REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 424 OF 1989

FRANCIS MWANGI WAMBURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No 2028 of 1988 of the Senior Resident Magistrate's Court at Nairobi J A Mango Esq)

JUDGMENT

The appellant was convicted in the court below on one count of robbery with violence contrary to section 296 (2) of the Penal Code and another count of handling stolen goods contrary to section 322(2) of the Penal Code. He was also convicted on two other counts under the Firearms Act, the first of which was being in possession of a firearm without a firearms certificate contrary to section 4 (1) of the Firearms Act while the second one alleged possession of ammunition without a firearms certificate contrary to section 4(1) of the same Act. In respect of the conviction on the charge of robbery with violence he was sentenced to the mandatory death sentence while the conviction on the charge of handling stolen goods attracted a 7 year sentence with hard labour.

He was also sentenced to 10 years imprisonment on each of the two convictions under the Firearms Act. The prison terms meted out were to be held in abeyance in view of the death sentence under the robbery with violence charge.

Briefly the case for the prosecution was that on 4.1.88 at about 8 pm John Kinuthia Njoroge (the complainant in the charge of handling stolen goods) was driving home from Nairobi along the Kamiti Road, when his way was blocked by him and robbed him of several items including his car and colt special revolver serial number 9347OM. In the course of the robbery Njoroge was severely beaten and injured. He was then left tied up in a forest together with another man who also had earlier been robbed (they managed to) free themselves, upon which they walked to a home of a friend of Njoroge from where they reported the matter to the police.

On 16.4.88 at about 11.00 am Hamisraj Devan Shah (PW 4) was in his shop when a group of thugs attacked him and his partner Lakha Baishi Devan (PW7). Both (PW4) and (PW7) were shot with a gun, causing grave injuries to (PW7) from which he almost died. He had to undergo an emergency operation during which a bullet lodged in his body was removed. He remained in the hospital for about a month.

After the robbery the robbers escaped in (PW4's) car registration number KTS 190. They did not however get very far for they were caught up in a traffic jam. In order to escape they jumped out of the car and started running away with a mob of people shouting "thief, thief" following them. One of the robbers, appellant in this appeal, was not so lucky. Before he could make good his escape he was arrested by two

police officers Corporal Boniface Kikaplog (PW5) and Corporal Muita (PW6), both of whom rushed towards the scene of the robbery after hearing the gun fire. (PW5) told the court below that at the material time he was a plain clothes policeman on special duties. On 16.4.88 he had taken his colleagues (PW6) to Jamia Mosque Clinic for treatment. As he waited outside the clinic, he heard the sound of gun fire and on looking towards the source of the gun fire, he saw four people enter a car and drive towards Muindi Mbingu Street. At that time he was ten meters from the car whose registration number was KTS 190. He started chasing the people and was followed by his colleague (PW 6). The motor vehicle KTS 190 was caught in heavy traffic and four people jumped off the vehicle and started running on foot along Muindi Mbingu Street towards Kenyatta Avenue.

As the chase continued, (PW5) noted that one of the people had a gun. When (PW5) was catching up on that robber, the robber turned back and fired a shot at him but (PW5) ducked and he was not hit. He continued with the chase and the robber again fired but again missed. At the junction of Banda and Muindi Mbingu Streets (PW5) caught the robber as he tried yet again to fire at him. The man arrested was the appellant in this appeal. The gun the robber had had 3 rounds of ammunition.

The evidence of (PW6) was substantially similar to that of (PW5) save that (PW6), said that the robbers ran towards the Post Bank House. Since it is common knowledge that the Post Bank House is next or near Muindi Mbingu Street there is really no material difference in the testimony of the two witnesses regarding the directions the robbers were running.

The gun and the ammunition recovered from the appellant were examined by Donard Mugo Mbogo (PW3), a firearms examiner. They were found to be a firearm and ammunition respectively within the meaning of the Firearms Act.

With respect to the gun (PW3) testified that it was 0.38 inch caliber colt revolver serial number 93470 M but the serial numbers stamped at the frame and yoke had been filed off. However examination of the concealed serial number under the side place revealed that the pistol bore that number. In his further evidence (PW3) said that the examination established that the bullet recovered from the body of (PW7) had been fired from the gun recovered from the appellant.

For his defence the appellant gave sworn evidence. He said he was a businessman in Kawangware Nairobi where he sold clothes. On 16.4.88 he was coming from Gikomba Market where he had gone to buy clothes for his business. With him was his sister and they were carrying two bales of clothes. They came to GPO to get a *matatu*. At the stage, the appellant was approached by two police officers who identified themselves to him.

They asked the appellant and his sister what they were carrying and said they would take him to the police station apparently because he did not have his national identity card. He was taken to Central Police Station where he was beaten and later taken to Court and charged.

The learned trial magistrate did not believe the appellant's defence. He accepted the evidence of the prosecution witnesses as true and found the four charges laid against the appellant proved beyond any reasonable doubt.

In his petition of appeal and written submissions the appellant raises three basic points, namely:-

> (I) The circumstances of his arrest and appearance in Court which in his written submissions he refers to as "The preliminary of the case".
>
> (II) His identification and connection with the robbery which he calls "Demonstration of Arrest (Chase)" and
>
> (III) The evidence regarding the firearm and ammunition particularly the recovery and examination of the gun which is referred to as "exhibits" in the written submissions.

We shall deal with the points in the above order.

Regarding his arrest the appellant complained that the court below relied on the false evidence of the two police officers, (PW5) and (PW6), whom he accused of implicating him in the robbery; a robbery, he said he had nothing to do with. In his submissions before us he said that he was removed from prison and charged with an offence which must have taken place when he was in prison in connection with another offence. He invited us to look at the record of the court below to verify his submissions on that point. It is true that the record reveals that when this case commenced the appellant was already in custody and a production order had to be issued for him to be brought to Court.

The record also reveals that the case leading to the conviction of the appellant started before the Chief Magistrate on 20.5.88 .That was almost a month after the robbery giving rise to this case. On that date the appellant was in custody in respect of Chief Magistrate's Criminal Case No 1628/88. The robbery in respect of which the appellant was convicted and the one that gives rise to this appeal was committed on 16.4.88 and the appellant was arrested the same day; infact immediately after the robbery.

In his defence the appellant admitted as much. It is therefore clear from all this that whatever charges the appellant might have faced in Criminal Case No 1628/88 he was not in prison on 16.4.88. Consequently there is nothing on the records to support his claim that he was implicated in the offences of which he was convicted while already in prison for other offences.

The appellant also complains about the undated judgment. It is true that the judgment is undated. However, when the trail ended, the learned Chief Magistrate indicated that he would deliver judgment on 4.5.89. There is no indication in the record that the judgment had to be deferred from the date, and we think we can safely assume that it was infact delivered on the date stated by the learned Chief Magistrate ie on 4.5.89 on which date the appellant was present, as the record clearly shows that he personally mitigated.

It is therefore not quite correct for the appellant to say that he did not know when the judgment was delivered or that he was not present when it was delivered.

Regarding the learned Chief Magistrate's failure to date the judgment we agreed with the appellant that the omission was in contravention of section 169 (1) of the Criminal Procedure Code. There was however nothing sinister about it except that humans do sometimes err; however no miscarriage of justice was occasioned by the failure and in our view, the error is curable under s 382 of the Criminal Procedure Code.

The appellants' major grounds of appeal attack the circumstances surrounding his arrest and indiction. On these two grounds, which are inter-connected, the appellant claims that the two witnesses who could have given the best evidence on the matter, Hamsraji Shah (PW4) and Baishi Deven (PW7) did not identify anyone.

He also claims that the two policemen (PW5) and (PW6) who said they saw the appellant, chased and arrested him as he tried to escape from the scene, were both telling lies.

There is no dispute that the robbery took place and that both (PW4) and (PW7) were shot during the robbery with (PW7) being gravely injured. Both (PW4) and (PW7) did not have sufficient time to see the robbers and in their evidence they did not purport to identify the appellant.

The evidence that connects the appellant with robbery is that of the two policemen (PW5) and (PW6). The appellant says that their evidence is flawed, in that what they told the Court is not only untrue but also because none of the policemen said he kept the appellant in sight from the time they allege they saw him until the time of arrest. He mentions certain discrepancies as to the location of the arrest, in the evidence of the two policemen, in an effort to demonstrate that the evidence is not reliable.

In his written submissions the appellant cited the case of *Ali Ramadhan v R* (Court of Appeal Criminal

Appeal No 79 of 1985) in which the Court held:-

> "The identification of a person, who took part in the offence alleged, and was then chased from the scene of the crime to the place of his arrest, is of course strong evidence of identification; and if all the links in the chain are sound, it may safely be relied upon".

and claimed that there were defects in the evidence of identification as adduced by the prosecution witnesses in this case. But having carefully analysed and evaluated the evidence on record, we are satisfied that there were no defects in the evidence of identification and that questions of the nature raised by the Court of Appeal in the above cited case do not arise in the instant case. We shall now proceed to demonstrate why we think the evidence in this case is watertight and that the possibility of error does not exist.

Although neither Corporal Boniface Kipkalog (PW5) nor Corporal Muita in their evidence stated that they kept the appellant in view throughout the chase, it is evident from the circumstances of the chase and the arrest of the appellant that infact both policemen did not loose sight of the appellant from the moment they saw him entering the get away car to the moment he was arrested.

Corporal Kipkalog said:-

> "I remember on the 16.4.88 at 10.30 am I had sent my friend to Jamia Mosque Clinic. This was CPL Muita. As he was being treated inside, I was waiting outside presently I heard gunfire from behind the clinic. My friend came and told me that he had seen a person with a gun. I left with him, and ran to the gate of Jamia Mosque – we came to Kigali Road at the gate. I looked towards the directions of the gun fire and I saw four people enter a vehicle and drive towards Muindi Mbingu Street. This was about 10 meters away from us. The vehicle was KTS 190 – Ponny. I started following. That vehile found a traffic jam on Muindi Mbingu Street. All the four came out of the car which had stopped. The mob was screaming 'thief thief'.
>
> The four started running towards Kenyatta Avenue following Muindi Mbingu Street. We followed them running. One of the people had a small pistol in his hand. As I heard the person who had the gun, he turned back and fired, but I went down and rolled and he missed me. I got up and continued to follow, he turned again and I went to the ground and he fired but missed me, I got up again and continued. We came to Banda / Muindi Mbingu Street junctions and I reached the man, I jumped and held him on the shoulder on side where the hand had the gun. He turned to fire at me, but I jumped and my friend Corporal Muita also reached and jumped on him".

Corporal Muita's evidence was that:-

> "I remember the 16.4.88 at 10.20 am I was at the Jamia Mosque Clinic. I had gone with (PW5) (*id*). He came with me and while I was in the clinic, I heard gunfire. I went to the window and through I could see a person standing with a pistol. I came and told (PW5) (*id*). We ran towards the gate and saw people entering into a motor vehicle – four people. The vehicle was KTS 190 Ponny white in colour. They drove off towards Muindi Mbingu Street, but they came upon traffic jam and people were shouting 'thieves thieves'. The four came out of the vehicle and started running away towards Post Bank House.
>
> We chased them and they started firing at us. We managed to arrest him. He had a gun."

The evidence of both (PW5) and (PW6) clearly establishes that the two policemen saw the four robbers as they entered the car and also as they jumped off the motor vehicle when it got into a traffic jam. They clearly saw one of the robbers with a gun. The robber fired twice at (PW5) but each time he missed. When (PW5) first saw the robbers, he was a mere 10 meters away from them. From that moment, he started chasing them to the place the appellant was arrested. There is no evidence to suggest that at any time the distance between (PW5) and the robbers increased; on the contrary, (PW5) was catching upon the robbers, particularly the appellant and that is clearly why the appellant was forced to use his gun

either to scare (PW5) off or to kill him and thus manage to escape. The attempt did not, as we know, succeed. The sighting of the robbers immediately after the sound of gun fire and the chase that followed, took place in broad day light and at the distance suggested by the evidence of (PW5), the possibility of a mistaken identity or of picking the wrong man was completely ruled out.

In the case of *Peter Muthiga Mwaura v Republic* (1982- 88) KAR 1129 the facts were that the appellant was a member of a gang of four robbers who attacked and robbed the complainant and his wife at about 8 pm on 13.3.84 after they had closed their fish and chips business along Moi Avenue, Nairobi.

The area was brilliantly illuminated by electric light. The appellant was chased as he fled from the scene down a lane and caught by a policeman on patrol and a civilian witness.

In the course of the chase he was seen dropping an object. After his apprehension, the police returned with him to the point where he had dropped the object which turned out to be a pistol. In his appeal to the Court of Appeal, it was contended on his behalf that he had not been positively identified as one of the robbers. The Court held:-

> "As the appellant was pursued and caught in well lit area and remained in full view of his pursuers and did not at any time elude their vigilance, the circumstances of his identification were favourable and free from the possibility of error".

Without repeating the circumstances of the chase in this case as related above, we wish to say that, in our view, the circumstances of this appellant's identification were much more favourable than those in the *Mwaura* case. There was absolutely no possibility of error.

Our view on the identification of the appellant as one of the robbers is strengthened by some other piece of important evidence that connects the appellant with the robbery. Upon his apprehension the appellant was found with a gun, a 0.38 inch caliber colt revolver serial number 93470 M. Three rounds of ammunition were also found in the gun. The gun and ammunition were taken to a ballistic expert who gave evidence as (PW 3).

The evidence about the recovery of the gun from the appellant and its being forwarded to (PW3) is clear and was properly handled. There is no substance in the appellant's complaint that the gun allegedly recovered from him was not the same gun that was examined by (PW3). There is however, a minor error which we think is a recording error, in which, in cross-examination (PW3) states that he got the gun on 14.4.88. That could not be so because earlier in his evidence in-chief he had clearly said that he received the exhibits on 18.4.88. The exhibit memo form used to forward the gun to (PW3) is also dated 18.4.88. Quite clearly therefore the exhibits could not have been received earlier than the date they were forwarded.

As we have already observed the gun and the three rounds of ammunition were on examination by (PW3) found to be a firearm and ammunition respectively within the meaning of the Firearms Act. Further, examination of the bullet recovered from the body of (PW7) established that it had been fired from the gun recovered from the appellant. We know from the evidence of (PW5) that gun was recovered from the appellant a few minutes after (PW7) had been shot. Moreover, the appellant had used the same gun to shoot at (PW5) during the chase as the appellant attempted to flee from the scene of the robbery. In our view, all the above matters prove beyond any reasonable doubt that the appellant was one of the robbers. The gun he was arrested with was the same gun taken from the complainant in the charge of handling stolen property. His conviction on that count was therefore proper.

Before we conclude this judgment we wish to deal with two other matters which the appellant raised in the grounds of appeal. He claimed that (PW5) and (PW6) implicated him in this offence. There is no reason in our view why two policemen who were not even on duty at the material time should fabricate such a grave charge against innocent men. Both of them in cross-examination said they did not know the appellant before the robbery. There could therefore be no question of a grudge or anything else that would explain why two off-duty policemen would wish to implicate an innocent person in a capital offence.

The appellant also claims that the directions given by the two policemen and the roads followed during pursuit of the robbers reveals discrepancies that show that the two witnesses were not telling the truth. The position is that all the roads mentioned by the two witnesses are in the vicinity of the scene of robbery and it all depends on where a witnesses perceived a suspect was heading for. In any case such discrepancies as exist in the evidence of those witnesses are minor and immaterial and do not effect the overall quality of the evidence which is otherwise clear and consistent. On our own assessment and evaluation of the evidence we are fully satisfied that there was more than ample evidence to support the conviction of the appellant on all the four counts.

The appeal against conviction has no merit and must be dismissed.

The sentences metted out were appropriate and there is no basis for interfering.

The appeal against conviction and sentence is dismissed.

Dated and delivered at Nairobi this 21st day of February, 1992

T. MBALUTO **S.O OGUK**

JUDGE **JUDGE**