



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.158 & 159 OF 2015**

**(AS CONSOLIDATED WITH CR. APPEAL NO.287 OF 2016)**

**(An Appeal arising out of the conviction and sentence of Hon. E.K. Nyutu – Ag. PM delivered on 11<sup>th</sup> September 2015 in Makadara CMC. CR. Case No.3576 of 2011)**

**ALEX OCHIENG ONYANGO.....1<sup>ST</sup> APPELLANT**

**ABDALLA BINDA MWANGO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Alex Ochieng Onyango (1<sup>st</sup> Appellant) and Abdalla Binda Mwangi (2<sup>nd</sup> Appellant) were jointly charged in the first count with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 22<sup>nd</sup> day of June 2011 at around 6.15 a.m., at Donholm in Nairobi County, the Appellants, jointly, while armed with dangerous weapons namely pistols robbed No.55654 Police Constable Jacob Wambua of Railways Police of a firearm Ceska Pistol Serial Number F.4585 with 14 rounds of 9mm ammunitions, a police communication gadget make vertex standard Serial Number 9D860233 and a pair of handcuffs, and at or immediately after the time of such robbery used actual violence to the said Jacob Wambua.

Both Appellants were jointly charged in the second count with the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code. The particulars of the offence were that on the 3<sup>rd</sup> of August 2011 at Buruburu in Nairobi within Nairobi County, the Appellants were jointly found with dangerous or offensive weapons namely firearms in circumstances that indicated that the Appellants were so armed with the intent to commit a felony namely robbery with violence.

The 2<sup>nd</sup> Appellant was charged in the third count with the offence of being in possession of an imitation firearm contrary to Section 34(1) of The Firearms Act. The particulars of the offence were that on the 3<sup>rd</sup> day of August 2011 at Buruburu in Nairobi County, the 2<sup>nd</sup> Appellant was found in unlawfully possession of an imitation firearm namely homemade gun with intent to commit a felony.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, they were convicted as charged on the first count and sentenced to death. The 2<sup>nd</sup> Appellant was additionally convicted as charged on the second and third counts and sentenced to five (5) years imprisonment for each count. The Appellants were aggrieved by their conviction and sentence and have each filed a separate appeal to this court.

In their petitions of appeal, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They were aggrieved that the trial court failed to find that the Appellants' identification was unsafe. They faulted the trial court for failing to appreciate that the circumstances of their arrest did not exclude the possibility of mistaken identity. They complained that the trial court failed to consider their respective defences in reaching its verdict. Finally, they took issue with their conviction stating that the prosecution had failed to prove their case to the required standard of proof beyond any reasonable doubt.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. During the hearing of the Appeal, both Appellants presented to court written submissions in support of their appeals. They urged this court to allow their appeals. Ms. Kimiri for the State opposed the Appeal. She made oral submissions to the effect that the prosecution's case was proved to the required standard of proof

beyond any reasonable doubt. She stated that PW1 left his house on the material day and boarded a matatu to city stadium. Just before the matatu reached Jam Rescue, five men boarded the matatu. The 2<sup>nd</sup> Appellant was seated in front of him. The 2<sup>nd</sup> Appellant stabbed him on the forehead. The 1<sup>st</sup> Appellant ransacked his pockets and stole his pistol, a phone and a pair of handcuffs. PW1 managed to escape. He reported the matter at Buruburu Police Station. He received treatment at Metropolitan Hospital. The next day, he was informed by the police that suspects had been arrested in relation to the robbery. He went to the station. He identified the recovered firearm. He also identified the Appellants from an identification parade. With regards to count 2, Learned State Counsel averred that PW2, PW4 & PW5 were eye witnesses. A pistol and two homemade pistols were recovered from the Appellants. The Appellants were not licensed firearm holders. She maintained that the Appellants' convictions were safe. In the premises therefore, she urged this court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: PW1, Jacob Wambua, at all material time worked as a police officer, stationed at Nairobi Railways Police Station. On 21<sup>st</sup> June 2011, he was issued with a ceska pistol No.F4585. It was loaded with 14 rounds of ammunition caliber 9mm. On the material day, he left his house at about 5.50 a.m. He boarded a matatu to City Stadium round about. There were three other passengers on board. On reaching Jam Rescue along Jogoo Road, five men boarded the matatu. One of the men sat on his left side and two others on the seats in front of him. PW1 informed the conductor that he wanted to alight at the next stop. The man seated in front of him suddenly stabbed him on the forehead with a knife. A struggle ensued as he tried to defend himself. As this was happening, the man seated on his left side ransacked his pockets. He stole his pistol. PW1 managed to escape through the window. He reported the robbery to his seniors at the police station.

On 3<sup>rd</sup> August 2011, he was summoned to Buruburu Police Station. He was informed that some suspects had been arrested in possession of the pistol that had earlier been stolen from him. He went to the said police station. He took part in an identification parade where he identified the Appellants. He also identified the firearm that had been recovered. PW2, PC Boniface Komen was one of the arresting officers. On 3<sup>rd</sup> August 2011, he was in the company of the OCS and other police officers. They had received reports that suspects who were armed had boarded a matatu. While on the road, they saw the said motor vehicle approach them. The OCS signaled the driver of the said motor vehicle to stop. He ordered all passengers to remain in the vehicle. However, four men tried to alight. One man alighted and fired his gun at them. They returned fire and shot him. He was fatally wounded. They arrested the three remaining suspects. Homemade guns were recovered from the 2<sup>nd</sup> Appellant and another man. The 1<sup>st</sup> Appellant had a yellow polythene bag.

PW3, PC Justus Wafula confirmed that on 21<sup>st</sup> June 2011, he issued a ceska pistol No.F4585 to PW1. It had 14 rounds of ammunition. He identified the firearm in court as the same one that he had issued to PW1. PW4, James Omari was a conductor in the bus where the Appellants were arrested. He was on duty on the material day when the Appellants were arrested. At about 7.15 a.m., they left Buruburu area. On the way, they saw a police vehicle. Suddenly, four passengers stood up. They approached the bus door. After the door was opened, he heard gunshots. He lay down on the floor. He identified the Appellants as among the said four passengers who tried to alight.

PW5, CIP Johnstone Matoke stated that he was the OCS at Buruburu Police Station. On 3<sup>rd</sup> August 2011, at about 5.30 a.m., he received information that four armed men had boarded a bus at Buruburu with an intention of robbing passengers. The bus was owned by Double M and was registered as KAY 695F. He proceeded to intercept the bus accompanied by other police officers. When they spotted the bus, they signaled the driver to stop. He ordered all of the passengers to remain in the bus. However, four men started alighting from the bus. One of the men shot at them. They fired back and shot him dead. They arrested the three remaining suspects. They managed to recover a ceska pistol, toy pistols, 14 rounds of ammunition, a yellow paper bag.

PW6, Dr. Zephania Kamau examined PW1 on 30<sup>th</sup> June 2011. He had stitched wounds that were yet to heal on the left side of his face. He had a scar on the left temporal scalp. He also had injuries on the big toe of his left leg. He approximated the age of the injuries to eight days. He stated that the injuries had been caused by sharp and blunt objects. He also noted that PW1 had earlier received treatment at Metropolitan Hospital. He produced a P3 form into evidence.

PW7, IP Evans Mwangi conducted the identification parade with regard to the 1<sup>st</sup> Appellant on 3<sup>rd</sup> August 2011. He informed the 1<sup>st</sup> Appellant that he was going to carry out an identification parade. The 1<sup>st</sup> Appellant did not object to the same. He also informed him of his right to have representative. The parade comprised of eight people. PW1 identified the 1<sup>st</sup> Appellant as his assailant. PW10, CIP Peter Mwaura conducted an identification parade with respect to the 2<sup>nd</sup> Appellant. The same was done on 3<sup>rd</sup> August 2011. PW1 identified the 2<sup>nd</sup> Appellant as one of the assailant from the parade. PW8, Emmanuel Lagat was a Ballistics Expert. He stated that he received exhibits on 13<sup>th</sup> September 2011. The same were ceska pistol Serial No.F4585, one magazine, 14 rounds of ammunition, and two imitation firearms. He examined the said exhibits. He produced a report of his findings dated 13<sup>th</sup> September 2011 into evidence.

PW9, PC Joseph Nderitu was the investigating officer of the case. He interviewed PW1 who narrated the events as stated in his testimony. He visited the scene where the incident took place. He also recovered the arms movement register from Railways Police Station where PW1 was attached. The same confirmed that PW1 had been issued with a Ceska firearm on 21<sup>st</sup> June 2011. The Appellants were arrested on 3<sup>rd</sup> August 2011. The firearm that had been stolen from PW1 was recovered from them. PW9 visited the home of the 2<sup>nd</sup> Appellant. He recovered two photographs. The 1<sup>st</sup> Appellant was photographed with the 2<sup>nd</sup> Appellant in the first photograph. In the second photograph, the 1<sup>st</sup> Appellant was photographed with the suspect who had been shot dead. The Appellants were also arrested in possession of imitation firearms and a yellow paper bag. An identification parade was conducted. PW1 identified both Appellants as the assailants. He thereafter charged the Appellants with the present offences.

When the 1<sup>st</sup> Appellant was put on his defence, he stated that he resided at Buruburu. He was going to work on the material day. He boarded a matatu. He met the 2<sup>nd</sup> Appellant in the matatu. The 2<sup>nd</sup> Appellant was one of his customers. The matatu was stopped by police officers. One of the police officers shot at a passenger. The officers arrested all the men in the bus. He stated that he was arrested among other passengers and taken to Buruburu Police Station. An identification parade was conducted. He was arraigned in court the following day. He denied involvement in the robbery.

The 2<sup>nd</sup> Appellant was put on his defence. On the material day, he was going to work. He decided to pass by his sister's workplace at Buruburu. Afterwards he boarded a Double M bus that was going back to town. When the bus approached Buruburu Police Station, it was stopped by police officers. The officers ordered all passengers to remain in the vehicle. The officers entered the bus and arrested one young man. They recovered a firearm from him. They afterwards forced the young man out of the bus. He was ordered to lie down. The officers shot him on the back. All the young men were thereafter ordered to alight from the bus. They were interrogated by police officers. Some of them were released. The 2<sup>nd</sup> Appellant and three other men were arrested and taken to Buruburu Police Station. An identification parade was conducted. He was thereafter arraigned before the trial court. He denied being involved in the robbery.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments regarding the demeanour of the witnesses and give due regard in that respect (See Njoroge vs Republic [1987] KLR 19). In the present appeal, the issue for determination is whether the prosecution established the Appellants' guilt with regards to the charges preferred against them to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification to secure the conviction of the Appellants. The court has a duty to examine thoroughly the evidence of identification before confirming a conviction based on the same. PW1 was a police officer. He boarded a matatu at about 6.00 a.m. The robbery occurred in the matatu sometime after 6.00 a.m. He saw five men boarding the matatu. One of the men sat on his left side. Two others sat on the seat in front of him. When PW1 told the conductor that he was to alight at the next stop, the man seated in front of him suddenly stabbed him on his forehead with a knife. A struggle ensued as he tried to defend himself. The man seated on his left side ransacked his pockets. He took his pistol. PW1 managed to escape through the window. He stated that he spent about ten to fifteen minutes with the assailants. It was his testimony that when the Appellants boarded the matatu, there was daylight. He was therefore able to identify them. The 1<sup>st</sup> Appellant sat next to him. The 2<sup>nd</sup> Appellant sat on the seat in front of him. PW1 was able to see the Appellants in close proximity as they boarded the matatu. The Appellants did not wear any disguise.

This court has re-evaluated this evidence of identification. The robbery incident took place on 22<sup>nd</sup> June 2011 at about 6.15 a.m. The Appellants were arrested on 3<sup>rd</sup> August 2011. It was clear from the complainant's testimony that he did not give the description of his assailants in the first report that he made to the police. In the hectic circumstances of the robbery, including the fact that he was stabbed on his face by one of the robbers, it may or it may not have been possible that the complainant positively identified his assailants. From his description of where two of the robbers sat, it was evident that he did not see their faces. They were seated on the front seat while he was seated behind them. He was seated with one of the robbers next to him. They were in a confined space of a matatu. This court would have been re-assured that the complainant had positively identified the Appellants if he had given their description in the first report that he made to the police. The subsequent identification parade that was conducted by the police was not useful in the absence of an initial description given by the complainant.

Although the Court of Appeal in Nathan Kamau Mugwe v Republic [2009] eKLR held that the evidence of identification parade cannot automatically be discounted on the basis that an initial description of the robbers was not given by the identifying witness, the court nonetheless held that the weight of such evidence would be strengthened if the description of the persons to be identified was given prior to the mounting of the identification parade. In the present appeal, it was clear to this court that although identification parades were subsequently conducted by PW7 IP Evans Mwangi and PW8 CIP Peter Mwaura on 3<sup>rd</sup> August 2011, this court is not satisfied that in the short period that the complainant was exposed to the robbers he was able to register in his memory their respective identities so that he could point them out in a police identification parade held over forty (40) days after the robbery. The robbers did not have any distinguishing marks that would have enabled the complainant to recall their appearance without fear of the possibility of mistaken identity. This court agrees with the Appellants that the circumstances in which the robbery took place, it would not have been possible for the complainant to be positive that he had identified the Appellants as the robbers. This court therefore holds that the evidence of identification was not watertight as to exclude the possibility of mistaken identity or error.

**In Maitanyi –Vs- Republic [1986] KLR 198 at P.200, the Court of Appeal held thus:**

***Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***

***“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.***

In the present appeal, the prosecution adduced other evidence other than the evidence of identification. PW5 CIP Johnstone Matoke, the then OCS Buruburu Police Station testified that on 3<sup>rd</sup> August 2011 at about 5.30 a.m., he received information that there were four armed men who had boarded a particular matatu registered as KAY 695F. He mobilized his fellow police officers and went to the road with a view to intercepting the matatu. When he saw the matatu, he stopped it and had his officers surround the matatu. He then instructed all the passengers in the matatu to sit down and not to alight. Four passengers who included the Appellants did not heed his orders. They attempted to alight from the matatu. One of the men who had a Ceska pistol shot at the police. He was gunned down by the police officers who were outside the matatu. The Ceska pistol and the magazine with several rounds of ammunition were found with the dead suspect. This Ceska pistol was positively identified to be the one that was robbed from the complainant on 22<sup>nd</sup> June 2011.

The Appellants were arrested. On being searched, a toy pistol was recovered from the 2<sup>nd</sup> Appellant. A paper bag was recovered from the 1<sup>st</sup>

Appellant. It was not clear from the evidence what was contained in the paper bag. From the above testimony, it was evident that the connection between the robbery that led to the complainant losing his Ceska pistol is the recovery of the Ceska pistol in possession of the dead suspect. The prosecution was not able to establish to the required standard of proof beyond any reasonable doubt the connection between the Appellants and the dead suspect from whom the Ceska pistol and ammunition were recovered. That being the case, this court cannot apply the doctrine of recent possession to the Appellants. The Ceska pistol was not recovered in their possession and therefore this court cannot apply the doctrine of recent possession to convict them on the charge of robbery with violence contrary to Section 296(2) of the Penal Code.

In the premises therefore, this court finds merit with the Appellants' appeal. The prosecution was unable to adduce evidence which connected the Appellants with the robbery of the complainant. The Appellants' appeal on the charge of robbery with violence contrary to Section 296(2) of the Penal Code is allowed. Their conviction is quashed. The death sentence imposed upon them is set aside. The 1<sup>st</sup> Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

As regard the 2<sup>nd</sup> Appellant, he was properly convicted for being found in possession of imitation firearm contrary to Section 34(1) of The Firearms Act. He was also properly convicted for the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code. It was clear to this court that the 2<sup>nd</sup> Appellant had the imitation firearm in circumstances that clearly indicated that he intended to commit a crime. His appeal on conviction in respect of the second and third counts lack merit and is hereby dismissed. The 2<sup>nd</sup> Appellant was to serve a period of five (5) years imprisonment on each count on 11<sup>th</sup> September 2015. The trial court did not make an order that the sentences run concurrently. The said sentences had been kept in abeyance since the 2<sup>nd</sup> Appellant had been sentenced to death. This court therefore upholds the said custodial sentences and makes a further order that the said custodial sentences be ordered to run concurrently. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**