



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NYARANGI, GACHUHI & APALOO JJA)**

**CRIMINAL APPEAL NO. 205 OF 1985**

**BETWEEN**

**MWAURA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

This second appeal is from a judgment of the High Court (Owuor(Mrs) Schofield JJ) given on 10 September 1985 whereby the High Court dismissed the appeal of the appellant against convictions on three counts of robbery with violence contrary to section 296 (2) of the Penal Code and two counts of attempted robbery contrary to section 297 (2) of the Penal Code.

The material facts which are necessary in order to enable the points of law raised to be examined and determined are these. On 13 March, 1984, at about 8 pm the complainant and his wife were attacked by a gang of four men. The couple had closed their fish and chicken shop on Moi Avenue, Nairobi. They were entering their car registration mark KRU 054 when one of the gang fired a shot using a pistol. One of the gangsters ordered the couple to sit while two others moved close to the complainant's wife and took her shopping bag. Yet another in the gang demanded the car keys and the complainant gave the keys to him. The man then opened the car and tried to start the car. The car could not start, whereupon the complainant was commanded to start his car. While he started his car, the complainant noticed the gang confront the driver of a Volkswagen and shoot its windscreen as the driver and his wife waited for the green traffic lights, at the round about close to the junction of Moi and Haile Sellasie Avenues and quite close to the fish and chips shop. A pistol was pointed at the driver. A bullet shot followed, causing the drive to become unconscious. Someone blew a whistle and night guards from American Embassy buildings which was opposite the fish and chips shop joined and blew their whistles. All that caused the gangsters to flee. Two of them ran towards the nearby Kahawa House while the other two followed a lane leading to Tom Mboya Street. Before the gangsters fled, they took the wristwatch of the complainant and that of this wife.

As the complainant and his wife walked from their shop towards their car, his wife was suddenly hit with a sharp object on her left buttock. When she turned to look she saw four men two of whom were near her husband and the other two close to her watchmen. After the gangsters left, she felt pain, realized she had been shot because the shorter of the two men near her had a pistol and she was rushed to the Aga Khan Hospital where a bullet was removed. The bullet head was handed to Senior Superintendent Shaw.

While he was on duty between Tom Mboya and Moi Avenue as a night guard on 13 March 1984, Kiplangat (PW 10) heard gun shots at about 8.00 pm from a shop behind where he was. He went to check and saw three men running towards him. On seeing him, the men changed direction. They were about 50 paces ahead of the witness. Policemen in a 99 car were chasing the men. PW 10 followed one of the three. He noticed him

drop something. The man was 15 paces away. PW 10 decided to chase and hold the man before returning to the object which the man had dropped. PW 10 arrested the man before turning to the object which the man had dropped. PW 10 arrested the man near Information House and he escorted him to where the 99 car was. The witness reported to the policemen that he had seen the man drop something. The policemen and PW 10 proceeded to the spot, searched and PW 10 found a pistol. We pause to observe that the man who was chased and held by PW 10 and the policemen in a 99 car is the appellant. He was convicted on the facts summarized above and in this second appeal, which raises only issues of law, his grounds of appeal are as follows:

1. The learned judges erred in law in making the finding that the appellant had been properly identified.
2. The learned judges erred in law by totally disregarding the alibi defence put forward by the appellant.
3. The learned judges erred in law in upholding the lower court's finding that the pistol marked (MFI 1) had been dropped by the appellant without fully and properly setting out the evidence in support thereof and considering the same fully as circumstances warranted.
4. The learned judges erred in law in upholding the lower court's finding that Richard Kiplangat's evidence (PW 10) that he saw the appellant drop a pistol (kindly see p 80 of the judgment) was credible without requiring such evidence to be sufficiently corroborated as is required by law.
5. The learned judges erred in law in making the finding that the appellant was properly identified in a police identification parade notwithstanding the fact that the said identification parade was prejudicial to the accused, wrongful and unlawful.
6. The learned judges erred in law in upholding the lower court's finding that the prosecution evidence was wholly admissible whereas the same was riddled with grave discrepancies and contradictions and therefore legally inadmissible.
7. The learned judges erred in law by upholding the appellant's conviction and sentence whereas the same was not proved beyond reasonable doubt in the lower Magistrate's Court as is required by law.
8. The learned judges erred in law in making the finding that the prosecution's failure to join counts II and III, namely the robbery of Mr Parekh's watch and the attempted robbery of his motor vehicle, did not occasion any prejudice to the appellant.

It is complained by Mr Gatuguta, learned counsel for the appellant, that the identification parade was of no evidential value, it being easy for the appellant to be identified as he was the only one with a visible injury on the head. The more substantial issue which is made on behalf of the appellant is that identification at the scene is not positive because the incident lasted no more than three minutes, it was night-time, there was no description by the witnesses of the amount of light outside the fish and chips shop and that the complainant and his wife lay when they heard a shot and so could not tell who fired the shot. Grounds 1 and 5 were thereby covered.

Grounds 3 and 4 which on examination overlap were also argued together. Mr Gatuguta lamented that, neither PW 4 nor PW 10 both of whom claimed to have seen the appellant drop something while he was running away from the scene, picked up the object immediately. Counsel said that if indeed the appellant was carrying a pistol he would have attempted to fire so as to frighten those who were pursuing him. Further that the two policemen who were in the 99 car and who got very close to the appellant did not see the appellant drop anything. The question posed was why were no fingerprint impressions taken and what

real evidence is there that the appellant had a pistol? It was suggested that the fire-arm could have been planted. Mr Gatuguta pointed out that nothing was said about the wristwatches and the handbag. None of the witnesses who gave chase said the appellant dropped or threw away any of those items. And yet there was prosecution evidence that two of the gangsters took wristwatches and a white hand-bag. Mr Gatuguta referred to the appellant's statement to the trial court and submitted that the prosecution had not even attempted to dislodge the defence of alibi put forward by the appellant.

On behalf of the respondent republic, Mr Muchiri, learned state counsel, made a number of points on the various matters urged on behalf of the appellant. In the forefront of the reply was the contention that there was adequate light at the scene and during the chase for safe identification of the appellant. There was, argued learned state counsel, clear nexus of evidence to show an unbroken chain from the time the complainant and his wife were stopped and assailed and the pursuit of the appellant. All that evidence points to the appellant and is proof of the robbery and attempted robbery while armed with a pistol. This is not a case of honest but mistaken identity; the prosecution disproved the alibi.

The whole question in this case turns on whether the appellant was positively identified at the scene and if he was pursued from the scene to the spot where he was arrested. The main attack by Mr Gatuguta was directed as it had to be, towards showing that the lower courts misdirected themselves by omitting to consider if there was the light for clear and positive identification. Mr Gatuguta remarked in the course of his submission that had the appellant been represented by an advocate at the trial and had the trial court visited the scene, matters might well be different for the appellant today. According to the complainant, 'street lights were on and security lights from the buildings', during the attack. PW 4, the guard who pursued the appellant and caught him said this about lights,

"At Sana Ltd there are security lights, street lights and security lights from the shops.'

PW 10 also testified that it was possible for him to see the man he caught,

"using electric lights".

PW 12, one of the policemen in the material 99 car which followed the thugs, stated, "the head-lights were flushing on them and there were streetlights."

Of that evidence, the trial court held that:

"the evidence of identification is quite clear and circumstances favouring correct identification were good. He was pursued while head lights of the police car were on, clearly illuminating. ...'

and the High Court had this to say:

"...the police officers did not lose sight of the arrested man and they followed him with their car head lights on him, from Etyang's car to where he was arrested. ... There is thus an unbroken chain from the complainant's car and from there to arrest..."

We have gone into this at some length because of the very crucial issue of identification in this case. The trial and the first appellate courts considered the evidence on identification and were alive to the matter of the quality of the light by which the appellant was seen. The conclusion squares well with the following passage in the case of *Wangombe v Republic* [1980] KLR 149 at 150, letter I:

"...in this case guilt turned upon visual identification by one or more witnesses.. a reference to the circumstances usually requires the judge to deal with such important matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of the light."

Respectfully adopting those words, we proceed to conclude that there was no misdirection on the issue of identification.

With that out of the way, we turn to the issue of alibi raised at the trial as a defence by the appellant. We dispose of the issue by simply saying that having been seen at the scene, pursued there from and caught, the appellant's defence of alibi is not available to him.

One other matter, that there was no evidence that the appellant had a pistol, was raised. Two prosecution witnesses, PW 4 and PW 10, said they saw the appellant drop something as they pursued him.

PW 10 ran after the appellant "in lanes". The policemen were following in a car. It was therefore possible for PW 10 to see what the appellant did before the policemen could. PW 4 did not lose sight of the appellant and the thing was dropped about 20 metres from where he was arrested. The lower courts were entitled to believe the two witnesses and accept their testimony. That being the state of the evidence, it would have been pointless to take finger-print impressions of the pistol.

A further point is taken as to count five. The argument advanced is that Shikuku (PW 4) did not say he was robbed of a wristwatch and a coat and therefore that there is no evidence to support the charge. With respect, that submission is well-founded. There is not in the evidence of PW 4 mention of wristwatch or coat. PW 4 did not testify that the appellant robbed him of a wristwatch and a coat. The conviction on count five is quashed.

We have asked ourselves whether we feel that the convictions are safe. We find no grounds, notwithstanding Mr Gatuguta's submissions which were a model for brevity and cogency, for saying that the convictions on the four counts are unsafe.

The appeals against convictions are accordingly dismissed.

A matter which arose in the trial court and which requires some comment by this court relates to the plea of guilty to lesser charges of the co-accused and the subsequent sentence of imprisonment of the convicted co-accused to five years' imprisonment, plus corporal punishment and compulsory police supervision for a period of five years.

The trial court thought the state accepted the plea of guilty out of magnanimity. The learned trial magistrate added:

'otherwise from the statement of facts this was in actual fact a case of robbery with violence.'

The High Court was critical of the decision of the trial court to accept a plea of guilty.

For our part we are concerned with the two verdicts which appear inconsistent with one another.

We respectfully request the presiding Judge (Owuor (Mrs) J) to make an observation to the President under 332 (1) of the CPC to the effect that a co-accused who pleaded guilty, albeit to lesser charges received five years' imprisonment plus four strokes corporal punishment whereas the appellant was sentenced to death and that mercy should be extended to the appellant. The deputy registrar of this court shall draw the attention of Owuor (Mrs) J to this judgment.

Dated and Delivered at Nairobi this 10th Day of October, 1987.

**J.O NYARANGI**

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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.

**DEPUTY REGISTRAR**