



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NANYUKI**  
**CRIMINAL APPEAL NO. 49 OF 2015**

**FRANCIS MWANGI NJIIRI.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in*

*Nanyuki Chief Magistrate's Court Criminal Case No. 22 of 2014*

*by Hon. E. Bett Senior Resident Magistrate on 5<sup>th</sup> March 2015).*

**JUDGMENT**

1. **FRANCIS MWANGI NJIIRI** was convicted before the Nanyuki Chief Magistrate's Court with **two offences of robbery with violence contrary to section 296(2) of the Penal Code**. He was sentenced in count one to death while count two was held in abeyance. He has appealed to this court against that conviction and sentence.

2. It is the duty of this court as the first appellants court to reconsider the evidence of the trial court, evaluate it and draw its own conclusion in deciding whether the judgment of the trial court should be upheld.

See **Okeno vs Republic 1972 EA**.

3. On 11<sup>th</sup> December 2013 at 5 p.m. **Peter Wanjohi Gichuki (Peter)** was at a building site. He was building his house and his father **Gerald Gichuki Wanjohi (Gerald)** was his contractor. There were other workers present at the site. Peter and Gerald were robbed by a group of people who except the appellant had concealed their appearance by tying a cloth over their mouth. Peter testified that at gun point he was taken by one of the robbers to where his father Gerald was. The person who accosted him had also concealed his appearance. Gerald had been ordered by another person whom Gerald thought was holding a gun to lie down. That man robbed Gerald kshs. 40,000. Peter when he reached where Gerald was lying down he was robbed of his legally licenced gun. He was robbed by a person who was at the place where Gerald was lying. This person who robbed him of his gun had not concealed his appearance. Peter identified this person as the appellant. The other workers at the site were at the time inside a building and did not witness the robbery.

4. The trial court in convicting the appellant found that indeed the appellant together with others had

violently robbed both Peter and Gerald. Secondly the trial court found that the appellant had been identified by Peter both at the scene and at the identification parade.

5. The appellant has presented a number of grounds of appeal. Those grounds essentially faults the prosecution's case on:-

- a. **Identification of the appellant;**
- b. **On prosecution's failure to call the informer as a witness;**
- c. **On the evidence surrounding recovery of the stolen gun belonging to Peter; and**
- d. **On insufficiency of the prosecution's evidence to lead to a conviction.**

6. The learned counsel for the appellant Mr. Kiget in submissions on the appellant's identification faulted the prosecution for failing to adduce evidence on the description given by the identifying witness before the appellant's arrest. He argued that the failure to do so pointed to the lack of positive identification of the appellant as being amongst the robbers who robbed Peter and Gerald.

7. The learned Senior Principal Prosecution Counsel Mr. Tanui submitted that the prosecution proved that the appellant was correctly identified on the required criminal standard. He pointed out that the robbery took place at 5 p.m. Further that Peter was able to pick out the appellant at the identification parade.

8. On 11<sup>th</sup> December 2013 at 5 p.m. Peter was accosted by an armed man who emerged suddenly. The man who had concealed his appearance ordered Peter to move to where Gerald was. When he reached where Gerald was lying down Peter also lay down as commanded by the armed man. One of the men who had been there with Gerald robbed Peter of his gun. Peter was categorical that it was the appellant who robbed him of his gun. This is what Peter said on being cross examined by the appellant's counsel:-

**“The first accused (appellant) had not covered himself at the time.”**

Peter went on to say that the appellant was not the same person who accosted him at first.

9. Gerald had earlier been ordered to lie down before Peter arrived. It is obvious from Gerald's evidence that even as Peter was ordered to lie down Gerald was not able to observe who was ordering Peter to lie down. It also seems that he did not observe which of the robbers stole Peter's gun. This is what Gerald said while being cross examined by counsel of the appellant:-

**“I lay flat on my stomach and I could not see anything else happening.”**

10. With that evidence in mind the appellant learned counsel's submissions that the person who robbed Peter was the fourth accused which accused was identified by Gerald as being amongst the robbers is incorrect because from the evidence adduced, there were more than two people involved in the robbery. It therefore follows that Gerald's failure to identify the appellant as the one who robbed Peter cannot be justification to fault Peter's identification of the appellant.

11. The identification of the appellant at the scene of the robbery was bolstered by the identification parade mounted by Chief Inspector of Police Patricia Mwanyali (PW 4 ) she was the officer in charge of the station (OCS) Kiganjo Police Station. In her evidence she stated that she organised the identification parade where the appellant was amongst the eight persons. Peter identified the appellant during that identification parade by touching him. PW 4 stated that the appellant was satisfied with the process of the parade and accordingly when asked to sign the parade forms he did so.

12. The appellant in his defence alleged that on the 5<sup>th</sup> January 2014 at 4.30 am. He was on the way to Nairobi to buy second hand clothes to stock his business at Ichuga in Nyeri County. It is important to note that this was the day that the appellant was arrested in respect of this case. The appellant stated that

he was on that day stopped by police officers who have been on community patrol vehicle. He stated he was taken to Naromoru police station where the police officers began to say amongst themselves that he should be booked for possessing one of their guns. He said that later he was taken by PW 4 to participate in the identification parade. While participating in that parade he was surprised that a person he had passed by at the police station reporting desk was the one called to identify the person who robbed his gun. Appellant stated that he only signed the parade forms on being threatened by OCS of Naromoru Police Station.

13. It should be noted that the appellant did not state where he was on the material day that is, 11<sup>th</sup> December 2013. Indeed he started in his defence evidence by stating that he could not remember where he was on that date. What is important however is that he did not deny that he was amongst the robbers who robbed Peter and Gerald. It is important to note he did not put to the investigating officer while cross examining him that his arrest took place while he was on his way to Nairobi.

14. It is important for this court to remind itself the evidence that the prosecution should adduce when the prosecution relies on identification evidence. The Court of Appeal in the case **NJIRU AND OTHERS VS REPUBLIC (2002) EA** in reference to a previous case of that court stated as follows in relation to identification evidence:-

**“..... among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This court, in *Hibuya and Another v Republic (1996) LLR 425 (CAK)*, held that:-**

**‘It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal this being a proved reliable way of testing the power of observation and accuracy of memory of a witness and the degree of inconsistency in his evidence.’**

15. In this case the prosecution failed to lead evidence on whether Peter gave description of the appellant when he first reported the robbery at the police station. As stated in the above quoted case depending on the circumstances of a case such failure can sometimes be fatal to the prosecution’s case.

16. In this case I am satisfied that the failure to give that description at the first report did not cause a fatal blow the prosecution’s case.

17. In the first place the prosecution’s case was not affected by that failure because the trial court quite correctly applied the doctrine of recent possession. The appellant’s house was raided by the investigating officer Sergeant Boniface Kiswiri (PW 6) together with 7 other police officers. This was after PW 6 got information from an informer and from the appellants co-accused of the whereabouts of the appellants house. They were able to recover during that raid Peter’s gun that had been stolen from him on 11<sup>th</sup> December 2013. The gun was confirmed to be the one that belonged to Peter by Chief Inspector Florence Karimi PW 2 a fire arm examiner. She stated that the gun had the serial **no. G01012**. That serial number was the one that was quoted in Peter’s gun licence.

19. In the case **ISAAC NG’ANG’A KAHIG alias PETER NG’ANG’A KAHIGA –vs- R NYR CA Criminal Appeal No. 272 of 2005**, the Court of Appeal stated that:

**‘It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the**

**complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”**

The conditions in the above case were fulfilled in the appellant’s case. The theft occurred in December 2013, the recovery was on 2<sup>nd</sup> January 2014 and the gun was positively identified as the one belonging to Peter.

The trial court found that the appellant’s participation was confirmed by the recovery in his house of Peter’s gun.

20. In my view the evidence is clear that the stolen gun of Peter was recovered in the appellant’s house. The ballistic officer PW 2 confirmed that the gun which was handed over to her by the investigating officer was the one bearing the serial number reflected in Peter’s gun licence. The investigating officer together with other officers on raiding the appellant’s house testified how the gun had been hidden between the wooden wall and a cover that was on that wall. It was therefore correct for the trial court to conclude that the appellant’s possession of the gun raised the presumption that the appellant was either a thief or a guilty receiver. The doctrine of recent possession was applicable in the appellant’s case. The appellant was required to explain the possession of that gun. He did not other than pleading that the police had planted their gun on him. However the gun taken to PW 2 was that which was stolen from Peter.

21. The issues raised above that the appellant was not identified by Peter in view of the above discussion in this judgment is rejected.

22. The appellant submission that the informer should have been called to testify on the trial is also rejected. This is because the police force in their investigation rely on such informers and it is not necessary for such informers to testify. It suffices that following any information given by informers it ends up yielding evidence that can lead to a conviction of a person such as the recovery of a stolen gun in the case of the appellant.

23. Having dealt with the recovery of the gun and the circumstances surrounding that recovery the issue (c) above will not be considered further other than to state that the appellant’s counsel was misguided to argue that the information which was given by the appellant’s co accused to the police whereby that co accused informed the police of where the appellant’s house was, amounted to confession. Confession as set out in **section 25A of the Evidence Act Cap 80** provides that confession is not admissible and cannot be proved against the person who makes it unless it is made before a police officer, not the investigating officer who is of a rank not below the Chief Inspector of Police or a Judge or Magistrate. The information given to the police by the appellant co-accused on the whereabouts of the appellant’s house did not amount to a confession as provided under Section 25 A Cap 80.

24. On the whole I find that the submissions made by the Learned Counsel Mr. Tanui was correct that is, the prosecution proved its case on the required criminal standard of proof. It is because of that finding that the appellant’s appeal against conviction and sentence is dismissed.

**DATED AND DELIVERED THIS 9<sup>TH</sup> NOVEMBER 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue

Appellant Francis Mwangi Njiiri .....

For the State: .....

COURT

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**