REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO.224 OF 1998

JACKSON NJOROGE GITAU…….. APPELLANT

VERSUS

REPUBLIC…….. RESPONDENT

[From Original Conviction and Sentence in Criminal Case

No.3638 of 1994 of the Senior Principal

Magistrate's Court at Nyeri]

JUDGMENT

The appellant was arraigned before the Senior Principal Magistrate's Court at Nyeri on a charge of robbery with violence, contrary to section 296 (2) of the Penal Code (Cap 63). He was tried by the Senior Resident Magistrate, Nyeri (J.S. Mushelle, Esq.) and subsequently convicted by him as charged on 20.02.98 and sentenced to death on the same date. He (appellant) lodged the present appeal against conviction and sentence. The appellant's initial petition of appeal was filed by him in person on 27.02.98. However, at the hearing of the appeal on 28.10.03, the appellant, who appeared in person, handed in written supplementary grounds of appeal plus lengthy written submissions.The grounds of appeal in the initial petition plus the supplementary grounds may be summarized as follows:-

1. That the prosecution case against the appellant was a fabrication.

2. That there was no description of the appellant in first report made about the robbery in which he was alleged to have been involved.

3. That the identification of the appellant was doubtful.

4. That the conviction of the appellant was based on uncorroborated evidence and that there was no eye witness to the offence he was charged with and convicted of.

5. That the charge preferred against the appellant was duplex.

6. That the evidence tendered conflicted with particulars in the charge.

7. That the alibi defence raised by the appellant was not sufficiently considered by the trial magistrate.

During the appellant's oral submissions before this court, he took issue with the trial magistrate's remarks to the effect that while it might be true as the appellant maintained that his name was not "Mohamed", there was a possibility that this was a nickname in view of the fact that he always wore a cap

usually worn by Muslims. The appellant took the position that there was no evidence to support the conclusion that he was a Muslim. It may be pointed out at this juncture that the appellant was referred to by prosecution witnesses as "Mohamed" or "Ali". In his written submissions he disowned both names and said he was a Christian at the time of the alleged offence and that he became a Muslim after he was taken into custody. He maintained that his name is as per the identity card he produced as defence Exhibit 1. Prosecution witnesses had also told the trial court that the appellant was using his motor vehicle Reg. No. KAC 367 u white in colour on the material date but the appellant stated in his written submissions that he was not the owner of the said motor vehicle.

The appellant made reference in his oral submissions to Othaya Police Station O.B. 3 of 02.01.94 which he said stated that at 3.27 hours No.64334 P.C. Imana was at the station and reported that while on duty in town with P.C. Nzomo, they were attacked by a gang of robbers. The appellant asked for the O.B to be brought to court and eventually IP. Moses Munene appeared in court as D.W.3 to testify on the matter.

This defence witnesses (D.W.3) told the court that he was stationed at Othaya Police Station. He was referred to O.B. No. 3 of 02.01.94 (wrongly typed as being of "21.1.94") and he said the report was made by P.C. Imana (P.W.1) who reported that while at a bar in Othaya town he was attacked and "CPL. Angaine and P.C. Nzomo was (sic) not issued with a gun on 1.1.94. It was P.C. Imana who was issued with the gun." The appellant then drew attention to the evidence of P.W.1 to the effect that he knew the assailant, i.e. the appellant, as Mohamed and asked why he (P.W.1) did not say so in his first report. In this connection the typed record seems to have omitted a portion of what was said to be P.W.1's entry in O.B. No. 3 of 02.01.94 that CPL Angaine and P.C. Nzomo had been shot dead and that the names of the assailant were not indicated. The appellant submitted that P.W.1's evidence in court that he knew the appellant as Mohamed was an afterthought, otherwise he would have said so in the subject O.B. entry.

The next issue taken up by the appellant in his oral submissions related to a discrepancy about the identity of the subject gun in that whereas the charge sheet refers to the gun said to have been robbed from P.C Anthony Nzomo as serial No.6740194, the evidence of P.W.1, who said the gun had been snatched from him by the deceased P.C. Nzomo who then followed the appellant out of the room in which they were all drinking shortly before the said P.C.Nzomo was shot dead, was that the said gun was serial No.6740174.

The appellant also submitted that it was not known who recovered the gun which was sent for ballistics examination. We note in this regard that No.212842 C.I. Kiragu (P.W.2) testified before the trial court that he recovered the gun in Muranga on 09.01.94 when he was the OCS Muranga after two members of the public, Fred Wekesa and Francis Mwangi, who did not testify, reported to his station that they had found the gun serial No. 6740194 beside the road outside Ihura Stadium in Muranga and that P.W.2 accompanied the two members of the public to the venue and recovered the gun which appeared to him to have been abandoned there during the night.

The appellant's final oral submission was that whereas the subject O.B. entry talked of the robbery in question as having taken place within Othaya township, P.W.1 told the trial court that the robbery was in a bar.

The appellant maintained that he was innocent and urged this court to allow his appeal.

Learned counsel for the respondent, Miss Okumu supported the appellant's conviction and death sentence. She submitted that enough evidence was tendered before the trial court to establish that the appellant stole P.C. Nzomo's gun and shot him, just as the appellant shot CPL Angaine. Counsel drew attention to the evidence of P.W.1, P.W.5, P.W.6 and P.W.7 that they plus the two deceased police officers were in a bar and that an argument arose there resulting in the appellant shooting the two police officers dead and that the appellant was positively identified as the assailant.

Regarding the appellant's alibi defence, respondent's counsel again reverted to the above prosecution witnesses and drew attention to their evidence that the appellant was with them in Othaya

township on the material date. She submitted that the appellant's alibi was displaced. As to the appellant's identification, counsel submitted that the same witnesses established that there was enough security light and that the witnesses knew the appellant and so their evidence was one of recognition.

Respondent's counsel urged that the appellant's appeal be dismissed.

In reply, the appellant submitted that the prosecution witnesses were in room 5 drinking and that nobody eye-witnessed the shooting and no fingerprints evidence was given. With regard to security light, the appellant posed: What was its voltage and where was it? The appellant pointed out that P.W.7 said one could not see the subject vehicle number plate from the upstairs room in which the prosecution witnesses were drinking. He added that some witnesses said they peeped out while others did not and re-emphasized that he was not drinking with the prosecution witnesses as "Mohamed" and that his identity card indicated otherwise. The appellant reiterated that his appeal be allowed.

The basic issue for the determination of this court is whether there is in the lower court record credible and adequate evidence to sustain the appellant's conviction.

We deal first with the appellant's challenge of the prosecution case that there was no mention of the name "Mohamed" ascribed to him by P.W.1 in his report to Othaya Police Station. The appellant submitted that since no report was made with such a name, the allegations subsequently made in court that he was involved in the subject robbery are highly suspect and do taint the credibility of prosecution witnesses and consequently support, in one way, his complaint that the case against him is a fabrication.

It would appear from the evidence on record that the entry at Othaya Police Station O.B. No.3 of 02.01.94 (wrongly indicated in the typed record as being of "21.1.94) that the said entry was the first formal report to the police about the robbery under inquiry. The report was by P.C. Imana of the same police station who testified as P.W.1 and told the trial court that he was at the scene of the fatal shooting of No.38611 P.C. Anthony Nzomo and No.42534 CPL.

Mutunga Angaine and the robbing from P.C. Nzomo of the G3 rifle he was carrying at the material time. We note from P.W.1's evidence that he had been drinking, inter alia, with the two victims of the shooting plus the assailant immediately before the shooting and robbery and that P.W.1 testified before the trial court that he had known the appellant before the material date and that he used to call himself "Mohamed" and further that people also called him so. Given this scenario, we are also asking ourselves as to why this description of the assailant of CPL. Angaine and P.C. Nzomo did not feature in P.W.1's entry at O.B. No.3 of 02.01.94 as the lower record shows?

Another issue raised by the appellant related to his identification by prosecution witnesses by the names "Mohamed" or "Ali". He submitted that his identification was doubtful as neither of these names, usually used by Muslims, was his name; that his name as at the time of the offence he was accused of was as per his identity card which he produced before the trial court; and that he became a Muslim after being taken into custody after the subject robbery. He said that this is yet another indication that this case against him is a fabrication.

We note with regard to the appellant's disowning of the names "Mohamed" or "Ali" that the thrust of the prosecution witnesses' identification was not centred on whether either of these names was his real name or nickname but rather that the witnesses physically saw him in the company of, and taking drinks with, the two victims shortly before the said victims met their death. The venue of the drinking session which ended in the subject tragedy was described by prosecution witnesses variously as Wainoga Day and Night Club by P.W.1; as Wainoga Makara – Night Club by Paul Nganga Kinyanjui (P.W.4); and as Othaya Night Club by Samuel Ndirangu Gachanja (P.W.6); etc. The totality of the evidence on record establishes, however, that it was one and the same venue in Othaya township.

As noted earlier, P.W.1 testified that he had known the appellant before the material date and that the appellant used to call himself "Mohamed". That during the subject drinking session, a teacher by the name Kinyanjui (P.W.4) came into the room where the drinking was taking place and after greeting the

group collectively he called the appellant by the name “Mohamed”. P.W.1 added that before he asked the appellant where he worked, he had himself said he was a special Branch Officer attached to Nyayo House. That out of curiosity P.W.1 followed P.W.4 outside and asked him if he really knew the appellant. That P.W.4 said the appellant was a regular customer of his (P.W.4’s) motor-bike taxi business and that after cross-checking the appellant’s identity outside with P.W.4, he (P.W.1) went back to the room where the drinking was taking place.

Paul Nganga Kinyanjui (P.W.4) confirmed what P.W.1 said about his having enquired from him (P.W.4) about the appellant’s real identity. He (P.W.4) testified that he was a teacher and that on 01.01.94 at about 10.00 p.m. he was in Othaya township where he used to operate a motor-bike taxi and that it had a clutch problem that evening. That he kept the motor-bike and started looking for means to go home. That he approached one Peter for transport assistance and he agreed to assist but asked to be bought a beer first and P.W.4 obliged. This, he said, was at Wainoga Makara – Night Club. That suddenly one “Mohamed” whom he (P.W.4) had known before came to the counter to buy beer. That P.W.4 identified this “Mohamed” as the appellant who was then the accused before the trial court. P.W.4 said he told the bar attendant to take beer to the appellant. That later when he (P.W.4) was going to the urinals, he saw the appellant taking beer in a room with two police officers, i.e. P.C. Nzomo and another and that he (P.W.4) went to greet them. That as he left the room the other police officer went to him and asked him if he knew the appellant and he (P.W.4) told the officer that the appellant was called ”Mohamed” and that he was his regular customer. That thereafter P.W.4 left with Peter but on the way they got stuck in a ditch and P.W.4 decided to go back where he had left his motor-bike and that on the way there he saw people running away beside the Night Club. That he was stopped by the police and asked to assist them in placing two injured victims into a police Land Rover and he recognized one of the injured victims as P.C. Nzomo. P.W.4 added that after completing the placement of the two injured victims in the police vehicle, he was released to go and that next morning he went to record his statement with the police.

P.W.6 told the trial court that he was the manager of “Othaya Night Club” and was on duty at the club at the material time. That at midnight on 01.01.94 he closed the bar but there were about nine customers inside whom he did not know. That at about 1.00 a.m. two police officers and one civilian came and asked to be served with beer and he ushered them into room No.5 and served them with beer there. P.W.6 identified the appellant as the civilian who was in the company of the police officers. That after about an hour another police officer in civilian clothes came and said he was the duty officer and ordered that the bar be closed. P.W.6 added that this officer was CPL. Angaine and that he joined the other two police officers and the appellant for drinks in room 5 and that they continued drinking until about 2.30 a.m. That the appellant then asked him (P.W.6) to open the door for him to go out but CPL. Angaine told P.W.6 not to open for the appellant as the police officers wanted the appellant to identify himself first before going out. That the appellant went out first and later two police officers followed and P.W.6 remained with one police officer (P.W.1) who was finishing his beer and that soon after the two police officers who followed the appellant left, P.W.6 heard gunshot.

That he (P.W.6) closed the door and remained inside with P.W.1 until about 3.00 a.m. when P.W.1 asked P.W.6 to open for him. That P.W.1 and himself went out and he (P.W.6) found that one police officer was writhing in pain while the other had died and that P.W.1 then went to the police station. That after about 30 minutes police officers came and asked P.W.6 if he knew who had gunned down the police officers and he said he did not know and that he later recorded his statement.

As against the evidence of P.W.1, P.W.4 and P.W.6 that they saw the appellant being physically present and drinking with the victims at Wainoga Day and Night Club in Othaya township on the material night, the appellant set up an alibi that he spent the night in Ol Kalou. He said that at about 9.00 p.m. on 01.01.94 he was at his house in Nairobi when one Lucy Wanjiru went to inform him that his father was sick. That he hired a taxi driven by one Peter Mwangi Gichira and that Lucy Wanjiru accompanied him on the journey to Ol Kalou and he returned to Nairobi on 02.01.94 and that he was not in Othaya township on the material night of 1st/2nd January, 1994 as alleged by the prosecution. The appellant called Peter Mwangi Gichira who testified in his defence as D.W.2. The evidence of D.W.2 given on 23.01.98, i.e. four years later, was basically that the appellant hired him to drive him in his taxi from Nairobi to Ol Kalou on 01.01.94 and that he did so. That he spent the night of 1st/2nd January, 1994 with

the appellant in one room at Ol Kalou and that he and the appellant left Ol Kalou at about 11.00 a.m. on 02.01.94 to return to Nairobi. This defence witness admitted during crossexamination that he was charged before the same court in April, 1994. The appellant also called a third witness, I.P. Moses Munene (D.W.3) who testified about the Othaya Police Station O.B. entry No.3 of 02.01.94, alluded to earlier, to the effect that P.W.1 made the O.B. entry; that P.W.1 recorded in that entry that while at a bar in Othaya town he was attacked; and that P.C. Nzomo was not issued with a gun on 01.01.94 but that it was P.W.1 who was issued with the gun.

After this witness (D.W.3), the appellant closed his defence.

We note that in addition to the evidence of P.W.1, P.W.4 and P.W.6 that they saw the appellant physically at Wainoga Day and Night Club in Othaya township having drinks, inter alia, with the two police victims shortly before the latter met their death, there are other prosecution witnesses who also testified to having seen the appellant in Othaya township on the material night. But before examining their evidence, we observe with regard to the first set of three prosecution witnesses that two of them, i.e. P.W.1 and P.W.4, said they knew the appellant before that date.

The latter set of prosecution witnesses who gave evidence that the appellant was in Othaya township on the material date are:-

(a) John Nyagah Munyoku (P.W.3). He testified that he stayed at Othaya and was a welder. That on 01.01.94 he was taking beer with friends at Silent Bar and that at about 11.00 p.m. he left to go home. That on the way he met “Mohamed” whom he identified as the accused before the trial court and who is the appellant herein. P.W.3 said he knew the appellant before and that he and the appellant proceeded to Kaga’s Bar and had beer with him there and that the appellant had a white car. P.W.3 added that he did not know where the appellant worked.

(b) Lydia Warukira (P.W.5). She testified that she stayed in Othaya and sold beer at Stadium Bar. That on 01.01.94 she was working at Kaga’s Bar and at about 11.00 p.m. some patrons came for beer and that they were CPL. Angaine and CPL. Macharia. That later P.W.3 went there with his wife and “Mohamed” whom he identified as the appellant herein.

(c) No 7701565 A.P. CPL. Moses Githaiga Macharia (P.W.8).

He testified that he worked at Kinunga Chief’s Camp. That on 31.12.93 he was given 3 days off and went to Othaya town and spent the night there. That on 01.01.94 at about 11.00 p.m. he went to Kago’s Bar where he met CPL. Angaine and the two of them took beer together until about 12.30 a.m. when the appellant whom P.W.8 knew before also went there. That after exchanging pleasantries with P.W.8, the appellant bought beer for P.W.8 and CPL. Angaine and the barmaid. That later CPL. Angaine asked the appellant which countries he knew and the appellant replied that he knew a number of countries and the two “started exchanging words.” That P.W.8 told CPL. Angaine to leave the appellant alone and CPL. Angaine agreed. That later the appellant left and went out. That P.W.8 and CPL Angaine and others left at abut 1.30 a.m. and went to Kiambiriria where there was a disco and eventually P.W.8 left CPL. Angaine and went to sleep.

The evidence surveyed above presents a scenario where P.W.1, P.W.3, P.W.4, P.W.5, P.W.6 and P.W.8 by their sworn testimony place the appellant in Othaya township where the subject offence is said to have taken place on the material night while the appellant and his witness D.W.2 say also on oath, that the appellant was nowhere near there on the material night but was far away in Ol Kalou. The evidence of the two sets of witnesses is incompatible. Both sets of witnesses cannot be right. The next question is: which evidence should be accepted?

In **Gabriel Kamau Njoroge vs Republic** (1982 – 88) 1 KAR 1134, the Kenya Court of Appeal held, inter alia, that it is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind

always that it has neither seen nor heard the witnesses and make due allowance for this. It is trite law that an accused person who sets up an alibi as a defence does not thereby assume any burden of proving it: see **Saidi S/o Mwakawanga vs Republic** [1963] E.A 6, cited with approval by the Kenya Court of Appeal in **Kiarie vs Republic** [1984] KLR 739. It is upon the prosecution to dislodge the alibi. The learned trial magistrate who saw witnesses for the prosecution and for the defence testify and had the benefit of observing their demeanour concluded as follows:

"I find the defence of alibi to be a made up story hence I reject it."

We of this first appellate court did not have the advantage of the live show at the trial. It would, therefore, be necessary for us to have very good grounds for coming to a different conclusion from the trial magistrate's finding of fact on the credibility of the two sets of witnesses on the question whether the appellant was or was not in Othaya township on the material night. We note from P.W.1's evidence that he and P.C. Nzomo were on night beat (patrol) duties on the night in question and he (P.W.1) was armed with a G3 rifle.

That instead of doing patrol duties P.W.1 and his fellow police officers went to drink beer in a night club. That is derelection of duty. It may even be said of P.W.1 that he might have a motive for implicating the appellant in the subject offence. But what about the other prosecution witnesses, i.e. P.W.3, P.W.4, P.W.5, P.W.6 and P.W.8 – why should they fabricate the evidence of the appellant's presence at the scene of crime at the material time? We find no good reason for them to engage in the alleged fabrication and we have come to the clear finding, as the trial magistrate did , that the appellant was indeed in Othaya township and not in Ol Kalou on the material night.

Accordingly, we find the appellant's alibi defence negatived by clear prosecution evidence to the contrary. We wish to add that it would have been better to include the appellant's alias name of "Mohamed" in the charge but the omission has made no material difference in this case..

We turn next to the appellant's complaint about discrepancies regarding the identity of the rifle said to have been robbed from P.C. Anthony Nzomo. The charge sheet gives its serial No. as 6740194 while P.W.1, who said he had it before P.C. Nzomo snatched it from him prior to pursuing the appellant, testified that the rifle's serial No. was 6740174.

P.W.2 who recovered a G3 rifle with 20 rounds of ammunition abandoned outside Ihura Stadium in Muranga town on 09.01.94 testified that he checked and found that the rifle was the one stolen from Othaya police and gave its serial No. as 6740194. However, No.35549 CPL Simon Bwaringa (P.W.12) of Divisional CID, Nyeri who prepared an exhibit memo form and took the rifle and ammunition to the Ballistics Examiner on 20.01.94 orally told the trial magistrate when he (P.W.12) testified that the rifle's serial No. was 6740114 while the exhibit memo from which he himself prepared recorded the rifle's serial No. as 6740194! We appreciate that these police officers were giving evidence nearly four years after the event but hasten to add that they had the benefit of records to refresh the memories and could have put up a better show.

What is the effect of the misdescription of the rifle's serial number in the present case? We note that, in addition to P.W.'1s evidence that he had the rifle under discussion, the manager of the subject Night Club (P.W.6) acknowledged that one of the officers in the Club at the material time had a gun. In P.W.6's own words during cross-examination:

> **'The police officer who had the gun is "a Mkamba".**
>
> **Later, the Mkamba snatched the gun from him (P.W.1) and ran out. It is true that after "Ali" was told that he could be arrested he ran away but slipped and fell down. He was arrested. One police officer said he wanted to immo bilize Ali. I told the police that if I saw that person again, I would be able to identify him.**
>
> **You were wearing a Cap … I had not known you before. The cap I am referring**

to is the one in court.'

Additionally, we note from the evidence of D.W.3 that the fact of P.W.1 having been issued with a gun on the material date was reflected in Othaya Police Station O.B. entry No.3 of 02.01.94 made by P.W.1 shortly after the robbery under inquiry. The evidence does in our view establish that there was a visible gun at the scene on the material date and that it was initially in the possession of one of the police officers. A gun is a dangerous or offensive weapon as envisaged in section 296 (2) of the Penal Code. That is the crucial factor in this case and in our respectful view the misdescription of its serial number is in the circumstances of this case immaterial.

From our analysis of the evidence so far, we have basically concluded that the appellant was in Othaya township on the night of the robbery charged. It is now time to consider the appellant's submission that there was no eye-witness to the offence of which he was convicted and that the evidence on which the conviction was based is uncorroborated.

It is true that no witness testified to having actually seen the appellant aim a gun at the victims P.C. Nzomo and CPL Angaine and pull the trigger. But P.W.1 gave evidence that he was with the two victims and the appellant, whom he knew before, drinking beer at Wainoga Day and Night Club on the night in question. As to which night it was, the appellant said that the charge sheet stated the subject robbery to have been committed on the night of 31st December, 1998 and 1st January, 1994 while witnesses talked of the night of 1st/2nd January, 1994. We note that while the particulars in the typed charge sheet in our appeal files allude to the night of 31st December, 1998 and 1st January, 1994, which obviously does not make sense, the original charge sheet in the lower court file bears an amendment of the date which reads therein as the night of **"1st January 1994 and 2nd January 1994**" and that the prosecution evidence, except that of P.W.13, plus the evidence of the appellant and his witnesses talk of the night of 1st/2nd January, 1994. We find that the material night was the night of 1st/2nd January, 1994 and that the appellant knew as much.

The gist of P.W.1's evidence regarding the appellant's involvement in the subject offence while P.W.1 and P.C. Nzomo, who were attached to Othaya Police Station (Nyeri), were on police patrol duties on 01.01.94, is that they found the appellant in Kaga's Bar at around midnight and that a CPL Angaine was also in that bar. That P.W.1 and P.C. Nzomo noticed motor vehicle Reg. No.KAC367 U parked outside the bar. That as the two police officers continued with their night patrol duties they later, at about 12.40 a.m, spotted the same vehicle going round the town and being driven by the appellant.

That later still that night P.W.1 and P.C. Nzomo ended up in a beer drinking session in room 5 at Wainoga Day and Night Club and that he (P.W.1) had a rifle loaded with 20 rounds of ammunition. That CPL Angaine joined them there and the appellant bought beer for him and when he (CPL. Angaine) was about to finish it, he asked the appellant what sort of an officer he was. It will be recalled that earlier on the appellant had told P.W.1 that he was a Special Branch Officer attached to Nyayo House. P.W.1 continued to tell the trial court that CPL. Angaine called the appellant a robber but the appellant kept quiet and instead he stood up and told the police officers that he was a bit drunk and because he had to drive home, he had to leave them.that CPL Angaine also stood up and followed him outside as he left the room. That the appellant called the bar manager and told him to open the door leading to the straircase and the manager (P.W.6) opened and the appellant left, followed closely by CPL. Angaine. After the above introductory account of the antecedents of that night's tragedy, P.W.1 gave the following narrative of what followed:

> **"After a short moment, we heard gunshot. On hearing the gunshsot, we all stood up. By then I was armed. On going out of the room, P.C. Nzomo snatched a G3 rifle S/No.6740174 from me. It was loaded with 20 rounds of ammunition. He ran towards the stairs. I was left at the door we were.**
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> **The gunshots continued for about 3 -4 minutes. I told the manager of the bar to close the door.**

We went to the main bar. The gunshots stopped. I peeped th rough the window and saw the accused person (appellant) carrying a G 3 rifle in his left hand and a pistol in his right hand. There was a lot of security light both inside and outside . He opened his motor vehicle KAC 367 U and entered. He put the alarm on and drove away. I went out. I met the late CPL. Angaine and late P.C. Nzomo in a pool of blood.

Both were lying on the corridor. The G3 rifle was nowhere to be seen. I went to the police station and reported the matter (at Othaya Police Station). I later heard that P.C. Nzomo died on the way to hospital.

CPL Angaine died while undergoing treatment the following day. The accused was wearing a black cap bearing words 'BULLDOG' (MFI – 2), a leather coat, blue 'T' shirt and cordroy trouser. I had see n the accused for one (1) month prior to this incident.

Later I was informed that the accused was arrested.

He is the same man I was referring to …."

P.W.1's evidence was corroborated in immaterial particulars by P.W.4, P.W.6, P.W.7, P.W.8, P.W.10 and P.W.11. We gave certain highlights of P.W.4's evidence earlier on. We wish to add here that P.W.4 testified that he saw one G3 rifle in the room where the police officers and the appellant were drinking beer and that it was the other police officer, not P.C. Nzomo, who was holding the rifle. This witness (P.W.4) added that he had known the appellant for about four months as he (appellant) had hired his mot-bike taxi about four times when he (appellant) did not own a vehicle. P.W.1 also said that when one is inside the bar, one can see outside. The manager of Wainoga Day and Nigh Club, however, said he could not have seen outside as to know the person who was firing the gun. It should be remembered in this regard that P.W.1 saw the appellant from room 5 when he (P.W.1) peeped through the window. And P.W.7 also said he peeped through the window after the gunshots and saw a car zooming off.

Clearly, whether one could or could not see outside depended on one's position.

We gave highlights of P.W.6's evidence earlier. We wish to add by way of emphasis that P.W.6 also said that the incident under discussion was on 02.01.94; that the police officer called Angaine asked for the appellant's identity card; that some of the police officers were referring to the appellant as "Ali" and that he (P.W.6) did not know the appellant's real name but that, nevertheless, he would be able to identify the appellant if he saw him again. The appellant quite rightly asked P.W.6 to tell the trial court if he had attended an identification parade and he said he attended none. This is a flaw in the police investigations. However, there is other evidence to make up for the omission.

Salient facts in the evidence of Gerald Wagatu Wambui (P.W.7) are that he worked as a waiter in Wainoga Day and Nigh Club on the material night. That two police officers and a civilian went there for drinks and they drank in room 5. That after about one hour a police sergeant joined them. That he (P.W.7) remained at the counter and that after a while he heard the door (to room 5) being opened and soon thereafter he heard gunshots. That he peeped through the window and saw a white car zooming off and went to check and found one policeman lying dead and another writhing in pain. Crossexamined by the appellant, P.W.7 said the bar was storeyed and that if one was standing at the top, one could not see the registration number of the vehicle and that he managed to see only the roof-top of the car. He also said that if a car passes and one is not peeping, one could not be able to see.

We also gave highlights of P.W.8's evidence and only wish to add that he said he knew the appellant in 1993 as "Mohamed" as that was the name people used to call him by; that he knew the appellant when he (P.W.8) was attached to Gatugi Chief's camp and that the appellant came form Gatugi area.

Post-mortem examination was done by Dr. Waweru, a Pathologist of Nyeri Priovincial General Hospital on 06.01.94. It appears, however, that Dr. Waweru could not give evidence on the matter.

Instead, Dr, John Pius Okullo (P.W.10) testified that he had worked with Dr. Waweru for 3 ½ years and was acquainted with her handwriting. Dr. Okullo then went through the two Post-mortem Reports by Dr. Waweru which, inter alia, showed the following:-

Body of Anthony Nzomo

It had an entry wound on the right side of the face and a large exit wound on the right parietal region. There was a bullet wound on the right arm and a large exit wound on the left lumber region. The body also had an entry wound on the left chest wall. The report gave the cause of death as brain injury following a firearm wound.

Body of Mutunga Angaine

It had fractures of the left side of the ear; a bullet wound on the lower part of the abdomen; a bullet wound on the left side of the right forearm; and a wound on the left buttock. The report gave the cause of death as bleeding in the abdominal tissues.

The thrust of the evidcence of I.P. Mutahi (P.W.11)was that he was attached to Othaya Police Station at the material time. That at about 2.30 a.m. on 02.01.94 he received a report that P.C. Nzomo and CPL. Angaine of the same police station had been shot by a lone thug at Wainoga Day and Night Club. That he (P.W.11) proceeded to the scene and, inter alia, collected 8 catridges and 8 bullet heads 9mm calibre which he handed over to CID team which took over investigations.

No.46814 CPL Wycliffe Marua (P.W.9) testified that on 03.01.94 he was at Pangani CID office with his colleagues. That they received information that there was a man being treated at Alice Nursing Home in Kariobangi (Nairobi) who was suspected to be one of those shot during a robbery at Standard Bank. That P.W.9 and colleagues proceeded there and found the person had been transferred to a private house in Gikomba (Nairobi). That P.W.9 and his colleagues traced the place and went back to their office to arrange to invade the place. That very early in the morning on 04.01.94 they stormed the place and found two women there who claimed there was no other person in the house. That the police officers, however, noticed some bandages and an assortment of medicines but the women still insisted that there was nobody else in the house. That the police officers ordered one of the women to remove the table near the bed and she did. That P.W.9 then knelt down and flashed his torch under the bed and found the appellant stark naked under the bed and his intestines were hanging out. That P.W.9 called his colleagues who had stepped out back into the house and they did. That the appellant then pleaded with the police officer that things were bad and that he should not be killed. That P.W.9 and his colleagues arrested the appellant and recovered from the house a pull through (gadget for servicing a gun) and some medicines. That P.W.9 and his colleagues took the appellant to Pangani and later he was taken to Nyeri. P.W.9 added that the pull through was produced as an exhibit in another case in Nairobi.

The last prosecution evidence we wish to revisit is that of P.W.12. This is the witness who prepared the Exhibit Memo Form vide which he forwarded to the Ballistics Examiner the G3 rifle and 20 rounds of 7.62 mm calibre recovered by P.W.2 in Muranga town on 09.01.94. It is to be recalled that although P.W.12 correctly recorded the rifle's serial No. as 6740194, he misdescribed the number of the riffle, said by P.W.2 to have been the one stolen from Othaya police, as 6740114. We have already commented adversely on the misdescription. Here we wish to observe that the G3 rifle P.W.1 had on the material date and which was snatched from him by P.C. Nzomo for purposes of immobilizing the appellant had 20 rounds of ammunition and that the G3 rifle serial No.6740194 recovered by P.W.2 a week after its robbery had 20 rounds of ammunition 7.62 mm calibre. The inference may be drawn here that the recovered rifle was not used to fire any of the subject shots. On the other hand, the Firearms Examiner who examined the 8 empty catridges and 8 bullet heads of 9 mm calibre found at the subject scene by P.W.11 and sent to him (Firearms Examiner) by P.W.12 found that the 8 catridges were all fired from one gun; that those catridges could not have been fired in the recovered G3 rifle; and that the said catridges could have been fired in either a 9 mm calibre SMG or a 9 mm calibre High Powered Pistol. It is to be called in the latter regard that P.W.1 told the trial court that when the gunshots stopped, he peeped through the window and saw the appellant carrying a G3 rifle in his left hand and a pistol in his right hand

and that there was a lot of security light both inside and outside:

As recorded earlier, the appellant set up an alibi which we found to have been rightly rejected by the trial magistrate. The appellant added that upon his return to Nairobi from Ol Kalou on 02.01.94 he was on 03.01.94 visited at his Nairobi house by one CPL. Maina from Pangani Fyling squad who demanded that the appellant repays him his debt but the appellant said he did not have the money. That CPL. Maina insisted that the debt must be repaid by next day. That the following day CPL. Maina accompanied by a police driver went back to the appellant's house, searched it and collected Kshs.18,000/= from the appellant's trousers. That when the appellant objected, he was told to keep quiet and taken into police cells at Central Police Station. That on 25.09.94 CPL. Maina and another police officer visited the appellant in cells and asked him about his home and the appellant told them it was Othaya where a search was made but nothing was recovered. That he was taken to Nyeri Police Station where the escorting police officers asked the police officer there about him (appellant) and the police officer said he did not know him. That on 27.09.94 the appellant was taken to Nairobi and charged with the subject offence of robbery and he denied having been in Othaya on the night of 1st/2nd January, 1994 and that P.W.1 and P.W.6 lied to the trial court in their evidence that he (appellant) was in Othaya on the material date.

The account by the appellant of the circumstances of his arrest is in sharp contrast to the account given by P.W. 9 and cannot stand side by side with it. In this regard we note that the lower court record indicates, significantly, that the appellant was admitted in hospital for a number of months after his arrest; that the admission was in connection with bullet injury; and that his plea was taken on 16.04.95 when he denied the charge.

The foregoing are the main features of the case involving the appellant. The rest of the evidence is basically formal or does not add much.

The last point raised by the appellant which we wish to address briefly is his contention that the charge preferred against him is duplex. The charge reads as follows:

"Statement of offence

Robbery with violence contrary to section 296 (2) of the Penal Code

. Particulars of offence

Jackson Njoroge Gitau:

During the night of 1st January 1994 and 2nd January 1994 at Othaya Township in Nyeri District within Central Province, while being armed with a dangerous weapon namely a pistol, robbed No.38611 P.C. Anthony Nzomo of his G3 rifle S/No.6740194 with 20 rounds of life (sic) ammunition calibre 7.62 mm valued at Kshs.10,000/- the property of Kenya Government and at or immediately before or immediately after the time of such robbery shot dead the said No.38611 P.C. Anthony Nzomo and No.42534 CPL. Mutunga Angaine."

The gravamen of the charge was the robbery by the appellant of the G3 rifle from P.C. Nzomo while he (appellant) was armed with a dangerous weapon, i.e. a pistol. It was a single act. Even if the particulars of offence stopped there, the offence committed up to that stage was a complete capital robbery offence. The fact that the appellant went further and fatally shot the two police officers constituted an additional but alternative element of the offence of capital robbery. The offence was one but with two alternative ingredients for its commission being present. And as long as the offence being focused on was violent robbery, it did not matter that the victims thereof were more than one but subject to the shooting in the course of the same transaction. We find that in the context of the violent robbery charge in the present case, the appellant's duplicity plea cannot succeed and we reject it.

Having done our own evaluation of the entire evidence on record, we find that the appellant was

convicted on very strong circumstantial evidence, which was corroborated, and that the learned trial magistrate was amply justified in convicting the appellant as charged. We have addressed expressly the main discrepancies in the prosecution case and come to the conclusion that, in the circumstances of this case, they do not vitiate the conviction. There are other discrepancies, e.g. relating to time of occurrence of certain events; relating to the position of some prosecution witnesses and whether they could accurately observe certain objects or happenings; etc. We are satisfied that any such discrepancies which exist in the evidence are immaterial, taking into account all the circumstances of this case. Accordingly, we have no hesitation in upholding the appellant's conviction.

The appellant's appeal against his conviction for the offence of robbery with violence, contrary to section 296 (2) of the Penal Code is hereby dismissed.

There is only one sentence provided by law for the offence of robbery with violence, i.e. death. The appellant's appeal against his death sentence is hereby also dismissed.

Orders accordingly.

Delivered at Nairobi this 4th Day of May, 2004.

D.A. ONYANCHA

JUDGE

B.P. KUBO

JUDGE