



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: PLATT, GACHUHI AND APALOO, J.J.A.)**

**CRIMINAL APPEAL NO.143 OF 1986**

**BETWEEN**

**GEORGE MATHEWS OTIENO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal from a judgment of the High Court of Kenya at Kisumu (Butler-Sloss, J.) dated June 13 1986

in

Criminal Appeal No.103 of 1984)

**JUDGMENT OF THE COURT**

The appellant was charged and convicted by the Senior Resident Magistrate Kisumu for an offence of robbery with violence contrary to section 296(2) of the Penal Code. His appeal to the High Court (Butler-Sloss, J) was dismissed. He now appeals to this court on four grounds: that the question of identification was not considered, the question of locality in relation to time and light was not fully considered, that the age of the appellant was not determined and that his mental capacity was not determined.

The fact of this case is that at 6.30 pm on October 26, 1983, in Kisumu Township, Ramesh Changanlal Gandecha (the complainant), a businessman in Kisumu closed his business at 6.15 pm. He carried with him the sum of Kshs 55,000 with other documents in a white plastic bag as he entered his Peugeot saloon car which was parked outside his shop. In the white plastic bag, there was a green plastic bag that contained documents which documents included a cheque book, driving licence, identity card amongst other documents. As he entered the car, he was confronted by the appellant who ordered him out of the car and demanded car keys at gun point. The appellant was joined by two others, one of whom hit the complainant on the head with a leather belt. The complainant dropped the plastic bag on the driver's seat in the car. The other person got into the car and tried to start it but the car did not start. The complainant ran and got a stone and hurled it to the intruders. He hit the person who was starting the car. The appellant fired at the complainant and missed him. Shouts made by the complainant and the sound of the gun shot attracted a crowd of people which started gathering at the place. One of the complainant's employees who had gone toward New Kisumu Hotel returned to help his employer. He threw a stone as well at the intruders. The appellant fired again at this employee but missed him as well. The three people fled on foot but were pursued by the members of the public as well by the complainant.

The complainant was assisted by a friend in a pick-up which he got into in pursuit of the robbers. When the pick-up stopped and two robbers about to get in, the complainant drove it away before the appellant could get in. The appellant was pursued and once again fired at the complainant. As the complainant ducked to avoid the bullet, he lost control and the car crashed into a fence wall. This shot damaged the side window glass. The appellant went to the vehicle fired again at the complainant what must have been point blank range but the complainant pulled the Lanyard which had secured the pistol which act deflecting the bullet from hitting him but damaged the steering. Members of the public were still pursuing the appellant. The appellant fired the last bullet to an administration policeman. He had no more bullets left so he continued running away. At this time he threw away the pistol. He was arrested immediately by members of the public a few yards from where the vehicle hit the wall and where he threw the pistol. On arrest he was beaten by members of the public but was rescued by the police. Complainant informed the police that the man arrested had a pistol. Police conducted the search and recovered it. A broken piece of the Lanyard which the complainant pulled was found during the search of the pistol. The other part was found inside the appellant's shirt at the police station. The other two members of the gang were not arrested.

The white plastic bag which had been dropped by the robbers while running away was found by a lady and taken to police station. No money was recovered though the documents in the green plastic bag were recovered. The whole episode took about 20 to 30 minutes when it was not dark.

Mr Olago Aluoch did not argue the grounds which he had filed on mental capacity of the appellant as this was not in issue either at the trial or on appeal to the high court. He also did not argue the other ground on the age of the appellant though the court undertook to have the appellant's age being determined. This was done and the age ascertained by the provincial medical officer. The appellant's age is now 22-24 years of age. He must have been between 17 and 18 years at the time of the commission of the offence.

The argument in this appeal is mainly on identification. The counsel argues that there is contradiction about the person who had a pistol when the robbery was committed and the person who was arrested without a pistol. He also urged that from the time of the offence and the time the appellant was arrested was at night and that no evidence that the witnesses kept continuous watch and never lost sight of the robber. He relied on *Abdala bin Wendo v Republic* (1953) 20 EACA 166 and *Roria v Republic* [1967] EA 585. He also complained that there was no identification parade held to clear out the discrepancies in the evidence of the person who fired at the complainant and his employee (PW1 and PW7) Mr Bwonwong's conceded that identification parade would have been advisable in the case of he Administration police (PW10) who fired at the appellant and who arrested and saved the appellant from beatings by members of the public.

In the case of the complainant (PW1) and (PW7) it was not a case of identification but of recognition. Both witnesses had seen the appellant previously when he posed as a casual customer. Recognition by the complainant must have been real. When the complainant was forced out of the car by the appellant at gun-point he stood outside the car watching the appellant. When PW7 came to the aid of his employer, he saw the appellant holding a pistol attached to a Lanyard part of which was inside the shirt. When all three ran away the appellant was clearly seen holding the pistol. Complainant met the appellant again when the appellant was accompanied by the other short robber and tried to get on the pick-up at the time the complainant drove away. Appellant again met the complainant and fired at him and missed again but the vehicle crushed into the wall. Once again the appellant shot at the complainant when he pulled the landyard deflecting the bullet which damaged the steering. Appellant was arrested not far away from where the pick-up crashed into the wall. In all these instances, the complainant could not have mistaken the identity of the appellant. There is no evidence to indicate the the other two members of the gang had guns or that one of them apart from the appellant had a gun. Members of the public were in pursuit of the person who had a gun. The administration policeman (PW10) had seen a person with a gun who fired at the complainant twice where the car crushed on the wall and who, he the policeman fired at and missed. That person was the appellant. He was seen from where the robbery was committed, he was chased until he was caught by members of the public. It is not of vital importance that a member of the public must give evidence. It suffices to say that the administration police arrested the appellant and the complainant and his employee knew the appellant and that he is the one of the gang robbers which committed the

robbery but was eventually caught. Mr Olago Aluoch complains of the lanyard that more emphasis was placed on it. It was an important piece of evidence. It was the same lanyard that held the pistol to the body of the appellant and when it was pulled by the complainant or when pulled off and thrown away it must have broken. The appellant threw it before he threw away the pistol. Yet part of it was left held inside the appellant's shirt. The appellant said it was attached to a charm that had fallen when the mob attacked him. The only known charm that was attached to the lanyard was the pistol. The lanyard implicated the appellant with being in possession of the pistol.

The complaint that it was dark does not help the appellant. The circumstances under which the appellant was arrested do not offend the law as stated in *Abdala bin Wendo v Republic* (1953) 20 EACA 166 and *Roria v Republic* [1967] EA 585. The incident started at 6.15 pm leading to the arrest at 7.15 pm. Those who chased him state that they could see him clearly. The complainant when chasing the appellant in a pick-up did not have to put on car lights. If all could have been seeing a person running at a distance without losing sight of him or a vehicle in the chase having not to put on lights, we are of the view that it was not dark so as to obstruct a clear view. If it was dark at the time, the appellant could have managed to get lost in the darkness and could not have been arrested. The grounds upon which this appeal was urged based on identification and the position of light at the time of arrest cannot, in our view, succeed, in view of the concurrent findings of the lower courts of confrontation of the appellant

and the complainant at Wedco Centre, in Milimani and the final stage when the appellant was arrested while still firing at the complainant. It was thought unnecessary to hold an identification parade in the light of the evidence on the record, that the appellant was not arrested on suspicion, but due to his insistence to bring to a successful conclusion the robbery which began at Wedco Centre. He started firing at the complainant outside

his shop after robbing him of his plastic bag continued firing at the complainant whenever they confronted each other until he exhausted his ammunition and was arrested. The person who did all that is none other but the appellant. The appellant was properly convicted on the evidence which was recorded and weighed according to law. We therefore dismiss the appeal against conviction.

On sentence we feel in agreement with the Principal State Counsel that the appellant was aged between 17 and 18 years. It is difficult to assess the age without the birth certificate. We accordingly give the appellant the benefit of the doubt and order that the appellant be detained in such a place and under such conditions as the President may direct, under section 25(2) of the Penal Code (cap 63).

Dated and delivered at Kisumu this 17th day of June 1987.

**H.G. PLATT**

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**JUDGE OF APPEAL**

**J.M. GACHUHI**

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**JUDGE OF APPEAL**

**F.K. APALOO**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original

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**DEPUTY REGISTRAR**