REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 60 OF 2014

ELIUD NJURE GATURA……...…….1ST APPELLANT

PATRICK MUCHOKI MUGAMBI…….....……2ND APPELLANT

VERSUS

REPUBLIC……..…….……RESPONDENT

(***Appeal from original conviction and sentence in Karatina Principal Magistrates Court Criminal Case No. 808 of 2012 Hon. D.N. Musyoka, SRM) delivered on 4th July, 2013)***

JUDGMENT

The appellants were jointly charged and tried on four different counts of various offences; in the 1st count they were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** cap 63 particulars being that on the 27th day of October, 2011 at Nakuru township in Nakuru county jointly with others not before court and while armed with dangerous weapons namely, wooden bars and clubs they robbed Kenneth Malakwen of a pistol, make Ceska serial number H4297 loaded with 15 rounds of 9 mm ammunition, a driving licence, a wallet and cash of Kshs 300 and at or immediately before or immediately after the time of such robbery used actual violence on the said Kenneth Malakwen.

In the 2nd count, they were charged with the offence of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code** and here the particulars were that on the 5th day of July, 2012 at Karatina township in Mathira East district within Nyeri County, while armed with a dangerous weapon, namely a pistol, they attempted to rob **Grace Nyaguthi Mwangi** of cash from her shop and at or immediately after the time of the said robbery, they threatened to use actual violence to the said **Grace Nyaguthi Mwangi**.

The 3rd count was in respect of the offence of possession of firearm contrary to **section 89(1)** of the **Penal Code**; the particulars were that on the 7th day of July, 2012, at Ihwagi trading centre in Mathira East district within Nyeri County, jointly and without a reasonable excuse were in possession of a firearm namely ceska pistol serial number H4297 in circumstances which raised a reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

The 4th and final count was that of being in possession of ammunition without a firearm certificate contrary to **section 4(1)** of the Firearms Act cap 114 in that on the 7th day of July, 2012 at Ihwagi trading centre in Mathira East district within Nyeri County, the appellants were jointly found in possession of 3 rounds of ammunition of 9 mm calibre without a firearm certificate.

Except for the second count, the appellants were jointly charged with one Nancy Nyaguthie Muriuki in the rest of the counts. At the conclusion of their trial, the appellants were convicted on all the counts. They were sentenced to death on the first and second counts; as for the third and fourth counts, they were each sentenced to 7 years' imprisonment, apparently for each of the counts; however, in view of their conviction on first count, the sentences in respect of the rest of the counts were held in abeyance. Nancy Nyaguthie Muriuki was acquitted of all the counts.

The appellants appealed separately against the conviction and sentence but since they were tried together their appeals were consolidated at the hearing. They raised more or less similar grounds of appeal which, as far as I understand them, are as follows: -

1. The learned magistrate erred both in law and in fact in convicting the appellants based on identification evidence which was not demonstrated to be free from possibility of error;

2. The learned magistrate erred in law and in fact in accepting the evidence in respect of the identification parade which was conducted in violation of the police force standing orders;

3. The learned magistrate erred in law in failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt;

4. The learned magistrate erred both in law and in fact in convicting the appellants on contradictory and inconsistent evidence of the prosecution;

5. The learned magistrate erred both in law and in fact in failing to consider that critical witnesses were not called by the prosecution;

6. The learned magistrate erred both in law and in fact in failing to appreciate that the case against the appellants was a frame up;

7. The learned magistrate erred both in law and in fact in failing to comply with the provisions of **section 169** of the **Criminal Procedure Code**; and,

8. The learned magistrate erred both in law and in fact in convicting the appellants despite the infringement of their constitutional rights to a fair hearing enshrined in **article 50 (2) (j)(k)** of the Constitution.

As always, this being the 1st appellate court, it is incumbent upon it to evaluate the evidence at the trial afresh and reach its own conclusions. In undertaking this exercise, this court is mindful of the fact that it is only the trial court that had the advantage of hearing and seeing the witnesses and therefore was in a better position to appreciate such aspects of evidence as their demeanour and disposition at the time they testified. But even with this limitation this court is not restricted from departing from the trial court's conclusions if it is evident that in reaching those conclusions the trial court misdirected itself or that no reasonable tribunal would reach the kind of conclusions that the trial court came. **(See Okeno versus Republic (1972) EA 32).**

The complainant in the 1st count, police constable **Kenneth Malakwen (PW3),** was accosted by armed robbers at Nakuru on 27th October, 2011 at about 11.30 PM as he walked back to his hotel where he was to spend the night. He was then a police officer attached to Parliament police station and was also the personal guard to a member of parliament and accordingly, by the very nature his position and the tasks associated with it, he had been assigned a firearm. On the material day, the firearm which was a ceska pistol H4297, was loaded with 15 rounds of ammunition. The robbers robbed him of his personal effects including the loaded pistol. He later learnt that the firearm had been recovered and was at Karatina police station where he identified it as his pistol and which the robbers made away with.

A government analyst, **Chief Inspector Charles Koilege (PW5),** confirmed that the firearm was forwarded to him for analysis. His evaluation revealed that indeed it was a pistol capable of firing and

was thus a firearm as defined under the Firearms Act; it could be loaded with cartridges of 9 by 19 millimeters and at the time of examination, it was loaded with three live bullets of this size. He also confirmed that the spent cartridge which was also sent to him for examination was fired from this particular firearm. It was his evidence that the firearm was serialised as No. H4297 which **Kenneth Malakwen (PW8)** identified as the same pistol he had been robbed of.

It was the prosecution case that this firearm was recovered from the appellants' house. Its evidence in this regard was that on 6th July, 2012, police constable **Damiano Mbithi (PW7)** who was then attached to Karatina flying squad section of the police force at Karatina got wind that a dangerous criminal gang involved in a series of robberies within Karatina township was hibernating at Ihwagi. His informer even pointed out to him the house in which these robbers were residing.

Armed with this information, constable Mbithi, his colleagues corporal Mwangi, **sgt. Muthui (PW9)** and police constable King'ori together with other officers from Ihwagi police patrol base raided the alleged robbers' hideout on 7th July, 2012 at 6 AM. They broke into the house where they found the appellants together with Nancy Nyaguthie Muriuki sleeping.

The officers conducted a search in the house and in the process, recovered the 1st complainant's firearm which, according to constable Mbithi was loaded with three rounds of ammunition; the pistol was hidden under the bed. Besides this weapon, the officers also recovered a metal cutter, two chisels and giant pliers. It was his evidence that he prepared an inventory of all these recoveries; he and the appellants signed the inventory at the scene.

Sgt. Muthui (PW9) who recovered the pistol from the appellant's house was also the investigations officer. He confirmed that he led other officers to raid the appellant's house on 7th July, 2012 and that it is from this house they found the appellant and recovered the pistol. According to him, the 1st appellant alleged that the gun belonged to the 2nd appellant who had come with it from Nakuru. He arrested the appellants and took them to Karatina police station. After he circulated the serial number of the recovered pistol to the police stations in this country, he got a response from Parliament police that the pistol had been assigned to the 1st complainant. He produced an arms movement register from that police station showing that the particular pistol had been given to the 1st complainant.

Prior to the invasion of the appellants' house and their subsequent arrest, and in particular on 5th of July 2012, the 2nd complainant **Grace Nyaguthii Mwangi (PW1)** was attacked in her shop at Karatina by armed robbers. On that day at about 9:40 AM, she was in the shop together with her assistant **Hilda Nyaguthii(PW2),** when three people who posed as customers entered. They made enquiries about a particular phone; one of them, whom the complainant identified as the 1st appellant enquired from Hilda whether she knew them. Hilda told them she was not familiar with any of them but she also sought to know from him whether he knew her. He responded that he did not. The three men left but came back after about 10 minutes; this time round the 1st appellant drew a pistol and pointed it at the complainant; he demanded for money. The complainant picked up her child and opened the door behind her; Hilda (PW2) also followed her and as they scampered for safety, they both fell down together with the child. They screamed for help and one of the persons who responded and came to their rescue was **Evan Muriuki (PW4); he came,** picked up the child and took off via the rear door. The 1st appellant shot in the air apparently to scare away the members of the public who responded to the complainant's screams and escaped in the process. Later, according to this witness, the police came and collected the spent cartridge. She identified the pistol in court as the one which the appellant held; she also identified the spent cartridge as the one that the police collected from her shop.

On 8th July, 2012, she was able to pick the appellant from an identification parade at Karatina police station. She testified that she was able to identify them because they spent some time at her shop. She testified that although she had told the police that she was able to identify them if she saw them that information, including her description of the first appellant, was not included in her statement.

Hilda Nyaguthii (PW2) corroborated the evidence of the 2nd complainant; she confirmed that she was her employee and she worked in her shop. She testified that on 5th July, 2012 she attended to 'customers' who came to their shop looking for a particular phone. One of them engaged her and enquired whether she knew them. She told him that she did not know them. She too asked them whether they knew her to which they responded in the negative. According to Hilda, the three people remained in the shop for close to 10 minutes before they left. Two of them came back after about 5 to 10 minutes; one of them, whom she identified as the 1st appellant drew a pistol and trained it on the 2nd complainant as he demanded for money. Both Hilda and her employer screamed and caught the attention of members of the public one of whom was **Evans (PW4)** who came to their rescue. The police responded after about 10 minutes; they collected a spent cartridge from the complainant's shop.

Evans Muriuki (PW4) testified that he was attracted to the 2nd complainant shop by screams. He used the rear door and found the complainant, her child and employee on the floor. He picked up the child but then he immediately saw two men one of whom drew a pistol; he identified him as the 1st appellant. He shot in the air before he escaped together with his colleague.

Although the description of the appellants was not recorded in the complainant's statements, the investigations officer still organised for an identification parade from which they were apparently singled out. One of the officers who conducted the identification parades was inspector **David Makau (PW6)** who testified that he was asked by the investigations officer to conduct the parade in respect of the 2nd appellant; the latter was picked out by one Teresiah Wangari whom the officer referred to as the 1st witness. The identification parade in respect of the 1st appellant was conducted by inspector **Lukas Simbolei (PW8);** he said that the 2nd complainant identified the 2nd appellant by touching him. In both cases the appellants signed the parade forms signifying that they were satisfied with the way the parades were conducted.

The appellants denied the charges against them; the 1st appellant gave sworn evidence and as far as the robbery at the 2nd complainant's shop is concerned, he offered an alibi. His evidence was that on 5th July, 2012 when the complainant is alleged to have been robbed and the day after, he had been working at the home of one Wangechi. The 2nd appellant, whom he described as his cousin, joined him at his house on 6th July, 2017; he had called him from Naromoru where he lived to assist him with the work he was engaged in at Wangechi's home. On the morning of 7th of July 2012, police officers stormed their house before they woke up; they beat them up and took them Karatina police station where they were beaten again and compelled them to sign some document. The 2nd appellant and their companion Nancy Nyaguthie Muriuki signed the document but the 1st appellant resisted; the latter was then driven to somewhere in Sagana near a river where the police officers started strangling him. He succumbed to their torture and signed the document; he was then taken to Sagana police station where he spent the night until the following day when he was returned to Karatina police station. He also signed several other documents which he came to learn much later that they were parade forms.

On the question of his identification, he testified that the witness who identified him was at the report desk when he was being taken to the identification parade. He also testified that he was the odd one out on the parade because his clothes were stained with blood. He denied that anything was recovered from his house, including the 1st complainant's gun.

Like the first appellant, the 2nd appellant also gave an alibi in respect of the second count of the offence of attempted robbery; he also gave a sworn testimony and said that on 5th July, 2012 he was at Nakuru and only came to Ihwagi on 6th July, 2012. He spent the night at the first appellant's house but was arrested together with the appellant and his friend the following day. He also testified that he was beaten and forced to sign some documents at the police station. He admitted having participated in an identification parade but he knew Teresa Wangari who identified him as a person who hailed from his home area.

Swaibu Maina Kariuki (DW4) testified on behalf of this appellant; he testified that he was in remand prison at Kingongo awaiting trial for offences involving robberies, burglaries and theft. He testified that on 5th July,2012 he spent the whole day with the appellant. He, however, testified that he could not recall when the appellant left Naromoru for Ihwagi.

The appellants' co-accused gave unsworn statement whose narrative was similar to that of the appellants. She admitted that she was arrested together with them and they were all brought to Karatina police station where they were forced to sign some documents. The learned magistrate held that there was no evidence to support her conviction and so, as noted, she was acquitted.

The evidence by constable **Kenneth Malakwen (PW3),** that he attacked by a gang of armed people on 27th October, 2011 at 11.30 PM was not contested or rather was not controverted; his evidence that he was robbed of his effects which included a gun during the attack was also not rebutted. There was no reason to doubt this officer's evidence that he was a police officer who was lawfully armed at the time he was attacked. The documentary evidence of the arms movement register from Parliament police station that the witness had been allocated a firearm by virtue of his position and duties was not in dispute. He reported the attack at Nakuru police station.

The circumstances under which this officer was attacked and his properties stolen from him fell squarely within the description of the offence of robbery with violence under **section 296(2)** of the Penal Code; that section says:

Section **296(2)** of the Code defines when robbery as defined under **section 295** graduates into robbery with violence; it says: -

> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

Robbery as an offence is itself defined in the preceding **section 295** while **section 296(1)** prescribes the punishment for such an offence. **Section 296(2)** prescribes circumstances when robbery, or simple robbery as is commonly known, escalates into robbery with violence or aggravated robbery. It is apparent from this section that if at the time of the robbery, the accused was armed with any weapon or instrument that may be deemed to be dangerous or offensive; or, he was in the company of one or more persons; or immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person then offence of robbery with violence is deemed to have been committed. In the complainant's case, he was attacked by a group of people who were armed with crude weapons; it is clear that at least two of the three strands of this offence, any of which is sufficient to prove it, were established. Here, I agree with the learned magistrate that the offence of robbery with violence was proved to the required standard.

Whether this offence was perpetrated by the appellants is the next question whose answer this court has to interrogate from the available evidence. It is important to note from the very outset that, to the extent that the second, third and fourth counts revolve around possession one of the items allegedly stolen from the first complainant during the robbery or its use, or possession of its contents, in this case, the bullets, the counts are intertwined and therefore the evidence in proof of any particular count may have a bearing on the proof the other count or counts. For instance, if the prosecution proved beyond reasonable doubt that the complainant's gun was stolen, then proof of the fact that the gun was found in the appellants' possession might as well be the basis for the conclusion that the appellants robbed the complainant subject, of course, to such other considerations as whether the doctrine of recent possession could properly be applied to the circumstances of the case against the appellants. Again, if it was proved that the police recovered from the second complainant's shop a spent cartridge fired from the gun that was found in possession of the appellants, it would be logical to conclude that the appellants were behind the attempted robbery at the second complainant's shop if there is other corroborative evidence pointing in this direction.

The prosecution case against the appellants in the counts for which they were convicted was based on two grounds; first, the fact of possession of the complainant's loaded pistol and second, the identification of the appellants. The first ground was obviously the basis of the first, third and fourth counts respectively on robbery with violence, possession of a firearm contrary to **section 89(1)** of the **Penal Code** and possession of ammunition without a firearm certificate. The second count was largely to do with whether the appellants were properly identified as the people who attempted to rob the second complainant. It may also be argued that the recovery of the spent cartridge of the bullet alleged to have been fired from the complainant's gun was also tied to that count of the appellants' possession of the complainant's gun.

It is ideal at this point to interrogate in greater detail each of these grounds upon which the prosecution case was based; starting with the question of the possession of the stolen gun, the prosecution's first task was to prove that indeed this particular item was a firearm as defined under the Firearms Act. This they did because the expert opinion of **Chief Inspector Charles Koilege (PW5),** that the ceska pistol was a firearm as known in law was not controverted. His report in regard to his opinion which was admitted in evidence was also not challenged.

The appellants vehemently disputed the prosecution evidence linking them to possession of this particular item. The state on the other hand, insisted that the weapon was found in the appellants' house. Two of the officers who arrested the appellants, police constable **Damiano Mbithi (PW7)** and sergeant **Muthui (PW9)** maintained that they not only found this weapon in the appellants' house but that they also prepared an inventory which appellants signed acknowledging that the items listed in the inventory including the offensive weapon were recovered from their house.

The signed inventory was produced and admitted in evidence; in it are listed the recovered items with the ceska pistol prominent among them; each of the appellants signed against their names as owners of these items. They did not in fact deny that they signed the inventory; their case was that they were tortured and compelled to sign.

The impressions the appellants created was that they were thoroughly beaten in circumstances amounting to torture just for them to sign the inventory. Just like the trial magistrate I am inclined to doubt the appellants' evidence in this regard; I say so because, there is nothing on record to suggest that when the appellants made their maiden appearance in court to take plea, none of them complained having either been beaten, injured or otherwise tortured by police officers for whatever reason. I note that they informed the court that they were not feeling well and needed to be taken to hospital; but the fact that they were feeling unwell does not necessarily mean that their indisposition was as a result of being beaten or tortured by the police officers. In any event, the first appellant suggested in his cross-examination police constable **Mbithi (PW7)** and sergeant **Muthui (PW9)** that he was unwell at the time of his arrest.

In the absence of any proof of having been beaten or even a mere complaint to the court that they were beaten, I am not prepared to accept the appellants' suggestion that the learned magistrate misdirected himself on the facts in accepting the prosecution evidence that the appellants were found in possession of the gun in question. Furthermore, there is nothing on record that dents the credibility of the evidence of police constable **Mbithi (PW7)** and sergeant **Muthui (PW9).** I can neither find any basis to doubt their evidence nor any other reason why they should not have been believed. I am satisfied that the learned magistrate came to the correct conclusion that the appellants were found in possession of complainant's firearm and therefore the 3rd count was proved beyond reasonable doubt.

The ceska pistol which the appellants were found in possession of was loaded with three rounds of ammunition. The ammunitions were amongst the items that were itemized in the inventory of items recovered from the appellants' house. In his report the government analyst, **Chief Inspector Charles Koilege (PW5),** confirmed that the three ammunitions were live and he test- fired two of them using the same firearm he had been given to analyse. According to him these ammunitions were of 9 x 19 mm calibre and were suitable for use in such a firearm. With this uncontroverted evidence and having found as fact that the appellants were found in possession of the firearm loaded with these ammunitions, I am also satisfied that the learned magistrate came to the correct conclusion that the appellants were found in possession of ammunitions without the relevant certificate and therefore were properly convicted of the

fourth count.

The evidence of **Chief Inspector Charles Koilege (PW5)** was also central to the second count. In his opinion, the spent cartridge collected by the police from the 2nd complainant's shop was of a 9x19 mm calibre and more crucially, he verified that it was fired from the same pistol that the appellants were found in possession of. His evidence, in my humble view, corroborated the evidence of **Grace Nyaguthii Mwangi (PW1)** and **Hilda Nyaguthii(PW2)** who testified that one of the two people who attacked them drew a pistol and fired in the air; later police came and collected the spent cartridge. The report of the attack recorded at Karatina police station as OB.42/5/7/2012 indicated that the cartridge was booked as an item that was collected from the scene.

That the appellants must have been the persons who attempted to rob the 2nd appellant violently and fired in the air during this attempt is a conclusion that can be logically drawn from the fact that they were in possession of the offensive weapon at the material time. As matter of fact, this evidence corroborated **Mwangi's (PW1's) and Hilda's (PW2's)** evidence of identification of the appellants. Ordinarily, their evidence in this regard would have been of little value considering it was nothing more than a dock identification which has been held to be generally worthless **(see Ajode versus Republic (2004) 2KLR 81**). It is accepted that the witnesses spent time with the appellants sufficient enough to identify them if they saw them again. It is also true that before the appellants struck menacingly they had had a polite or rather a friendly encounter with the witnesses and at least one of the witnesses, **Hilda (PW2)** had a conversation with them. All these happened in broad daylight; it is therefore safe to conclude that there were favourable conditions for a proper identification, free from the possibility of any error. However, despite the existence of such conditions, there was no evidence that before the identification parade was conducted, the witnesses identifying the appellants either gave the latter's description to the police or the police asked for that information and recorded it. It has been held that identification parades can only be conducted if the police have prior information on the description of the suspect or suspects. In the absence of information on identification, the ensuing identification only amounts to dock identification. In the Court of Appeal decision in **Gabriel Kamau Njoroge versus Republic (1982-88) 1KAR 1134** it was held that before the police conduct an identification parade a witness should first be asked to give the description of the accused.

Nevertheless, it has also been held by the same Court of Appeal, that identification parades are not always necessary in order to prove identification. Put differently, it is not in every case that dock identification is disregarded as worthless and there may very well be circumstances in which the trial court may convict based on the evidence of dock identification. This approach was well articulated in the Court of Appeal decision in **Criminal Appeal No. 63 of 2008, Nathan Kamau Mugwe versus Republic (2009) eKLR** where the Court (Omolo, Waki and Visram JJA) discussed its own decision in **Gabriel Kamau Njoroge versus Republic (supra)** in which it had held, as was held in **Ajode versus Republic (supra),** that a dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. That a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.

The court proceeded to explain the gradual deviation from this rather rigid stance in the following words:

> ***That was the position for some time after Gabriel case which was decided in 1982. In 1984 the court further re-emphasised the position in the case of Kiarie versus Republic (1984) KLR 739 where it was stressed that the identification of an accused person in court by a complainant is almost worthless without an earlier identification parade. But in 2002, the court started to move away from that position.***

The court then quoted a passage from its judgment in **Muiruri & 2 Others versus Republic (2002) 1KLR 274** that apparently is representative of the new position which the Court subsequently adopted. In that case the Court of Appeal said:

> ***But the holding in Gabriel Njoroge case (supra) appears to us to be too broadly couched. We do not think it can be said that all dock identification is worthless. If that were to be the case then***

decisions like Abdulla bin Wendo versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasised the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.

As far as I am aware the Court of Appeal has not resiled from this decision; neither has this decision been held to have been decided by per incuriam nor has it been that the passage quoted above was obiter dictum. The correct position of the law is therefore that if it is a case of single identification witness, as long as the trial court warns itself on the dangers of relying on the evidence of a single identification witness, it can go ahead and convict based on the evidence of such a witness notwithstanding that this evidence is that of dock identification.

The Court of Appeal added that the trial court must be satisfied that the facts and the circumstances of the case are true before convicting on the basis of the evidence of dock identification.

It follows, and it is my humble view, that where there is other corroborative evidence then the trial court will not necessarily overlook the evidence of dock identification; it can safely convict on this evidence alongside other corroborative evidence. Where such corroborative evidence does not exist the evidence of dock identification may not be sufficient enough to stand on its own and I reckon that it is in such circumstances that it may be considered worthless. As the Court of Appeal hinted, each case depends on its own peculiar circumstances.

If this reasoning is applied to the appellants' case, the evidence of dock identification could not of itself be sufficient in identification of the appellants but it could properly be taken into account if it was considered alongside the evidence that the appellants were in possession of the pistol from which the cartridge found in the complainant's shop was established to have been fired. For this reason, I am inclined to conclude that considering the prosecution evidence in its entirety, the appellants were properly identified as the people who attempted to violently rob the second complainant. They were therefore properly convicted of the second count of attempted robbery with violence.

As far as the conviction of the appellant on the 1st count of robbery with violence was concerned, it is apparent from the trial court's judgment that it based its conviction of the appellants on the doctrine of recent possession. This doctrine was explained in **Chaama Hassan Hasa versus Republic (1976) KLR at page 10** where the High Court **(Trevelyan and Hancox JJ) stated as follows:**

Where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining).

It was established that the appellants were found in possession of the pistol that was robbed from the 1st complainant in circumstances that amounted to the offence of robbery with violence as contemplated under **section 296 (2)** of the Penal Code. The only question is whether the appellant's possession of the pistol could properly be described as possession of property that was "recently stolen" as to attribute the robbery of the 1st complainant to them. The complainant was robbed of his pistol on 27th of October 2011 but it was not until the 7th of July, 2012 that pistol was found in possession of the appellants. Would a property recovered 8 months after it was stolen be deemed to have been recently stolen?

My take on this question is that what amounts to recent possession varies from case to case depending on the frequency with which a particular item can exchange hands. In my view, a pistol of the kind that was

robbed from the 1st complainant is not such an item that would pass from one hand to another within a short period. In **George Ochieng Adundo versus Republic (2006) eKLR** the Court of Appeal considered whether five months could be considered as recent possession; the Court held that considering the nature of the item in question, a firearm, it is not an object that could freely change hands from one person to another. The court held that, in the circumstances five months could be regarded as recent possession of a stolen firearm. I would adopt this line of reasoning and find that the learned magistrate properly applied the doctrine of recent possession to the appellant's case. It followed that the burden fell upon the appellants to give a reasonable explanation as to how they came into possession of the gun failure of which the trial court was justified to draw the inference that they violently robbed **Kenneth Malakwen (PW3)** of his gun. In the case of **R versus Thomas Henry Curnok (1914), 10 Cr. Appeal Rep.207** cited in the judgment of the court in **Zus versus Uganda (1967) E.A. 420**, a prisoner was convicted of feloniously receiving stolen property. He was sentenced to fifteen months in prison. It was held that he was properly convicted because the burden of giving a reasonable explanation was on the prisoner.

Based on this doctrine of recent possession, the appellants were properly convicted of the offence of robbery with violence.

In the ultimate, I agree with counsel for the state that the appellants were properly convicted and there is no reason for this court to interfere with the conviction or the sentence. I therefore dismiss their appeal.

Dated, signed and delivered in open court this 17th day of January, 2017

Ngaah Jairus

JUDGE