REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 97 of 2007

SAMUEL GATHUKU MUIGAI…………………APPELLANT

VERSUS

REPUBLIC………………………………….....RESPONDENT

JUDGMENT

SAMUEL THUKU MUIGAI, the Appellant, was with another charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was also charged with the offence of being in possession of ammunitions without a certificate contrary to **Section 4(1)** as read with **Section 3(a)** of the **Firearms Act** Cap 114 Laws of Kenya and being in possession of a firearm without a firearm certificate contrary to **Section 4(2)(a)** as read with **Section 3(a)** of the **Firearms Act**. The particulars of the charge in count one are that on 29th November 2004 at Happy Church in Nakuru District within Rift Valley Province jointly with others not before court and while armed with a dangerous weapon namely a pistol they robbed David Wainaina Maina of his motor vehicle registration number KAR 207 P, Honda saloon, a brief case containing church files and personal documents as well as a purse containing cash Kshs.700/- all valued at Kshs.2,000,700/- and at or immediately before or immediately after that robbery they wounded the said David Wainaina Maina.

The particulars of counts two and three read that on 6th January 2005 at Race Track in Nakuru District of Rift Valley Province the Appellant with his co-accused, Mary Wanjiru Mathara were jointly found in possession of two rounds of ammunition .45 without a license and a pistol (US colt) No. 106927 without a firearms certificate.

They pleaded not guilty to the charges but after trial before the Ag. Principal Magistrate, Nakuru the Appellant was convicted and sentenced to death on count one and seven years imprisonment on each of counts two and three. The imprisonment terms were ordered to run concurrently. The co-accused in that case was acquitted.

The Appellant has now appealed to this court against that conviction and sentence on seven grounds which raise three major issues. The first one is that the learned trial magistrate erred in convicting him on the basis of visual identification evidence which in the circumstances of the case was not positive. On that point the Appellant also complained that the identification parade was flawed and should not have been relied upon. The second point raised in the appeal is that the evidence on record did not support the conviction on counts two and three. Lastly the Appellant complained that his defence and submissions were not considered as required by law.

At the hearing Mr. Mugambi, learned state, counsel conceded the appeal on count one on the ground that the identification on the Appellant was not positive. We have ourselves examined the evidence on record and agree with Mr. Mugambi that the identification of the Appellant was suspect. The robbery was alleged to have taken place at about 8.00 p.m. There was no moon light or security lights at the scene. The only witness who identified the Appellant as one of the people who robbed David Wainaina Maina (the complainant) was John Mbugua Gachu, PW2. He said he was able to see the Appellant with the aid of light from a nearby kiosk and barber shop. We are not told whether the light from the kiosk was inside or outside. The one from the barber shop is said to have been a florescent energy saver bulb outside that shop. The intensity of light from both those sources was not stated. And at the time PW2 said he saw the Appellant emerge from near the barber shop, he had a gun trained on the back of his head by one of the robbers.

Taking all these factors into account we agree with Mr. Mugambi that the conditions prevailing at the scene were not favourable for a positive identification of the Appellant by PW2 and as his conviction rested solely on the evidence that witness the same cannot be allowed to stand. The conviction on count one is therefore hereby quashed and the sentence

set aside.

On counts two and three Mr. Machage, counsel for the Appellant, submitted that the conviction of the Appellant on those counts rested entirely on the evidence of PC Timothy Kanake, PW8 who, at the time of the alleged recovery was with four other police officers. He wondered why none of them was called as a witness. He further submitted that the pistol and ammunition were found in a toilet cistern which was not functioning in a house the Appellant had occupied for only five days. In the circumstances and in view of the fact that the firearm was not dusted for finger prints he submitted that the evidence on record was not sufficient to support the Appellant's conviction on those two counts and urged us to allow the appeal in its entirety.

Mr. Mugambi opposed the appeal on counts two and three and submitted that the conviction on those counts was based on overwhelming evidence. He said that both the pistol and the live ammunition were found with the Appellant and he did not offer any explanation as to how he came to be in possession of them without the requisite certificate and license.

We have considered these submissions and the evidence on record. The Appellant's defence was that the charges preferred against him were tramped up by PC Timothy Kanake, PW8, with whom he had a grudge over a love affair with the co-accused, Mary Wanjiru Mathara. He claimed that PC Kanake had had a love affair with the co-accused which had gone sour and they had parted company. On 12th December 2004 while having a drink with the said Mary Wanjiru Mathara at Taidy's Club PC Kanake went there and threatened to fix the Appellant because he found him with that woman.

That allegation does not make sense. If before meeting the Appellant PC Kanake had already disagreed with Mary Wanjiru Mathara, what interest could he have had in her to want to harm anybody he found with her. If anything one would have thought that he would have sympathized with the Appellant for not knowing whom he was dealing with instead of being jealous.

The arrest of the Appellant was ordered by the OCPD Nakuru who sent PC Kanake and four other police officers to the Appellant's house at Race Track. As soon as he was arrested both the OCPD and PCIO rushed there and had him brought to the Nakuru Police station. Like the learned trial magistrate we find the allegation that PC Kanake tramped up the charges against the Appellant hollow and far fetched. Even if that were the case and such a grudge was established we find it incredible that to settle that score PC Kanake could have marshalled the leadership of literally the entire provincial police force to his aid. We therefore find that the learned trial magistrate was right in dismissing that allegation.

The pistol and the ammunition were found in the Appellant's house. The Appellant himself admitted that he was indeed the owner of that house and the evidence of his landlady confirmed that. That he had rented the house for only five days does not make any difference. He could still have kept anything in the house even if it had been in his possession for only a few hours.

We agree with Mr. Machage that the admission of evidence of the Appellant's alleged involvement in other cases with which he was not charged was irregular and would give one an impression that the Appellant was a seasoned criminal. However, having carefully studied the lower court record we find that that evidence did not influence the trial court. It therefore did not cause any prejudice to the Appellant.

For these reasons we find the conviction of the Appellant on counts two and three to be safe and we accordingly dismiss his appeal against the conviction on those counts.

The appeal against sentence on those counts has also no merit. The seven years imprisonment terms imposed on him against the maximum sentences of fifteen and ten years respectively are not harsh. We accordingly dismiss the appeal against counts 2 and 3 in its entirety.

DATED and delivered at Nakuru this 11th day of December, 2008.

D. K. MARAGA

JUDGE

M. MUGO

JUDGE