IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CRIMINAL APPEAL NO. 92 OF 2007

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

BETWEEN

GEOFFREY CHEGE MWANGI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (Koome, Kimaru, JJ) dated on 15th day of March, 2007

in

H.C.Cr.A. No. 384 OF 2002

****

JUDGMENT OF THE COURT

1. At about 6.30pm on 29th April 2002, **Musa Njue** (PW1) (Musa), a lecturer at Egerton University picked up his wife, **Nancy Njoki** (PW2) (Njoki) from her shop at Engashura Market and headed home in their car. Their home was about one kilometer away in **KITI** area where they had left their two young children under the care of their maid, **Purity Kagendo** (PW3). On arrival at about 7.15 pm, Purity opened the gate and the garage door and they drove in. Electricity lights were on. As she returned to the gate to close it, four people burst in and told her not to scream. She saw three of them holding a *rungu*, a gun and an iron bar and one of them ordered her to lie down as the other three went towards the garage. They pulled Musa and Njoki out of the car and demanded money. Musa gave then 1,500 and Njoki gave them Sh. 10,000. They were not satisfied. They herded Musa, Njoki, Purity and the two children into the house and demanded the key to the bedroom. Njoki said she had forgotten the key in her shop and pleaded with the robbers to go and fetch it. Two of them left with Njoki in the car leaving the other two guarding the rest of the family. They returned thirty minutes later without the key.

2. The robbers then ordered Musa to take them to his Barclays Bank ATM to withdraw money and two of them left with him, leaving two others guarding Njoki, Purity and the children. After a short while, Njoki duped the two robbers, slipped out of the house and alerted the police. When she returned back in the house, the two robbers had disappeared. Meanwhile, Musa and the other two arrived at the Nakuru East

Barclays branch where he withdrew Sh. 10,000 at gun point and gave it to the robbers who shared it out immediately they entered back into the car. As they drove off from the bank, gun shots rang out and the driver sped off in panic but crashed the car. It was the police, who closed in and Musa came out identifying himself. He was handcuffed but later released. They pulled out and also handcuffed one of the robbers who was trapped in the car and was injured. The driver had been shot dead. The police recovered an American Browning pistol with 5 rounds of ammunition.

3. It is not clear what became of the robber who was injured and arrested. There is only fleeting reference by the arresting officer **PC Edward Wamalwa** (PW4) that *"he was charged"* and by the investigating officer, **CPL Silas Chepkwony** (PW7) that *"the suspect was sentenced to death"*. Musa and Purity also made reference to an identification parade where they were able to identify another person who was not before the court.

4. Be that as it may, one month went by. But on 30th May 2002, Njoki was going to a shop in Mchanganyiko area when she saw the appellant entering a video shop. She recognized him as the robber with a metal bar who confronted her on 29th April 2002 and removed Sh. 10,000 from her handbag, the same one who threatened to hit her with the metal bar as they went to collect the bedroom key from her shop and one of the two left guarding her in the house after Musa was taken away. She ran back to the house and told Musa. They called the police who arrested the appellant. Purity was also called to the police station and she identified the appellant by appearance. There was no identification parade organized for the appellant.

5. Upon his arrest, the appellant took the police to his house where a search was conducted in his presence and several items were recovered:- a jungle trouser, a jungle bag and purse, two live ammunition, two Somali swords, a bar, a *rungu* and assorted wrist watches. The ammunition was examined and tested by a ballistics expert, **Donald Mugo Mbogo** (PW6) and found to be live ammunition in terms of the Fire Arms Act. The appellant was then charged before Nakuru Principal Magistrates Court with three offences: (i) Robbery with violence against Musa contrary to **Section 296(2)** of the **Penal Code;** (ii) being in possession of ammunition, to wit, two rounds of 7.62 calibre ammunition without a fire arms certificate contrary to **Section 4(1)** as read with **Section 3(2)(a**) of the **Fire Arms Act**; and (iii) being in possession of public stores, to wit, one jungle trouser and one Kenya army jungle bag, contrary to **Section 324(2)** of the **Penal Code**.

6. He denied the offences contending that he was not at the scene of the robbery as alleged but was arrested on 30th May 2002 by five people who said they were police officers and taken to someone's homestead after which he was taken to the police station. There, he was shown some clothes and was asked who used them. He was then charged with the offences he knew nothing about. To show that there was no report about him to the police on 30th April 2002 and 30th May 2002, he applied for production of the Nakuru Central Police Station Occurrence Book (OB) and an order for production of the OB was made by the trial court. But only the OB for 30th May 2002 was produced by **PC James Kariuki** (DW1).

7. The trial court (S. Muketi) accepted the identification evidence of Njoki, Musa and Purity as consistent and truthful. It also accepted the evidence of the police officers who recovered the offending items from the appellant's house. He was convicted on all three counts and sentenced to death for the robbery but discharged under **Section 535(1) of the P. C.** (sic) on the other two counts. On appeal to the High Court **(Koome J**.) as she then was, and (**Kimaru J**.), the appeal was dismissed, hence this second and final appeal.

8. The appellant challenges his conviction on five grounds of appeal listed in a Supplementary Memorandum of Appeal filed by his learned counsel **Mr. Maragia Ogaro** who abandoned the original memorandum. Essentially the five grounds raise two issues of law: firstly, whether the appellant was properly identified, and secondly, whether the first appellate court re-evaluated the evidence on record as it was bound to do in law. Before we examine the two issues, we must observe that when the appeal first came up for hearing on 11th February 2013, Mr. Maragia sought leave to file an application for admission of further evidence and he did so in March 2013. He sought the introduction of OB entries of 29th April,

30th April and 30th May 2002 from Nakuru Central Police Station. After one adjournment, Mr. Maragia applied to withdraw the application, which he did, and further applied to file a supplementary record of appeal, the particulars of which he did not disclose before leave was granted on 23rd November 2013. However, the supplementary record filed was an extract of two police OB entries of 29th April 2002 and 30th May 2002. The source and authenticity of the document was not explained and it was certainly not an Exhibit produced before the trial court which could validly and procedurally be introduced as a supplementary record. As stated earlier, the only record produced in evidence by DW1, **PC Kariuki,** was the OB for 30th May 2002 which was marked "D. Ex 1". In the circumstances, we think Mr. Maragia sought to introduce by side wind the same further evidence which he had abandoned and this, to say the least, was mischievous. We reject the document and leave it at that.

9. On the issue of identification, Mr Maragia submitted that the appellant was not arrested for any robbery but for being in possession of Government stores which had nothing to do with the robbery committed on 29th April 2002. No cogent evidence was tendered to satisfy the identification of the appellant at the scene of the robbery and there was no evidence of a first report made by the victims on 29th April 2002 describing the appellant. The possibility of error was thus so open in this case that only an identification parade could have resolved it, but none was held in respect of the appellant. As for re-evaluation of evidence, counsel submitted that the prosecution case was riddled with contradictions and inconsistencies which the High Court did not notice as there was no thorough re-examination of the record. He cited several excerpts of the evidence before concluding that the burden of proof was shifted to the appellant and there was no connection between the offence of robbery and the OB entry produced in evidence.

10. In response, learned State counsel **Mr. Kibelion** submitted that the evidence of Musa, Njoki and Purity, as well as the police officers, was consistent that there were four robbers, one of whom was shot dead in the course of the robbery while the other was arrested and charged in court. Of the other two, one was still at large but the appellant was arrested one month later after he was recognized by Njoki. Njoki was able to do so because she spent a lot of time with the appellant during the robbery and the circumstances at the scene of robbery favoured proper identification as the house was lighted. Her evidence was also corroborated by the other two victims. As for an identification parade, counsel submitted that it was not necessary as it was a case of recognition.

11. We have considered the appeal on the two issues but, in our view, it stands or falls on the issue of identification. This, of course, is an issue of law which falls within our competence to consider under **Section 361** of the **Criminal Procedure Code**. As we examine the issue, we are aware that we are bound to respect the concurrent findings of fact made by the two courts below, but as always, we will not hesitate to interfere with the findings if there are compelling reasons to do so. It would be compelling, for example, if they are based on no evidence, or are based on a misapprehension or perverted appreciation of the evidence on record or the two courts are shown demonstrably to have acted on wrong principles in making the findings. See ***J.A.O v Republic [2011] eKLR*** and ***Mwita –vs- R (2004) 2 KLR 60***.

12. As this Court has emphasized times without number, evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. We cite only two decisions for illustration:

In ***Wamunga v Republic [1989] KLR 424*** , the Court stated thus:-

> ***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".***

And in ***Kariuki Njiru & 7 others –vs- R- Criminal Appeal No. 6 of 2001***, the Court reiterated:-

> ***"The law on identification is well settled, and this Court has from time to time said that the***

evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error."

13. Some measures for minimizing this danger have been suggested in various authorities and we take it from the case of ***Republic vs. Turnbull [1976] 2 ALL ER 549*** at page 551, thus:-

"First, whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness, can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

14. The High Court had this to say on the issue of identification:-

"This appeal turns on the issue of identification of the appellant. The robbery in this case took place between 6.30 and 7.30 pm. The complainants PW1, PW2 and PW3 who were victims of the robbery testified that there was electricity light at the garage and in the house throughout the robbery. PW 1 and PW2 were with the appellant for a considerable period of time about one hour during the incident. PW2 who spotted the appellant one month later, after the incident and told the trial court that he was the one who was armed with an iron bar with which he threatened PW2, she said that they spoke for a long time as she tried to persuade the appellant not to harm her and the family. The appellant was left behind when the others took away PW1 to withdraw money at an ATM. PW1 said that he was left with the appellant when PW2 was commandeered to go for the keys and they stayed for about thirty minutes.

This evidence of identification was corroborated by PW3 the house girl who said that the appellant was one of the people who was left guarding them when PW1 was taken hostage and PW 2 managed to sneak to the neighbour's house where she made a report to the police."

Was the finding borne out by the evidence?

15. There is no argument that the appellant was a stranger to all three witnesses of identification. They all admitted so in their evidence. The submission that theirs was evidence of recognition was thus misplaced. There is also no evidence on record that the witnesses, in making their first report to the police, had made any strong impressions on the physical features of the appellant and described them. The star witness was Njoki who said she identified the appellant by appearance when she saw him for the second time one month later. She was able to do this because, in her words, she took more than one hour with him: firstly at the garage when he removed Sh. 10,000 from her handbag; secondly in the car when they took half an hour going to fetch the bedroom key; and thirdly when he was left in the house guarding her and the children after the others took Musa away. But that evidence was contradicted by Purity and Musa.

16. According to Purity, the appellant was the person who ordered her at gun point to lie down when they

burst through the open gate, as the other three went towards the garage. We may quote her during cross-examination:-

> ***"There are 4 people who arrested (sic) us. You are the one who ordered me to lie down. The other went to remove the lady and the man from the car. You had a gun."***

It is doubtful therefore that the person who confronted Njoki at the garage was the appellant, as she stated.

17. Musa for his part stated that the appellant did not go with Njoki to collect the bedroom key. We may quote him:

> ***"I was also able to identify the accused in court. He is the one who had the metal bar and he had held my children. He went with me in the sitting room. I was left with him when my wife left. I was with him for 30 minutes. He was left behind when we went to the ATM machine. When he was arrested, I was there. This was a month later."***

Again, it is doubtful that Njoki made any observation of the appellant in the car for a period of 30 minutes.

18. It seems from that state of the evidence that Njoki did not have the appellant under observation for one hour as she stated, and that the person she observed on the three occasions may not have been one and the same person. The best the prosecution could have done in the circumstances to clear any doubts was to hold an identification parade for Musa and Purity to test the accuracy of Njoki's identification of the appellant. On the contrary and quite inexplicably, the police took the appellant to Musa to see him after the arrest and also invited Purity to the police station to see him. An identification parade after such goof would have been superfluous. As this court has stated before in the case of ***James Tinega Omwenga v Republic [2014] eKLR*** :-

> ***"The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless."***

19. We have said enough to satisfy ourselves that the necessary safeguards for proper identification were not sufficiently considered by the two courts below and we are entitled to interfere with their concurrent finding of fact that the appellant was identified beyond reasonable doubts as one of the robbers. The doubts apparent from the evidence must go to the appellant. We would in the circumstances allow the appeal on the first count of robbery with violence, quash the conviction thereon and set aside the sentence.

20. As for the two counts relating to possession of ammunition and government stores, we find the evidence consistent, and was properly accepted as truthful by the two courts below, that the appellant led the police to the recovery of the items. His feeble attempt in defence asserting that he found the items at the police station, was properly rejected. Before us, Mr. Maragia submitted that the only offences the appellant could be charged and convicted of were the possession charges and we agree with him. We would in the circumstances affirm the conviction for the offences.

21. With regard to the sentence, this court will only interfere if the legality of it is in question. The record shows that trial court made an order for discharge of the appellant under "***Section 535 (1) of the P. C"*** and the High Court said nothing about it. Presumably **"P.C"** refers to **"Penal Code"** but the last section in that code is **Section 398.** The provision of the law invoked is thus nonexistent and therefore unlawful. More importantly, the trial court purported to make an order relating to sentence on the alternative counts after meting out a sentence of death on the 1st count. That was improper. The manner of sentencing where the death sentence is imposed has been repeated by this Court on numerous occasions. We cite only one

pronouncement from the case of ***Abdul Debano Boye & another v Republic Criminal Appeal No. 19 of 2001 (unreported)*** , thus:-

> ***"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."*** (Emphasis added).

22. The emphasized portion is applicable to the case before us. The sentence relating to counts two and three ought to have been left in abeyance but were not. The punishment for possession of ammunition under **Section 4((2)(a)** as read with **4(3)(a)** of the **Firearms Act** is ***"imprisonment for a term of not less than seven years and not more than fifteen years".*** The punishment for possession of government stores is a misdemeanor under **Section 324 (2)** of the **Penal Code** and is punishable under **Section 36** with ***"imprisonment for a term not exceeding two years or with a fine or with both"***. In view of those provisions, we set aside the order made by the trial court and affirmed by the High Court in respect of Counts 2 and 3 and substitute therefor a sentence of imprisonment for ten (10) years in respect of count 2 and one (1) year in respect of count 3. The sentences shall run concurrently from the time the appellant was convicted by the trial court on **5th December 2002**.

23. As the appellant must by now have served imprisonment for longer than the sentence we have imposed, we order that he be set at liberty forthwith unless otherwise lawfully held.

24. Orders accordingly.

Dated and delivered at Nakuru this 27th day of April,, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR