REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 484 of 2005, 485 of 2005 & 486 of 2005 (Consolidated)

GODON ONYANGO WANYANGE ……..…….....…1ST APPELLANT

GEORGE MUNGAI…….....……....2ND APPELLANT

OUMA OMONDI…….…….....…….…….3RD APPELLANT

V E R S U S

REPUBLIC…….....……. RESPONDENT

J U D G M E N T

GODON ONYANGO WANYANGE (1st appellant), GEORGE MUNGAI WANJIRU (2nd appellant), and BERNARD OUMA OMONDI (3rd appellant) were charged jointly with three others who were acquitted in the subordinate court, with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on 13th May, 2003 at AKIBA ESTATE LANGATA within Nairobi Area Province jointly with others not before the court while armed with dangerous weapons namely pistols, robbed HUDSON WAFULA Kshs.3,000/- and at or immediately before or immediately after the time of such robbery killed the said HUDSON WAFULA.

After a full trial, the 1st and 2nd appellants were convicted of robbery with violence and sentenced to death. The 3rd appellant was found guilty of possession of firearms contrary to Section 12 of the Firearms Act (Cap 114) and sentenced to 6 years imprisonment. The three appellants have now appealed to this court, challenging both their conviction and sentence. At the hearing of the appeals, the appellants appeared in person.

The first appellant stated that he did not file written submissions. He submitted that no witness identified him either at an identification parade or in court. No inventory of recovered items was produced. He also stated that he did not lead prosecution witnesses to the recovery of firearms as alleged. In addition, he submitted that he gave a sworn defence and no reasons were given for the rejection of his defence. He contended that the evidence did not establish the offence of robbery with violence. The Kshs.3,000/= alleged to have been robbed was not mentioned by any of the witnesses. Lastly, he submitted that the case having been based on circumstantial evidence, that evidence did not point to him as one of the culprits.

The 2nd and 3rd appellants relied on their written submissions.

The learned State Counsel, Mr. Mukura, opposed the appeals and supported the convictions and sentences. Counsel submitted that the convictions were based on circumstantial evidence, and particularly the recovery of arms and ammunitions in the rooms of the 1st and 2nd appellants. The said arms and ammunitions had been transferred from the room of the 3rd appellant. Counsel contended that the evidence on record pointed irresistibly to the guilt of the appellants. Counsel conceded that the robbery occurred at night in darkness, and the complainant was killed. However, P.W.2 a Senior Administrative Officer at the University of Nairobi, witnessed the recovery of arms and ammunitions from the rooms of 1st and 2nd appellants a few days afterwards. P.W.8 arrested the 1st and 2nd appellants on information that they had been involved in several incidents of robbery and carjacking. Counsel contended that the prosecution established that 1st and 2nd appellants led P.W.8 and another, to the rooms where the arms and ammunitions were recovered. The ballistic expert confirmed the items to be actual arms and ammunition. Counsel submitted that it was proved that the bullet heads recovered from the body of the deceased were fired from one of the firearms recovered from the room of the 1st and 2nd appellants at Mamlaka Hall University of Nairobi.

With regard to the 3rd appellant, Counsel submitted that he was arrested at Lokichogio on information that he was involved in several robberies and car-jackings. An inventory was produced showing the movement of the arms and ammunitions from his room to the other room. Counsel contended that the evidence on record incriminated all the appellants, and there was no other reasonable hypothesis than that of guilt. Lastly, Counsel submitted that the defences of the appellants were given due consideration and disbelieved as they were mere denials and did not cast any doubt on the prosecution case.

In response to the State Counsel's submissions, the 2nd appellant submitted that the prosecution failed to produce a cautionary statement regarding the recovery of firearms, nor did they produce an inventory of the recovered items, as required under the mandatory provisions of the Police Act. Secondly, the prosecution did not produce the OB from Pangani Police Station, as requested by him at the trial which meant that the information in the OB was prejudicial to the prosecution. Thirdly, the police tried to get P.W.1 to identify him at a parade, but P.W.1 insisted that he was not involved in the robbery. That witness insisted that it was 5th accused who had been acquitted. Therefore, the police simply wanted to implicate him. He lastly, submitted that there was no forensic evidence produced on the firearms, therefore the prosecution could not establish who was in possession of the firearms.

The 3rd appellant, on the other hand, submitted that he was charged with robbery. The prosecution did not amend the charge. Therefore, the magistrate was wrong in coming up with her own charge and convicting him on a charge for which he was not tried and could not therefore have defended himself. He submitted that he had been charged with possession of firearms without a certificate in another court, and was acquitted. He also submitted that the magistrate relied on the OB entry to convict him, though the person who made the OB entry did not testify. He lastly, submitted that the only allegation of transfer of the arms and ammunition to his room, was that P.W.13 stated that an informer, who did not testify, was the one who alleged so.

This is a first appeal. As a first appellate court, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences – see *OKENO –VS- REPUBLIC [1972] E.A. 32.*

We have re-evaluated all the evidence on record. The learned magistrate made a comprehensive summary of the evidence. We do not think that it is necessary to reproduce the same here. The appellants were the 1st, 2nd and 6th accused before the trial court. The prosecution case was that the 1st appellant and 2nd appellants were passengers in a taxi at Mamlaka road near the University of Nairobi Mamlaka students residential hostel, when they were arrested at 11 pm at night. They were alleged to have taken the police, the morning after arrest, to their Nairobi University Mamlaka hostel room where arms and ammunitions, including the firearm which killed the complainant, were recovered. The arms were said to have been recovered in room 19. The 3rd appellant was arrested later at Lodwar. He was

alleged to have been the occupant of room 9. All the appellants gave sworn defences. Their defences were in the form of *alibis,* that they were not at the scene of robbery. The learned magistrate appreciated this. The magistrate also appreciated that the case was based on circumstantial evidence before convicting them.

According to the evidence of P.W.2 FREDRICK MESHHACK ALUOCH, a Senior Administrative Assistant at University of Nairobi and Officer-in-Charge of Mamlaka Hall at the time, room 19 was allocated to Olonde B.O; and Mbaabu A.G. in October, 2003. The 1st and 2nd appellants are Gordon Onyango Wanyange and George Mungai Wanjiru. The room therefore did not belong to the 1st and 2nd appellants. The magistrate correctly cited the case of REPUBLIC –VS- KIPKERING KOSKE 1949 EACA 135, and observed that in that case, the Court of Appeal for Eastern Africa held with regard to convictions based on circumstantial evidence that-

"*the incriminating facts must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis other than that of guilt.*"

The above is the tests required in proving a case based on circumstantial evidence. In our present case, the 1st and 2nd appellants were not the owner or occupants of room 19. The owner or occupier of that room do not appear to have been charged. P.W.8 PETER NJOROGE was the person who led the team, including the 1st and 2nd appellants, to room 19 Mamlaka hall on 17/5/2008 where firearms and ammunitions were found. This witness, during examination in chief stated-

"*On 16/5/02 I can recall about 10 pm thereabouts I was in the office of the Flying Squad on duty with Inspector Chemwano, Sergeant Kiptai, Sergeant Kisoluki, Police Constable Onyango and other police officers. While there we received a tip off information of carjacking robbers and after they had committed the carjacking they were hiding their guns at Nairobi University hostels, Mamlaka B door 19. This was information from an informer.*"

It was after this, that the police drove to the Mamlaka road and arrested the appellants after 11.30 am. Clearly, it cannot be said that the information on the firearms and ammunition in room 19 was given by the 1st and 2nd appellants. The appellants were in fact arrested after the said information had already been received by the police. In addition, the informer was not called to testify as to who moved the arms and ammunition from room 9 to 19. The learned magistrate therefore erred in finding that it was the 1st and 2nd appellants who led the police to the discovery of the said arms and ammunition. There was no such evidence on record, notwithstanding that the police might have taken the appellants to the said room 19 where the arms and ammunition were found. The magistrate also erred in finding that room 19 was occupied the applicant. On that account alone, and the conviction having been based on the circumstances related to the recovery of the arms and ammunition, the appeals of the 1st and 2nd appellants will succeed.

On the 3rd appellant his conviction on an offence of being in possession of a firearms and ammunition was an error. Firstly, there is no admissible evidence on record that the arms and ammunition were from his room 9. The items were clearly found in room 19. The evidence of the informer that the items were transferred from room 9 to 19 was hearsay evidence, as he did not testify in court. It was not admissible evidence and should not have been relied upon to convict the 3rd appellant for the offence. The other reason why the conviction of the 3rd appellant was an error was that the magistrate purported to convict for a lesser offence under Section 179 of the Criminal Procedure Code *(Cap. 75*). The opinion of the learned magistrate, was that the offence under Section 12 of the firearms Act (*Cap. 114*) of the Laws of Kenya was a minor cognate offence to the offence of robbery. – Section 179 of the Criminal Procedure Code provides-

179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not

charged with it.

2. When a person is charged with an

offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

In our view, both under sub-section (1) and (2) of Section 179, the offence must be minor and similar to the charge which was not wholly proved. If it were otherwise, an accused person would be prejudiced as he is entitled to defend himself for the offence charged. He cannot speculate and try to defend himself against imaginary offences for which he is not being tried. In our present case, the offence charged was robbery with violence. Minor offences could be simple robbery, assault and theft. The ingredients of an offence of possession of firearms are totally different. They are no such ingredients that the appellant could possibly have defended himself. Therefore, in our view, the conviction was an error.

That is not all. The learned magistrate appears to have convicted the three appellants before considering their defences. The defences of the appellants should have been considered alongside the prosecution case before convicting the appellants. The procedure adopted by the learned magistrate in convicting the appellants, and later considering their defences clearly demonstrated bias. It prejudiced the appellants. On that ground also the appeals will be allowed.

Consequently, and for the above reasons, we allow the appeals of the three appellants, quash the convictions and set aside the sentences imposed.

We order that all the three appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 19th June, 2008.

J.B. OJWANG **G.A. DULU**

JUDGE **JUDGE**

In the presence of –

1st appellant in person

2nd appellant in person

3rd appellant in person

Mr. Makura for State

Huka/Mwangi Court Clerk.