



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO 913 OF 1989**

**PETER MUSABI KIHINGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Peter Musabi Kihingu, was arraigned before the learned Resident Magistrate, Nairobi on a charge comprising of 9 counts of which 7 were in respect of the offence of robbery contrary to section 296(1) of the Penal Code, while the two remaining counts were for possession of firearm and ammunition contrary to section 4(2) of the Firearms Act (cap 114, Laws of Kenya). He was acquitted on 4 counts of the robbery charges for lack of sufficient evidence but was convicted on 3 counts, namely counts 1, 3 and 5. He was also convicted on counts 8 and 9 for being in possession of firearm and ammunitions respectively. Upon his conviction, he was sentenced on each of the three counts of robbery to serve 10 years imprisonment and to receive one (1) stroke corporal punishment. For being in possession of a firearm he was sentenced to serve 15 years imprisonment together with one (1) stroke corporal punishment and so was for being in possession of ammunitions. The sentences were to run concurrently. He was further ordered to be under police supervision for a period of 5 years upon his completion of the sentence. His appeal to this Court is against conviction and sentence.

Briefly, the prosecution case in respect of the first count was that on the 27th of September, 1987 at about 10 pm, Snr Private Stephen Muganda (PW 1) of the 7th Kenya Rifles Battalion, Langata Barracks was guarding the magazine store while armed with a G3 rifle S/No 6502488 which was loaded with 20 rounds of ammunition. As he was relaxing at his place of work lying on his great coat which he had spread on the ground with his rifle underneath the said coat, two men suddenly appeared. He stood up and asked them what they wanted and one of them asked him if he knew one by the name of Francis Makokha. As he was informing the said men that the Makokha whom he knew was then on duty at Isiolo, he noticed that the other man who was in the company of the man he was talking to was moving towards the security box and started checking underneath his great coat where he had kept his rifle. Suddenly he said the man jumped high and picked his rifle. He started to struggle with the said man but he was hit on the face by his colleague who had at first engaged him in a conversation. The man who had taken the rifle then aimed at him and he decided to run away to the guardroom where he reported the matter to the duty officer. The matter was reported to the police and according to CI Davis Maina Mwangi of the CID (PW17), they circulated the said robbery through the 999 control room. In the course of their investigations of the said robbery, they suspected ex-army servicemen especially Kihingu (the appellant). No reasons were given for that suspicion. They obtained his photograph from the Army Headquarters, Ulinzi House and started looking for him. He testified that later on 16th of October, 1987, he and other CID officers found the appellant and another outside Odeon Cinema, Nairobi and arrested him. He had never known him before except through his photograph which they had. They took them to CID Nairobi Area for questioning in connection with the rifle robbery at Langata Barracks. He testified that the appellant then volunteered

information and led them to his house at Waithaka at a place known as Muthonga. On arrival, the appellant opened the locked door of the house using a key which he had in his possession. They searched the house and found one red bag under the bed. Inside the bag, C I Mwangi testified that they found a dismantled G 3 rifle S/No 6502488 which had been reported stolen at Langata Barracks together with a magazine containing 16 rounds of 7.62mm ammunitions. The appellant and his colleague were then informed of their arrest. This rifle and ammunitions form the basis of the charges in counts 8 and 9. The said rifle was then handed over to Supt Nathan Muinde who in turn handed it over to the C I Nzioki (PW14) on the 26th of October, 1987 to be forwarded to a ballistic expert for examination. He duly prepared the exhibit memo forms and escorted the same to the Firearms Examiner, William Lubanga (PW 11). Mr Lubanga testified that he duly examined the same and found that it was a G 3 rifle 7.62 x 51 mm caliber S/No 6502488. He formed the opinion that it was a firearm within the meaning of the Firearms Act (cap 114, Laws of Kenya).

Continuing with his evidence, Snr Private Muganda (PW1) stated that the place where he was robbed of the said rifle was well lighted with security lights and that he was able to see those who had attacked him and could easily identify them if he could see them. He stated so even in his police statement which was produced at the request of the appellant (D Ex 1). Later on the 20th of October, 1987 I P Samson Muasya (PW10) of Langata Police Station conducted an identification parade at the request of the investigating officer at Langata Police Station grounds at which the appellant was identified by Snr Private Muganda (PW1).

With regard to count 3, the complainant, Arther Mwangi Muthama, (PW4) who is a clinical officer in private practice at Ngong Town, testified that after he had closed his clinic at about 7.15 pm, he drove his vehicle Reg No KQP 060 Renault to Maasai Spring Building Ngong Town. This was on the 9th of October, 1987. He parked his vehicle where there was some electric light facing the parking. He was then ambushed by some three people, one of whom was armed with a rifle. They demanded the keys to his car which he gave them. He was then pushed to the back seat and two of the men entered the car and sat on his either side. One of the men sat on the driver's seat. In order to enable the said man to insert the ignition key to start the vehicle, the inside lights of the vehicle were put on. The man then reversed the vehicle and drove on towards Kiserian. As they drove on, the man on his left removed his wallet containing about Shs 190/-. They asked him if the vehicle had enough fuel and he agreed. As they approached Kiserian, there was a police road-block on the way and the man with the rifle pressed it on his foot and ordered him not to shout as they passed the police road-block. He made no noise and they went through the road-block. After about 2 Km drive, the car stopped by the road side and he was ordered out. He asked the man who was driving to separate his office keys from the bunch containing the vehicle keys and give him the same. The man obliged. The inside lights of the vehicle were then put on then the keys were separated. His office keys were then handed over to him. He was also given Shs 40 to hire a taxi out of his money that had been taken from him. He then went back to the road-block and reported the matter to the police. He then proceeded back to Ngong town and reported the matter to the police. On the 13th of October, 1987, he learnt that his car had been recovered and was at Githunguri Police Station. He went there and collected the same. It had only a minor dent but spare wheel together with the sunshades were missing. His vehicle was later photographed and handed back to him. He stated that he was able to see clearly the men who had robbed him of his vehicle when the inside lights of the vehicle were twice put on also because they had travelled through Ngong town streets which were well lighted. He gave a description of the men who had robbed him and stated that the appellant was the man who was then armed with a rifle. He later identified him at the identification parade which was conducted by I P Samson Muasya (PW10) on the 21st of October, 1987 at Langata Police Station.

As for count 5, the evidence of the complainant, Gabriel Ngugi (PW6) was rather confusing and can never be stated with the perfect clarity. He alleged that on the evening of 15th of October, 1987 at about 7.15 pm, as he was driving his pick-up vehicle Reg No KQH 739, he spotted some three men ahead of him outside his gate. He asked them where they were going to as that was a private road they replied that they were police officers. Without explaining how he left his vehicle, he stated that he got hold of one of them and threatened to stab him with a *simi*. One of the said men then shouted to his colleague to shoot him and one of them cocked a rifle and hit him with it on the stomach. He called his neighbours as he was holding the said man whom he earlier on stated he had left when he was hit on the stomach with the rifle.

As the men went away while being followed by members of the public, he carried some of the members of the public in his pick-up and went towards the said people along Naivasha Road. He parked the vehicle across the road. They then chased one of the said men whom they arrested while the two others escaped. Soon thereafter, one of the said men came back to rescue the man they had arrested. By then the man who had come back had covered his face and was aiming at them with a rifle threatening to shoot those who were holding his colleague but the members of the public still held the man. They only left the said man after his colleague who was armed had fired twice in the air. The complainant alleged that by then he was lying down at a place where he could see the man who was firing in the air. The said men then drove away in his pickup vehicle. He alleged that the appellant was the man who was armed with a rifle and that he had seen him as there were some security lights along the road and from the house where he had been struggling with the said men and that he struggled with them for about 20 minutes, but no identification parade was held at which he was called.

The defence of the appellant is that the entire case against him has been framed up in a conspiracy involving the Director of the CID, the Director of Security Intelligence, the Military Intelligence and the Commissioner of Police, as a way of silencing him by confining him back to prison to prevent him from exposing certain senior officers in the military and in the police who had falsely brought a charge of espionage against him to cover up their own ill-intentions or misdeeds against the Government of Kenya. The appellant testified that he had been sacrificed by his superiors in the Armed Forces where he was serving in the Kenya Army when they preferred charges against him before the then Nairobi Chief Magistrate in Criminal Case No 1531 of 1980 where he was charged with espionage on the allegation that between 1976 and 1980 while he was a soldier in the Kenya Armed Forces, he was spying for the Tanzanian Government. He alleges that the charges against him were false but nevertheless, he was convicted by the Court on the 14th July, 1980 and sentenced to 14 years imprisonment. He would have completed the full sentence and would have been released on the 13th of July, 1994 as he was a segregated prisoner who could not benefit from any remission, but he was clandestinely released – without preferring any appeal on the 4th of April, 1987 after serving only 6 years of the sentence. This followed a secret meeting between him and the Director of CID whom he called as a witness (DW10). Their meeting took place on the 5th of February, 1987 while he was serving sentence at Naivasha Maximum Prison. He then revealed to the Director of CID the truth relating to the circumstances of his arrest and prosecution in the espionage charge. He informed him that the espionage charge against him had been trumped up by the security intelligence. After Mr Too had verified his information and ascertained the truth of them that he had been framed up in the espionage charge, he was quietly released from prison two months after this disclosure.

The appellant called several senior prison officers – both from Kamiti and Naivasha Maximum Security Prisons as his witnesses. Their evidence was to the effect that during the period the appellant was serving his 14 year jail term for espionage, they found him a very difficult and dangerous prisoner. They described him as a special watch prisoner whom they segregated. At one time they placed him under solitary confinement. Occasionally they charged him under the Prisons Act for possessing unauthorised articles. They remember that the appellant never made any petition for his release on Presidential Clemency, all the same, he was released before completing the full sentence.

While the appellant was still serving the said prison sentence on espionage charge, he testified that he wrote a manuscript entitled “*The Veiled Conspiracy*” in which he detailed the circumstances pertaining to his arrest and subsequent prosecution and imprisonment. He smuggled out of prison the original manuscript but the copy which he retained was confiscated by the prison authorities. That he wrote such a manuscript while under segregation was confirmed by one of the prisoners, Eledjius Nyange (DW2) who testified that while they were at Naivasha Maximum Prison, the appellant wrote a book in some 5 exercise books which he entitled “*The Veiled Conspiracy*”. On the 28th of September 1987 he was arrested by the police and for 24 days he was held at the Provincial Police Headquarters till the 16th October, 1987 when he was officially booked at Langata Police Station. He was kept in police custody till the 4th of November, 1987 when he was brought before the Court to answer the charges that were laid against him in this case. It is his contention that he was framed up by the CID and the security intelligence officers who wanted him confined in prison having illegally held him in police custody for 42 days in an attempt to silence him. He denied having committed any of the offences that were laid against him or

having been found in possession of the alleged firearm and ammunitions.

In his petition of appeal and in his submissions both written and oral, the main point taken up by the appellant is that he was framed in these charges by the police and that the learned magistrate erred in not believing his case. That he was convicted upon insufficient evidence and that the sentence that was imposed upon him was manifestly excessive.

The robbery charges that were laid against the appellant were based on single witness identification at night. Although the learned trial magistrate accepted the evidence of the complainants – PW 1, PW 3, and PW6 on the grounds that the circumstances were favourable for proper identification as there were sufficient lights in respect of each count, he did not however, specifically go on record as having warned himself of the dangers of conviction based on single witness identification. It is quite possible for a witness to believe genuinely that he had been attacked by someone he had seen very well and knew and yet still be mistaken: *Roria v R* [1967] EA 583. In the instant case, the learned trial magistrate appears to have accepted the evidence of the complainant wholesale without ruling out any possibility of mistake on their part. This, we observe, was a misdirection. Even though the circumstances for proper identification were good as was pointed out by the court below, what was obviously lacking was testing the evidence of the complainants with the greatest care, as was required in this case. Could the Snr Private Muganda (PW1) be really believed that he had remained standing talking to one of the two intruders at the magazine store when one of the said men alleged to be the appellant, was moving towards the security box and inspecting underneath his great coat where he had kept his loaded rifle. Similarly could Gabriel Ngugi (PW6) the complainant in count 5, be believed that he did all that he alleged to have done. Whereas his evidence was that several members of the public had come and had assisted him in chasing the said men one of whom was armed with a rifle, why were the other people who were alleged to have been with him not called as witnesses in this case? We would still go further and ask why none of the other police officers who had accompanied C I Mwangi (PW17) to the house of the appellant where the rifle S/No 6502488 and 16 rounds of ammunitions were recovered were not called to corroborate his story. This was the very man whom they had been suspecting right from the beginning when they received the robbery report of the said rifle at Langata Barracks, they knew him to be ex-serviceman and had even taken his photographs from Ulinzi House, who were the other officers who had accompanied him to search the house of this man, who to them, was a dangerous man?

We raise these questions as we believe that as the first Appellate Court, we are expected to subject the entire evidence in the court below to a fresh and exhaustive scrutiny in the course of which we are expected to weigh such evidence and draw our own inferences and conclusions bearing in mind that we had not had the advantage as the trial magistrate to see such witnesses:

*Pandya v R* [1957] EA 336; *Ruwala v R* [1959] EA 570.

The identification of the appellant after his arrest by Gabriel Ngugi (PW 6) was based on dock identification which we have repeatedly pointed out to be generally worthless unless it has been preceded by a properly conducted identification parade: *Gabriel Kamu Njoroge v R* [1982 – 88] I KLR 1134. Given the uncertainty we have regarding the alleged robbery which Ngugi was complaining of and his evidence of identification of the appellant at the scene which we find to be unreliable and uncorroborated, we unhesitatingly allow the appeal in respect of count 5. Similarly, upon our own consideration of the evidence of Snr Private Muganda (PW1) regarding the alleged robbery at Langata Barracks and the evidence of C I Maina (PW 17) in light of the evidence of the appellant, we entertain some doubt as to whether the appellant committed the alleged offences. We are not satisfied as the law requires us to be, that the guilt of the appellant in respect of counts 1, 8 and 9 were proved beyond all reasonable doubts.

Turning now to count 3 in which Muthama (PW4) complains of having been robbed of his vehicle Reg No KQP 060 within Ngong Township by a gang of three men armed with a rifle, we consider that he had sufficient opportunity to see the said men as they drove along the street within Ngong Township and twice when the inside vehicle lights were put on. However, he was unable to describe the features of the said men, their clothes or say what makes him think that the appellant was the man who was armed with a rifle which was pressed on his foot. Whereas we do not dispute that he was robbed of his car in the

circumstances which he explained, we do not however, find any tangible evidence to connect the appellant with this robbery other than what the complainant himself says, which in our view is not sufficient to convict him of the said offence. In our view, further corroboration of the evidence of PW4 was necessary. This was lacking.

The conclusion to which we have reached upon our assessment and evaluation of the evidence that was adduced in the court below, is that the conviction of the appellant in all the offences he was convicted of cannot be upheld. We allow his appeal and quash his conviction in respect of counts 1, 3, 5, 8 and 9. We set aside the sentences that were imposed in each of these counts. We order that he shall be set free and be released forthwith unless otherwise lawfully held.

Perhaps, it is necessary for us to state for record purposes, that we deplore the conduct of the police officers in keeping the appellant in police custody for unnecessarily too long before being brought to Court. Although we do not have proof of the allegation of the appellant that he was held in police custody for upto 42 days before being brought to Court, we are however, certain from the record of the court that he was held in custody between the 16th of October, 1987 upto the 4th of November, 1987 when he was brought to Court.

Dated and delivered at Nairobi this 30th day of September 1992.

**T. MBALUTO**

**S.O OGUKE**

**JUDGE**

**JUDGE**