REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 980 of 1994

WILLIAM KAKA .. .. APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Judgement

The appellant WILLIAM KAKA was on 7th July, 1994 convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was sentenced to death. It had been alleged in the charge sheet that on the 27th September, 1993 at Valley Arcade Shopping Centre, Nairobi, jointly with others not before court, and while armed with a pistol, he robbed one Julius Mutie Matheka of a motor vehicle Reg. No. KAC 863 H make Pajero valued at Shs.8 million and at or immediately before or immediately after the time of the robbery wounded one Vincent Imbahala. The appellant was also convicted of two other offences relating to unlawful possession of a firearm and ammunition contrary to Section 89 (1) of the Penal Code and contrary to section 4(2)(b) of the Firearms Act, Cap 114 respectively. He was sentenced to serve seven (7) years imprisonment on each of these two counts (sentences to run concurrently with each other) and also to suffer five (5) strokesOf the cane on each.

He has appealed against the three convictions and attendant sentences. He is not represented by counsel here. He was also not represented by counsel at his trial.

The prosecution case was this. On 27th September, 1993 at about 4.00 p.m. PWl, an ex police officer who was driving motor vehicle KAC 863 H, and his passenger, PW2, drove to the Valley Arcade Shopping Centre. PWl stopped the car at the shops and PW2 alighted to go shopping. Then PWl saw some three people coming towards him hurriedly. He was still in the car with the drivers door window open. When the three people got to PWl one of them put his hand inside the motor vehicle and pushed a pistol into PWl's chest. The man then asked PWl to move. He did and the man then opened the driver's door. PWl took the opportunity to roll out and started running away. According to PW3 it was one of the other robbers who opened the door, not the one with the pistol.

PWl run away screaming "robbers, robbers!" as the robber with the pistol shot at him three times. Fortunately, he was not hit. In the meantime one of the other robbers got into the vehicle, reversed suddenly and drove off. When escaping PWl had left the key in the ignition. But he had activated an immobilizer in the car and he did not expect it to move more than 400 yards. The other two robbers (including the one with the pistol) were left at the scene by their colleague.

PWl ran after his car and as he expected it stopped after 400 yards. The robber driving it got out and escaped even after PWl

Tried to chase him in the car which he drove after de-activating the immobilizer (the robber had also left the key in the ignition).

PWl then rushed to Kilimani Police Station. Some police officers accompanied him back to the scene. He found that one of the robbers had been arrested by members of the public and taken to Muthangari Police Station. PWl later went to that police station and he identified the appellant as the robber who had the pistol during the robbery, had shot at him (PWl) but missed and in the process shot another person in the leg. The evidence before the lower court does not show that this identification was in a properly conducted identification parade. PWl had not seen the appellant before the robbery.

When PW2 left PWl in the motor vehicle he went into the shop. After a very short while he heard the sound of gunshots. He and others in the shop rushed out to where the motor vehicle had been parked. It was not there. He then saw it at a distance where it had stopped. He rushed to it and saw nobody in it. Just then PWl arrived, got into the vehicle and started chasing somebody in it. The man disappeared, even after PW2 and other members of the public tired to chase him. PW2 then returned to the shops, bought milk and went home. In cross-examination he said that nobody told him about anybody being beaten. Apparently he never witnessed the beating or arrest of the Appellant by members of the public.

PW3, a security guard in uniform, was on duty at the Valley Arcade Shopping Centre on the material date and time. He saw the motor vehicle KAC 863 H at the parking lot with its driver in it.

He had also seen the Appellant and another person come to the shopping centre. He then observed the Appellant approach the motor vehicle and stop at the driver's side of the motor vehicle. He (PW 3) was only a few meters away. He then saw the Appellant point a pistol at the driver's chest. PW 3 moved nearer to the scene. Just then the Appellate companion opened the driver's door, the driver rolled out, fell down, scrambled up and started running away. The Appellant shot at the fleeing driver. PW 3 then started to run towards the robber. The Appellant then shot at PW 3 using his right hand. He then took the pistol in his left hand, aimed and shot PW 3 in the left leg. In explaining his rather unusual behavior of moving towards an armed robber who was firing his pistol PW 3 said he preferred that rather than being shot in the back as he fled. PW 5 medically confirmed PW 3's injuries but did not state if there was an entry and an exit wound in PW 3's leg, or if the bullet had lodged therein and had been removed or left there. The P3 he produced in evidence is also silent on this point, which point would have been useful to assist the court to determine if PW 3 was shot while facing the Appellant or while fleeing - an important matter when considering the issue of identification of the Appellant by PW 3.

After PW 3 was shot in the leg members of the public came. The Appellant started running away towards Kawangware. PW 3 and members of the public chased him. They arrested him at Gitanga Road near Ratna Fitness Studio. It is not stated how far this was from the scene of the robbery, or if there were intervening

Buildings, cars, other people, etc. PW 3 stated further that the Appellant was arrested by members of the public with a pistol in his hands. PW 3 had "hobbled" after the members of public chasing the Appellant and had witnessed him being arrested. However, he does not state that he had kept him in his sight throughout from the time of the robbery to the time of his arrest. He did not know the Appellant before the robbery.

PW 4, a police constable, was in the meantime on his way back to his station from the provincial headquarters. He was traveling in the station motor vehicle. When he reached Gitanga Road he saw many people gathered near Gitanga Close. He rushed there and found one person lying down bleeding with members of the public beating him. He was told that this man had robbed another person of a motor vehicle and had also shot a watchman. He recovered a pistol from the man which had four rounds of ammunition in it. The pistol was lying under the man, and that man was the Appellant. He took him to Muthangari Police Station and later caused him to be charged with the offences before court.

PW 6, a firearms examiner, confirmed the pistol and the ammunition to be a firearm and ammunition respectively within the meanings to be found in the Firearms Act, Cap.114.

In his own defence the Appellant gave an unsworn statement and did not call witnesses. He said he was a Ugandan national who left Kampala, where he worked, on 20th September, 1993 with his Kenyan woman friend called Muthoni (or Mama Julius). He wished to attend the Nairobi International Show which was to start on 27th

September, 1993. He was staying with Muthoni at Kangemi.

On 27th September, 1993 the Appellant and Muthoni left for the show. They went back home at about 6.00 p.m. A vehicle approached Muthoni's residence and Muthoni was called to it. He was then called, put in the motor vehicle and driven to a police station where he was held for a week. Nobody told him why he was arrested. His statement was not recorded. On 4th October 1993 he was called from the cells and charged with the offences before court. He knew nothing about the charges and was innocent.

The Appellant has challenged his convictions on three main grounds. One, that he was not and could not have been, positively identified by PW 1 and PW 3. Secondly, that the evidence of the circumstances surrounding his arrest and the recovery of the pistol and ammunition was not good. And thirdly, that there were material inconsistencies and contradictions in the prosecution evidence such as to render his convictions unsafe.

As a first Appellate court it is our duty to appraise all the evidence adduced before the lower court and make our own decisions. We must weigh the evidence and draw our own inferences and conclusions. We must however make due allowance for the fact that we did not ourselves see or hear the witnesses give evidence.

The case against the Appellant depended very substantially, if not wholly, upon the correctness of his identification by PW 1 and PW 3. The Appellant both in the lower court and in this court has challenged that identification to be mistaken. The trial magistrate should therefore have warned herself of the special need

For caution before convicting the Appellant in reliance upon the correctness of this identification. This learned trial magistrate appeared to do, though not in express terms. But she should have further cautioned herself of the possibility that a mistaken witness could nevertheless be a convincing witness, and that a number of such witnesses could all be mistaken. This she did <u>not</u> do.

To her credit, the learned trial magistrate made a valiant effort to examine closely the circumstances surrounding the robbery and the conditions under which the Appellant was identified, arrested and the pistol and ammunition recovered from him. But was his examination close and thorough enough?

The evidence of PW 1, PW 2 and PW 3 shows clearly that the robbery took a very short moment indeed. PW 1 could not have had more than a glance at the man with the pistol before he rolled off the car and started running away for dear life with at least three bullets fired at him as he fled. We have considered that it was broad daylight and that PW 1 was an ex-police officer who by virtue of his training as a police officer may better observe persons in certain given circumstances than an average untrained person. But his training as a police officer obviously made him realize the mortal danger he faced when the pistol was thrust at his chest and that is why he immediately took steps to save himself. In these circumstances, did he adequately observe the person attacking him sufficient to make a good and positive identification? On our own evaluation of the evidence we think not. Things might have been

Different if PWl's identification of the appellant had been confirmed in a properly conducted identification parade. But none appears to have been held. There was no impediment to an identification parade being held as PWl was not at the scene when the appellant was arrested. The appellant had already been taken to the police station where PWl later purported to identify him.

The evidence of PW3 has surprised us. Does a normal human being walk and run towards a gangster who is armed with a pistol and is indeed firing that pistol at another person? Would not the reaction of a normal human being be to flee from such danger? Was PW3 a man of exceptional courage or merely a

foolish person? Was he telling the truth? We hold that the evidence of PW3 was simply incredible and should not have been believed by the trial court. There is no doubt that he witnessed the incident, and that he was in fact shot. Whether he was shot while fleeing or as he approached the armed gangster is not indicated by the medical evidence available. He could not, we hold, have had any better opportunity than PWl to make a good and positive identification of the appellant.

PW3 further says that after he was shot he "hobbled" along after the mob chasing the robber and that he witnessed the appellant being arrested with the pistol in his hands. The evidence does not show how far the robber was. Chased from the scene of the robbery. Did PW3 keep the robber in his sight throughout the chase? Were there any intervening buildings or bushes, or people or cars, etc? All these matters are not cleared

By the evidence available. Is it not possible that the wrong person was caught by the mob in the confusion of the moment? These things are known to happen! And why were the persons who actually caught up with the appellant and arrested him not called to give evidence? PW4, the police officer, did not himself see the appellant with the pistol in his hands. He was already down being beaten with the pistol underneath him. Is the possibility excluded that one of the fleeing robbers dropped the pistol, which was picked up by a member of the public who subsequently planted it on the unfortunate innocent victim of the mob? We think not.

On our own evaluation the evidence of PW3 could not be used to corroborate PW1 and it was itself defective and should not have been believed. The evidence of PW4 does not corroborate the evidence of the arrest of the appellant as given by PW3 for two reasons. One, PW4 found the appellant already incapacitated by the beatings he was receiving from the mob. He did- not witness him being chased, caught and arrested. And two, there is the possibility that PW3 did not himself keep the robber in sight throughout the chase from the time of robbery to the time of apprehension.

As we have held that there was no positive identification of the appellant looking at the available evidence and the evidence of his arrest and recovery of the pistol and ammunition was defective, we shall allow this appeal in its entirely, quash the convictions and set aside the sentence of death and the sentences of imprisonment and corporal punishment.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND Delivered at NAIROBI this 7TH day of .AUGUST 1998.

J.L.A. OSIEMO

JUDGE

H . P . G WAWERU

JUDGE