



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 1065 OF 2003

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO 148 OF 2002 OF
THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIAMBU**

RICHARD MWENDWA MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1066 OF 2003

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 148 OF 2004 OF
THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIAMBU**

ISAAC MUTHEE GICHUHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1063 OF 2003

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 148 OF 2002 OF
THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIAMBU**

ELIUD MBUTHIA GIKARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 1064 OF 2003

PAUL OMBALA MAISHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

There were a total of nine (a) accused persons who were tried in Criminal Case No. 148 of 2002, at the Chief magistrate's Court, Kiambu. They were all charged with **ROBBERY WITH VIOLENCE**, contrary to section 296(2) of the Penal Code.

The 1st accused, Eliud Mbuthia Gikaru alia Kawana, was also charged with two other counts of Being in Possession of firearms, without firearm certificates, contrary to section 4(2) (a) of the Firearms Act. The said 1st accused is now the 3rd Appellant, in this appeal. He became the 3rd Appellant following the consolidation of the four appeals filed by **RICHARD MWENDWA MUTISYA, ISAAC MUTHEE GICHUHI, ELIUD MBUTHIA GIKARU** alia **KAWANA** and **PAUL AMBALA MAISHI**. The other three appellants bear numbers in the order listed herein. And for the sake of clarity, I also deem it necessary to relate each of the appellants to the number which they were cited as, at the trial. I believe that by so doing, it will make it easier to follow the record of the proceedings.

NAME OF APPELLANT	ACCUSED	APPELLANT NO.
1 RICHARD MWENDWA MUTISYA	7	1
2 ISAAC MUTHEE GICHUHI	8	2
3 ELIUD MBUTHIA GIKARU ALIAS KAMWANA	1	3
4 APUL AMBALA MAISHI	9	4

At the hearing of the consolidated appeal, Mr. Njau advocate represented the 2nd Appellant. The other three Appellants were un-represented. While the respondent was represented by Mrs. Toigat, learned State Counsel.

As the hearing of the appeal commenced, Mrs Toigat notified the court that she would not be contesting the appeals by the 1st, 2nd and 4th Appellants. However, she did oppose the appeal by the 3rd Appellant.

The respondent's decision not to contest some of the appeals was informed by the contradictions in the prosecution evidence.

PW4, CPL Samson Kiprono Sang, testified that he was the person who arrested the 2nd appellant. He says that the arrest was made after he chased the 2nd appellant for about 100 metres. He said that the police had laid an ambush at Serena Hotel, after receiving a tip off. He (PW4) was outside the hotel building, at the parking. Other police officers went inside the hotel, where they arrested the 1st and 4th appellants.

Meanwhile, PW4 received information, through the police radio, that one of the suspects had run out of the hotel, and that he was wearing a leather jacket. That is the sole reason why PW4 arrested the 2nd appellant.

Thereafter, searches were conducted at the residence of the 1st, 2nd and 4th appellants, but nothing was recovered.

PW8, PC Fredrick Tsuma, testified that he was in the group of police officers who laid an ambush at Serena Hotel, on 22nd January 2002. he said that some three men entered the hotel, at about 11.00 a.m. The three are said to have had a blue bag. When the police officers asked them to surrender, two of the men ran into the hotel, while the third man ran out.

It was the testimony of PW8 that when he picked up the bag, he found a firearm inside it. PW8 also identified the 1st appellant as the man who had dropped the bag. According to him, the 1st appellant ran towards the road, after he had dropped the bag. Even during cross-examination, PW8 firmly reiterated that the 1st Appellant was not arrested inside the hotel. He added that the officer who arrested the 1st appellant was PW4.

Furthermore, PW8 testified that the 2nd appellant was not arrested by PW4. Clearly, these contradictions between PW4 and PW8, who were the arresting officers are not capable of being reconciled.

When it is borne in mind that the 1st 2nd and 4th Appellant's houses were searched, and that nothing was recovered there from, it implies that the evidence of PW4 and PW8 remained uncorroborated.

Also, each of these three appellants gave sworn testimonies in their respective defences. The 1st appellant said that he was at Serena Hotel, meeting a Mr. Abdalla. He said that he had some juice, and was arrested while seated at his table. He says that he was searched, and his house was searched, but the police recovered nothing. He also testified that the police officer who had arrested him did not testify in court. This latter piece of evidence is particularly significant because immediately after PW4 had testified in court, the 1st appellant had notified the learned trial magistrate that the police officer who had arrested him and taken his "Motorola" mobile phone and "Seiko 5" watch.

To my mind, the defence of the 1st appellant sounded plausible, and remained unshaken by the prosecution evidence. I therefore agree with the learned State Counsel that it would be unsafe to uphold his conviction.

On his part, the 2nd appellant had also given a sworn testimony, in his defence. He said that he was a tour guide. He went to Serena Hotel, on 22nd January 2002, to meet his client Johnson smith and his son David. He negotiated with them the charges, and they also agreed on the departure date. On his way out of the hotel, a police officer stopped him and interrogated him. He explained his mission nonetheless, the police arrested him. The police officer was identified by the 2nd appellant as PW4. Interestingly, the defence of the 2nd appellant is in line with the evidence of PW8, to the extent that both said that he was arrested inside the hotel.

Having re-evaluated the defence, I find that it was plausible. Coupled with the contradictions in the prosecution evidence, I hold that any doubt created thereby should have been to the benefit of the 2nd appellant. Consequently, I find that it would be unsafe to uphold the 2nd appellant's conviction.

The 4th appellant also gave a sworn defence. He said that he was a hotelier. On the material dated (22.1.02) he was in the company of a friend, Jennifer Cowce. They had lunch and thereafter continued enjoying themselves with beverages, while at the same time listening to music from a live band. He was arrested in those circumstances. He was searched, but nothing was recovered from him. The 4th appellant also said that his lady friend was questioned by the police. However, as she left the country the night after, the said friend was not available, so as to testify at the trial.

The prosecution evidence did not shake the defence of the 4th appellant. Also the said defence sounded quite plausible.

And it is somewhat worrying that the learned trial Magistrate did not appear to have deemed it necessary to analyse the defence of the 1st, 2nd and 4th appellants. Each of them stated that they were not in the company of any of the other two. But the trial court held as follows:

“The court heard that accused 7, 8, and 9 fell into the trap of police officers as they were reported to have intended to commit a robbery. The court finds that 7th accused guilty of the offence of being in possession of a firearm and convicts him accordingly. The 8th and 9th accused were in the company of Accused 7 at the time of arrest and upon being challenged to surrender, they ran away whereupon they were chased and apprehended. This indicates they were aware the 7th accused was armed and they were up to a bad mission and that’s why they ran away but on being chased, they were arrested. This court has not doubt that accused 8 and 9 consorted with accused 7.”

It would have been prudent for the learned trial magistrate to analyse the appellants defences before arriving at a verdict. That is the requirement envisaged by section 169 of the criminal Procedure Code. I am afraid that the trial court failed to discharge that statutory requirement.

As a first appellate court, I am enjoined to re-evaluate the evidence on record. I have done so, in relation to the 1st, 2nd and 4th Appellants, and found that it would be unsafe to uphold the convictions against them. Therefore I quash their convictions, set aside the sentence, and direct that they be set at liberty, unless they were otherwise lawfully held.

That now leaves the 3rd appellant when canvassing his appeal, he submitted that he had been prejudiced by the failure of the trial court to call witnesses whom the appellant had sought. He also said that he had been jailed in yet another case, in which the same police officers were involved.. For that reason, he asked me to re-evaluate the evidence on record.

PW1, Edward Muchemi Kiema, testified that he was employed as a driver to the Wambaa family. He said that on 19th march 2000, he was at the Wambaa residence, in the company of a mechanic, one Wamacho. The mechanic was repairing a vehicle belonging to the complainant. After carrying out the repairs, the mechanic and PW1 went to the staff quarters occupied by PW1. thereafter, the mechanic left, at about 11.30 a.m.

When Pw1 approached the place where the vehicle that had been repaired was, he noticed several men emerge, one from behind flowers, another from the corner of the complainants house, and a third one from inside the complainant’s house. Two of the men had guns.

PW1 testified that he recognised the 3rd appellant, as the person who had the small gun. It was the 3rd appellant who emerged from the complainant’s house, through a window. However, when the 3rd appellant asked PW1 if he knew him, PW1 answered in the negative. The 3rd appellant then demanded to know where the complainant hid money, inside the house. He forced PW1 into the house, through the window, and made him rummage through some drawers. When the two were inside one of the bedrooms, the 3rd appellant stepped out ahead of PW1, and the witness locked the door behind the 3rd appellant. PW1 then hid the ceiling.

As the foregoing was going on, the complainant PW2, was attending a church service, in the company of his wife.

After about half an hour, PW1 heard one of PW2’s employees talking outside the house. He then came out of hiding, after ascertaining that it was safe.

PW1 promptly told the other employee, (Kamande) what had happened. PW1 told him that the 3rd appellant was one of the robbers.

According to PW1, the 3rd appellant used to be an employee of the complainant. He was a conductor in a lorry belonging to PW2. At that time, PW1 was employed by a Mr. Thande, who is a neighbour to PW2., thereafter, PW1 was employed by the complainant but the 3rd appellant had lost his job. Indeed, as far as PW1 could recall, the 3rd appellant used to ask for his help in trying to be re-employed by PW2.

By his testimony, PW1 said that he also told the complainant and the police that he had recognised the 3rd appellant, during the incident.

PW2 Stephen Mungai Kamua, was the complainant. He testified that he had held licences for firearms, for a long period of time. He said that he had had guns since 1965. However, the said guns were stolen from his house, on 19th March 2000.

During the theft, PW2 had gone to church together with his wife Racheal. On his return, much later, he found that his house had been broken into. The intruders had also broken into the safe, and stolen guns and ammunition.

PW2 confirmed that the 3rd appellant used to work for him previously. He said that the 3rd appellant first worked as a turn boy, and later as a gardener. By that evidence, the complainant corroborated part of the testimony of PW1. therefore, there would be absolutely no doubt that PW1 had recognised the 3rd appellant.

PW2 did identifying the guns which were stolen from his house. He did so, notwithstanding the fact that two of them had been tempered with. The butts had been sawed off. However, the numbers still matched those on the licences which PW2 had been granted by the Kenya Licencing Bureau. In effect, there was no doubt at all that the guns were the same as those which had been stolen from the complainant's house.

PW3, PC Julius Isoe, did visit the scene of crime, on the date when the incident occurred. He said that the safe was dusted for finger-prints, by scene of crime personnel. However, the investigations were thereafter taken over by CID personnel, and therefore PW3 was not aware of the results of the dusting.

PW5, PC Anderson Same, was the arresting officer. He said that he arrested the 3rd appellant at Ngitu Bar, on 29th July 2000. PW5 effected the arrest of the 3rd appellant, after he received information that the 3rd appellant was a person wanted by Kikuyu CID for a robbery case.

In the judgment, the learned trial magistrate held that the 3rd appellant had been [positively identified by PW1. Clearly, the trial court cannot be faulted for arriving at that conclusion. The finding is supported by the evidence on record. PW1 saw the 3rd appellant emerging from the complainant's house, through a window. The 3rd appellant was carrying a gun, which was later identified as belonging to the complainant. The gun was test fired by PW6, Donald Mbogo, and PW7, Emmanuel Langat, who both confirmed that they were firearms. The 12 bore shot gun and the rifle were recovered on the directions of the 3rd appellant. In the light of all the evidence on record, I have no doubt whatsoever that the learned trial Magistrate was right to have convicted the 3rd appellant for the lesser offence on count 1 and for count 2 as charged. Therefore, the 3rd appellant's conviction is duly upheld.

The lesser offence for which the 3rd appellant was convicted was HOUSE BREAKING AND STEALING, contrary to section 306 of the Penal Code. That offence attracts a penalty of imprisonment for 7 years. However, the 3rd appellant was jailed for 5 years.

In relation to count 2, the offence of POSSESSION OF A FIREARM WITHOUT A FIREARM

CERTIFICATE, under Section 4(2) (a) of the Firearm Act, attracts a Penalty of imprisonment for a term of not less than 5 years, but not exceeding 10 years. For that offence, the appellant was jailed for 7 years.

Both the sentences are lawful, and the 3rd appellant has not given me any reason to warrant interference with the sentences. Accordingly, the sentences are hereby upheld as well.

In conclusion, the appeals by the 1st, 2nd and 4th appellants are successful. Their convictions are quashed and sentences set aside. They are to be set at liberty, unless

otherwise lawfully held. But as regards the 3rd appellant, his appeal is dismissed. His conviction and sentences are upheld.

It is so ordered.

Dated at Nairobi this 24th day of January 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of

For the State

Appellants in person present

Mr. Odero Court Clerk