REPUBLIC OF KENYA

IN THE HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEAL NO 406 OF 1979

SAMUEL GAKUU MACHARIA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence by FE Abdullah Esq at the Senior Magistrate's Court, Nairobi/Criminal Case No 2303 of 1977)

JUDGMENT

The appellant was convicted by the Senior Resident Magistrate, Nairobi, on four counts: (1) robbery with violence, contrary to section 296(2) of the Penal Code; (2) attempted robbery, contrary to section 297(2) of the Penal Code; (3) possession of a firearm without having a current firearm certificate, contrary to section 4(2) of the Firearms Act; and (4) possession of ammunition without a current firearms and ammunition certificate, also contrary to section 4(2) of the Firearms Act. He was awarded the mandatory death sentence in respect of the first two counts and sentenced to concurrent terms of three years' imprisonment in regard to the third and the fourth counts.

In order to consider in some detail the various grounds of appeal raised and argued by Mr Otieno for the appellant in the amended petition of appeal, we will set the stage by very briefly stating the evidence in the case. In a nutshell, the prosecution case in respect of the first count was that on 22nd July 1977, at about 8.00 pm when the complainant was returning to his Peugeot 504 motor car (registration KLH 314), which was parked outside the "Kentucky Chicken" restaurant in Kenyatta Avenue, Nairobi, in company of his friend Mr Karanja, he saw three men. One of them pointed a pistol at him and ordered him to drop his keys, which he did. One of the other two men then got into the motor car and eventually managed to start it; whereupon the man with the pistol and the third man also got in and, after warning the complainant not to shout for help, all of them made off. The robbery, which was also seen by Mr Karanja, was reported at the Central Police Station on the same night.

The complainant testified that the man who had pointed the pistol at him was the appellant; and that was corroborated by Mr Karanja. Both of them had picked out the appellant at an identification parade held by Inspector Njuguna on 8th August 1977.

As to the second, third and fourth counts of the charge, the prosecution case was that on 25th July 1979, at about 9.45 am, an armoured car of the "Pinkerton" security service had parked outside the shop known as "Deacons" on Kimathi Street, Nairobi. Some of the security officers entered the shop and came back towards their car carrying a cash box containing a large sum of money. At that time two men came towards them, one of them being armed with a pistol, pointed the pistol towards

the security officers and ordered them to drop the cash box. At that time the security officers heard shots

being fired and they retreated into the Deacons shop with the cash box. The attempted robbery of the cash box had been witnessed by P C Wilson Nganga of the President's escort who happened to be waiting for a "VIP" across the road from the "Deacons" shop at about that time. He witnessed the attempt to rob the cash box by three men, two of whom were carrying pistols; and, as he was armed, he opened fire at the three robbers aiming his gun at the one of them who had a big pistol. One of those three men escaped in a Peugeot 504 motor car (registration KQT 523). The other two men made off in different directions on foot. However, according to Mr Rono an escort officer with Pinkerton's, two of the three robbers made off in the Peugeot motor car while the third man ran across the road.

At about 10.00 am on the same day a man who had been shot in the stomach came to the Blukat restaurant on Muindi Mbingu Street opposite the city market and asked a waiter named Mr Kioko to be shown a telephone. While Mr Kioko was conversing with that man, somebody rang for an ambulance and that man left the restaurant in the direction of the New Avenue Hotel holding his abdomen and with his body bent. Shortly afterwards the appellant was picked up by an ambulance about 20 yards away from the New Avenue Hotel bleeding profusely from his stomach. He was taken to the Kenyatta National Hospital. A doctor who operated upon him found two small round wounds in his abdomen which were consistent with being an entry and an exit wound made by a bullet which had passed through the abdomen.

The police recovered some bullets, empty cartridges and a gun at or near the scene on the same morning. These were apart from the gun and bullets in possession of, or used by, PC Wilson Nganga.

In an inquiry statement made by the appellant to Inspector Mungai on 8th August 1977, he stated that he had been picked up by three men in a Peugeot 504 vehicle and handed a gun loaded with one round of ammunition. He was then taken to the Deacons shop where he remained outside for some time; but he told them (presumably his companions) not to go into the shop; that he did not fire any shots and did not want to shoot anybody. However, he was shot and on his way towards Muindi Mbingu Street he dropped the gun and the ammunition. He then rang for an ambulance at the Blukat restaurant and was subsequently picked up by an ambulance. The inquiry statement was admitted after a trial within the trial.

In his evidence before the magistrate the appellant stated that he had spent the evening of 22nd July 1977 at his home in Eastleigh Section II. His brother, Mr Joseph Kabage, supported him and testified that he was with the appellant at their home between 7.30 pm and 10.00 pm when they retired to bed. As to the incident of 25th July, he stated that he was on hisway to the Kenyatta National Hospital for treatment when he heard some shots and he himself was accidentally shot in Kimathi Street. He decided to look for some help to take him to hospital so he walked to Muindi Mbingu Street where at the Blukat restaurant an Asian called for an ambulance at his request; and that at the suggestion of that Asian he waited outside the restaurant so that he could be seen by the ambulance when it came to pick him up, which it eventually did. He denied any connection with the incident at the Deacons shop and stated that he was badly beaten up by police officers, who had also threatened to shoot him; and that he made up his inquiry statement in order to save his life. His brother again supported him to the extent that they had been together on that morning and that they parted at 8.30 am when the appellant told him that he was going to hospital.

The above is only a very brief resume of the evidence before the magistrate. His judgment runs into twenty-six typed pages and the rest of the record is about 125 pages long. We have all that is on the record in mind, but have set out only the very salient features of the evidence.

The first ground of appeal relates to the identification of the appellant both at what we will (for the sake of convenience) call the "Kentucky robbery" and the "Deacons robbery". Mr Otieno argues that the Kentucky robbery was over in a very short space of time, that the complainant and Mr Karanja must have been in a shocked state, that there was no evidence that the inside light of the Peugeot motor car had been switched on, that the complainant could not even say how the car was started by one of the robbers and, in the circumstances, had not the complainant and Mr Karanja seen a photograph of the appellant in the Daily Nation of 26th July 1977, they could not possibly have picked him out at the identification parade.

A photograph of the appellant as "the man shot in the stomach by police in Nairobi yesterday lies at Kenyatta National Hospital" made front page headlines in the *Daily Nation* of 26th July 1977, and Mr

Karanja saw it. Not only that, the complainant in the first count discussed it with him, whereupon he looked at the photograph carefully to determine whether that was the photograph of the man with the gun (at the Kentucky robbery). However, he could not make him out because the face of that man was not as fat as it looked in the photograph. The newspaper certainly grievously erred by publishing that photograph; and the magistrate properly castigated it for doing so. It should have been reasonably clear to the newspaper that a prosecution was very likely to follow and the matter was for all practical purposes *sub judice*. Whether or not there is contempt of court must be viewed objectively. It is, of course, an act or an omission calculated to interfere with the due administration of justice; and it cannot but be calculated to do that if there is a real risk that prejudice will result.

It must follow, as we think, that to publish a photograph of a likeness of a suspect may well provide that risk. And it may be, we put it no higher in the absence of argument, that an editor or publisher responsible for the publication can be held to be in contempt of court where he has no personal knowledge of the offending matter and has even devised a system ordinarily adequate to prevent such matters being published. However, we are told from the Bar that there has been no such further publication in the past two years, so that we need not deal with the matter further now.

revert, however, to the evidence before us; that publication must be most carefully thought on, going as it does to the weight of the evidence: *R v Marzuk Salim Msubwa* (1951) 18 EACA 257. Having done so, we are satisfied (as the trial magistrate was), that the newspaper photograph did not in any way influence the identification of the appellant in either of the two robberies. In so far as the first count is concerned, the newspaper did not link its suspect with the robbery some three days before; and all that occurred was (as we have stated earlier) that when the complainant saw it he thought that the photograph seemed, possibly, to be of the man who had robbed him of his car. Neither he nor Mr Karanja thought it a good likeness; and we cannot see that the publication in any way lessens the two men's identification or that of any other witness in the case.

The two men had good opportunity of observing the appellant when he had pointed the pistol at the complainant, there was ample light, and we are satisfied (as the magistrate was) that the appellant was identified beyond reasonable doubt and that the possibility of any mistake could be ruled out.

However, different considerations apply to the identification at the Deacons robbery· Apart from Mr Rono and Mr Kimolo, none of the other witnesses were able to identify the appellant. In fact, Duncan Kiilu testified that he would be able to identify two of the robbers if he saw them again; but that neither of them was in the Court. In regard to Mr Rono and Mr Kimolo the learned magistrate made the following finding:

> I am satisfied that both these witnesses have positively identified the [appellant] as the person who pointed the gun at them and ordered them to drop everything. I find it so ....

With respect, that finding would not have been made if the following significant answer of Mr Rono to cross-examination had been given its due weight:

> In this statement I have stated my reasons for identifying the [appellant]. In my statement I have said that I identified [the appellant] by the clothes he was wearing. The [appellant] was wearing the coat at the Deacons which he was also wearing at the parade ...

The senior State Counsel, in these circumstances and very properly, does not support the appellant's identification by Mr Rono. However, that still leaves the identification by Mr Kimolo. We have borne in mind the several contradictions in evidence of the witnesses to the Deacons robbery; but we are in agreement with the magistrate that Mr Kimolo's identification of the appellant was clear and without the possibility of any mistake, despite some impropriety in the identification parade with which we will now deal. Again, with respect to the magistrate, his short finding that "I am satisfied that the [identification] parade was held properly and correctly" was not absolutely right, or may not be; Inspector Njuguna testified:

> Before conducting the parade, I had spoken to all the witnesses in room 14. I told them that I had a suspect. I was going to place him among other people, for them to view if they could identify him as the one who was among the people who tried to rob them of some money along Kimathi Street ...

This statement was not in accordance with the rules governing identification parades and should not have been made. It told everyone that a suspect was there, although Inspector Njuguna then went on to say that they might or might not find anyone concerned in it. Amongst the six identifying witnesses were also the complainant in the first count and Mr Karanja, and the aforesaid might have misled them into believing that there was not a suspect for them to pick out; although it did not. The Kentucky robbery took place in Kenyatta Avenue and no money (only a car) was stolen in it.

The evidence of identification by Mr Kimolo does not stand entirely alone. Although PC Wilson Nganga of the Presidential Escort was not able to identify any of the robbers, his evidence was of material significance. He stated, *inter alia*:

> I then heard shots. I turned to look. I heard shots being fired. One of the bullets hit the parking meter where I was standing. I then took cover behind my car. I took out my gun and started to fire shots at the gang of three persons. After covering myself, I looked and I saw that these people were chasing the guards. The guards retreated into the shop. I saw three persons chasing the guards. I saw that two of these persons were carrying guns. I aimed my gun at one of them who had a big pistol and I fired a shot at him. They ran away. Two of them ran on foot and one of them ran in a car. Their car was parked on the left side of the shop. I saw that vehicle. It was Peugeot 504 blue in colour ... Those two who ran on foot, ran indifferent directions. One of them ran following the car and the other one crossed the road and ran away. The one at whom I aimed the gun and fired a shot ran on foot and crossed the road. He ran across the road opposite the Deacons.

According to the appellant's own evidence, after he had been shot (allegedly accidentally) he passed the McMillan library and then walked towards Muindi Mbingu Street. The man whom P C Wilson Nganga had shot must have been the appellant. PC Wilson Nganga testified that he shot at one of the robbers with a gun and, although the use of the word "robbers" was in the nature of a finding, it was based upon his own observations of the incident and actions of the three men; and, again, although PC Wilson Nganga could not identify that man there can be no doubt that he must have been the appellant. The appellant's claim of having been accidentally shot cannot be possibly true. His actions also belie that claim. He did nothing to protest or indicate his innocence; on the contrary, he ran away from the scene. His evidence in Court was that he had been shot in Kimathi Street; but according to the waiter at the Blukat restaurant, Mr Kioko, the wounded man, who must have been the appellant, first told him that he was ill and then told him that a bullet had hit him in Mama Ngina Street. And when Mr Kioko asked him if he was a policeman or a thief, the appellant did not reply. Mr Kioko also testified that the wounded man stood for about three minutes and then continued to walk towards the direction of the New Avenue Hotel. This the appellant denied in his evidence. Mr Kioko's evidence was not challenged in crossexamination by the advocate for the appellant in the lower court. Upon admission to the Kenyatta National Hospital, the appellant was treated by a Dr Wachira. According to Dr Mwale, Dr Wachira had been transferred to Mombasa. If so, he could have been called as a witness without much expense and delay. However, the appellant was operated upon by Dr Mwale personally, so that he was in a good position to describe the appellant's injuries, treatment and subsequent discharge from the hospital.

Inspector Mungai was the investigating officer in the case. He took an inquiry statement from the appellant on 8th August 1977. Although the inquiry was in respect of both the Kentucky and the Deacons robberies the appellant chose to speak only about the Deacons robbery. In effect, he admitted that he had participated in it, but attempted to minimise the role played by him. Objection was taken to the admissibility of the inquiry statement on the ground that it was made under duress and that the appellant had been forced to concoct something about the Deacons robbery in order to save his life. The magistrate held it admissible after a trial within the trial. Prior to the making of the statement the appellant was in police custody for three days and, before that, he had been in hospital recovering from his wounds. The magistrate did not comment on it. Although the advocate for the appellant did not cross-examine

Inspector Mungai about the allegations against Mr Shaw, the appellant's challenge was not as inconsistent as the magistrate found it to be. In dealing with the inquiry statement in his judgment, the magistrate stated, *inter alia*, "Of course, it may be said that it is the word of one against the other and Court may accept whatever it chooses ...".

The use of word "chooses" was unfortunate, but it must have meant that he believed the one and not the other. Upon our assessment of all the evidence regarding the inquiry statement (and especially its contents) we are satisfied that it was admissible in evidence. The statement is, of course, corroborated by the appellant's identification by Mr Kimolo, his being shot by PC Wilson Nganga and the events leading to his arrest.

We agree with Mr Otieno that the charge of attempted robbery is incorrectly drawn, both as to the statement of the offence and its particulars upon the authority of *Abubakali v Uganda* [1973] EA 230. There are textual differences between section 274 of the Uganda Code on which it was based and our section 297; but they are of no consequence to us. On the facts before us, although the charge should have been described as assault with intent to rob, the facts established the ingredients of the offence under section 297 and the error occasioned no embarrassment to the defence or any possible failure of justice. Nor was there any doubt that the attempted robbery charge was the capital offence.

Turning now to the third and fourth counts of the charge, upon our assessment of the evidence there can be no doubt that the appellant was armed with a firearm and ammunition (at the Deacons robbery), which he later threw away. Under section 4(2) of the Firearms Act, if any person:

> purchases, acquires, or has in possession any firearm or ammunition without holding a firearm certificate in force at the time ... [he is] guilty of an offence ....

While the third and fourth counts were correctly drafted in statements, they were wrongly drafted in particulars as "found in possession". The prosecution takes upon itself an unnecessary burden where it uses such expressions, and one which may be difficult to discharge (as *R v Lumsden* (1951) 35 Cr App Rep 57 in relation to the words "found in" shows). But the ingredients of the charge under section 4(2) were established and the error can have occasioned no embarrassment to the defence and no possible miscarriage of justice. Furthermore, one charge for the gun and the ammunition was enough; but concurrent sentences were awarded. A similar situation arose in *Turon v The Republic* [1967] EA 789. Whether it was worth bringing these two counts is another matter. It would at least have been better to have left them on the file.

There were other implications in the case but they are of no material significance; and we need not concern ourselves with them now, eg the fibres on which we need not reply. There was evidence upon which the magistrate could have correctly made the findings which he did, and upon our own independent consideration and assessment of the written word we are satisfied that the guilt of the appellant on all four counts was proved beyond reasonable doubt.

We support the awards of sentences on all convictions; see *Turon v R* [1967] EA 789. This appeal is dismissed.

Appeal dismissed.

Dated and delivered at Nairobi this 2nd day of October 1979.

E. TREVELYAN

JUDGE

S.K SACHDEVA

JUDGE