution could not therefore have charged him in court within the 14 days permitted under the law.

We have anxiously considered all that has been urged before us in this appeal and as we have endeavoured to show, we are not satisfied with the conviction of the 1st appellant. Accordingly we allow his appeal, quash the conviction and set aside the sentence of death imposed on him. He should be set at liberty forthwith unless otherwise lawfully held.

As for the 2nd appellant, we are satisfied that he was convicted on very sound evidence. We decipher no error in the way the trial court dealt with his trial. For this reason we find no merit in his appeal and we order that the same be and is hereby dismissed in it's entirely.

***Dated and delivered at Nyeri this 4th day of December, 2009.***

**J.K. SERGON**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**