IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU, & KIAGE, JJ.A)

CRIMINAL APPEAL NO 289 OF 2011

BETWEEN

STEPHEN KIHUNGE KARIUKI

STEPHEN MAINA WAMBUGU …… APPELLANTS

AND

REPUBLIC ……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Emukule, J.&Ouko, J. as he then was) dated 18th November, 2011

in

H.C.CR.A No 58 & 60 of 2010

****

JUDGMENT OF THE COURT

Stephen Kihunge Kariuki ('the 1st appellant') and Stephen Maina Wambugu ('the 2nd appellant') were part of a quartet including Wilson Mathenge (Wilson) and Moses Maina (Moses) who were arraigned before the Principal Magistrate's court at Nyahururu to answer to a main charge of attempted robbery with violence contrary to **Section 297 (2)** of the **Penal Code**; count 2 being that of possession of a firearm without a firearm certificate contrary to **Section 4 (1)** as read with **Section 4 (3)** of the **Firearms Act**; count 3 being that of possession of ammunition without a firearm certificate contrary to **Section 4 (1)** as read with **Section 4 (3)** of the **Firearms Act**; and count 4 being that of consorting with a person in possession of a firearm contrary to **Section 89 (2)** of the **Penal Code**.

The main charge applied to all the accused; the second and third counts applied solely to the appellants; while the fourth count applied to Wilson only. The particulars of the main charge were that on the 19th day of June 2008, at Kianugu area along the Nyeri-Nyahururu road in Nyandarua District of the former Central Province, the appellants and their co-accuseds jointly with others not before court, while armed with dangerous weapon (sic) namely AK 47 rifle serial number 19513 attempted to rob Gerishon Kamoko Gatitu of a Motor Vehicle registration number KAL 857 K Isuzu Lorry valued at Ksh 3,

000,000, and after the time of such attempt shot and injured the said Gerishon Kamoko Gatitu.

With respect to count 2 the particulars were that on the 20th day of June, 2008 at Kianugu forest within Nyandarua District of the former Central Province, the appellants were jointly found in possession of an AK 47 rifle serial number 19513 without a firearm certificate. As for count 3 the particulars were that on the 20th day of June, 2008 at Kianugu forest within Nyandarua District of the former Central Province, the appellants were jointly found in possession of four 7.62 Millimeter caliber ammunition without a firearm certificate.

The appellants, Moses and Wilson pleaded not guilty to the main charge and the alternative counts; save that the alternative count facing Wilson namely consorting with a person in possession of a firearm contrary to **Section 89 (2)** of the **Penal Code** was withdrawn pursuant to **Section 87 (a)** of the **Criminal Procedure Code** leading to his discharge by the trial court. Subsequently, the trial court delivered a ruling at the close of the prosecution case and acquitted Moses and Wilson under **Section 210** of the **Criminal Procedure Code** of the remaining charges. Both appellants were placed on their defence.

The brief facts of the prosecution's case were that on 18th June, 2008 PW 1Gerishon Kamoko Gatitu (Gerishon) who was a Lorry driver employed by Summer Limited based at Nyeri town left Nyeri at 6a.m. driving a Lorry registration number KAL 857K destined for Nyahururu. Aboard the Lorry was his turn boy (PW2) Joseph Mwaniki Njau (Joseph) and cargo comprising assorted merchandise including cooking fat, sugar, rice and flour which the duo was to distribute at various shops at Nyahururu. After an uneventful journey, the pair arrived at Nyahururu at 10a.m. or thereabouts and immediately embarked on their mission, with Joseph guiding Gerishon as to where the deliveries were to be made. Upon concluding that leg of the trip, the pair drove to Njebi (Marmanet), then onwards to Gatundia (Rumuruti) where they undertook a similar routine; before making their way back. It so happened that Joseph had unfinished business at Njebi, making it necessary that the pair stops thereat before heading back to Nyeri. At about 6p.m. Gerishon and Joseph left Njebi for Nyahururu. Upon reaching Kinamba, two people, one of whom was armed with a gun stepped onto the road from the nearby bushes. The second assailant was carrying a black paper. Gerishon made as if to stop by pulling over to the side of the road, only to switch on the Lorry's lights and accelerate towards Nyahururu.

The duo rang PW 4 Tanki Monoch Kumar Dirajilal (Tanki) who was the Transport Manager at Summer Limited moments after the incident and briefed him on what had transpired. He in turn advised his crew to park the Lorry at Nyahururu Police Station for the night, and then spend the night at Nyahururu, which instructions were duly complied with. The following day Gerishon and Joseph returned to the Police Station to collect the Lorry for the trip to Nyeri. Prior to departure the pair called Tanki and the company accountant PW 5 Luke Rugara Kimunya (Luke). The latter advised them to deposit the previous day's collection of Ksh 330,000 at Equity Bank before setting off, which instruction was duly executed by Joseph. Thereafter, in the company of PW 3 Edwin Murimi Marui (Edwin) the pair started the journey to Nyeri with Joseph at the wheel of the Lorry. Gerishon was not feeling well.

As they approached Ndaragwa the trio was waylaid by two robbers who emerged from the bushes along the side of the road. One had a gun and began to shoot at the Lorry thereby injuring Gerishon who was hit by bullets in the arm and in the stomach. Gerishon urged Joseph to park the Lorry by the roadside to no avail. Instead he drove on and sustained injuries after he was hit by a bullet. Upon reaching Ndaragwa the trio called for help before being taken to the Nyahururu District Hospital where they received first aid. Gerishon remained admitted at the hospital from 19th June, 2008 until 30th June, 2008 when he was discharged.

The foregoing facts were recounted to the trial court by Gerishon, Joseph, Edwin, Tanki and Luke; with the testimonies of PW 6 Cecilia Wanjiku Njoroge (Cecilia), PW 7 Ag. IPJames Wambua (Ag. IP Wambua), PW 8 PC Jacob Lenaiyar (PC Lenaiyar), PW 9 CI Solomon Kurgat (CI Kurgat), PW 10 Lindsay Kipkemei (Lindsay), PW 11 PC Daniel Kiragu (PC Kiragu) and that of PW 12 CI Moses Kibet Arap Sang (CI Sang), PW 13 Ag. IP Phelemon Kiplagat (Ag. IP Kiplagat), PW 14 CPL Paul Limo (CPL Limo), PW 15 PC Ezekiel Njage (PC Njage), PW 16 CPL Mugo (CPL Mugo) (as recounted by PC Kiragu); cumulatively confirming that Gerishon and Joseph sustained gunshot wounds and rendering an

account of investigations by police following the events of the material date. We note that the testimony of CI Sang was ruled inadmissible for want of compliance with **Section 25A** of the **Evidence Act**.

In their defence each of the appellants gave sworn statements with the 1st appellant's statement premised on an alleged grudge which CPL Limo allegedly harboured against him. According to him the said police officer was under the impression that he was out to befriend a lady by the name Agnes who was allegedly a girlfriend to the officer hence the decision to implicate him in the events of the material date. On his part, the 2nd appellant advanced the defence of alibi contending that on the material dates he had been hired to construct a house for one Dan Gichohi, and was not in the vicinity when the events of the material date occurred. At the conclusion of the trial the learned trial magistrate convicted the 1st and 2nd appellants of the main charge and sentenced them to death as by law prescribed. She acquitted them of the alternative counts pursuant to **Section 215** of the **Criminal Procedure Code**. Dissatisfied with the trial court's judgment, the appellants lodged an appeal at the High Court, which in turn dismissed the appeal but substituted the sentence to imprisonment with a term of 20 years.

Aggrieved and dissatisfied yet again, the appellants have now brought this second appeal wherein they lodged similar memoranda of appeal containing 5 grounds of appeal. These grounds can be summarized as follows:-

> ***. The 2nd(sic) appellate judges made a crucial error in a matter of the law and fact in passing the conviction of 20 years imprisonment on the alleged charge of attempted robbery c/s 297 (2) of the Penal Code without observing that the same section is in conflict with Section 389 of the same code.***
>
> ***. The 2nd (sic) appellate judges made a crucial error when seemingly based the conviction on misapprehension merely adduced in court by the prosecution without considering that identification was below standard.***
>
> ***. The 2nd (sic) appellate court made a crucial error when (sic) maliciously based the conviction on the purported evidence tendered in court by the prosecution witness without considering the fact that the weight of the evidence was below the standard required for the proof of the offence.***
>
> ***. The 2nd (sic) appellate court made a crucial error when (sic) erroneously objected my defence without cogent reasons as provided by Section 169 (1) of the Criminal Procedure Code yet the same was remarkably comprehensive in casting doubts to the strength of the prosecution case.***
>
> ***. May the appeal be allowed, conviction quashed and the sentence set aside.***

The said grounds were further supplemented by two strikingly similar grounds contained in Supplementary Memoranda of Appeal advanced by both appellants to the effect that:-

> ***. Both the trial court and the first appellate court erred in law in holding that evidence on identification was credible and that the identification of the appellant/s at the identification parade was free from irregularities or procedural anomalies.***
>
> ***. The substituted sentence meted out by the first appellate court of 20 years was a sentence in error and which sentence contravened the provisions of Section 389 of the Penal Code as read together with Article 50 (2) (p) of the Constitution and as such the substituted sentence was excessive, manifestly harsh and unlawful.***

Mr. Kanyi Ngure, learned counsel appeared for both appellants, while Miss Nelly Ngovi, learned Prosecution Counsel appeared for the State at the hearing of the appeal. Mr. Ngure dealt with the appeal under two themes as outlined in the Supplementary Memorandum of Appeal namely: - identification and erroneous sentence. He submitted that Gerishon, Joseph and Edwin who testified on behalf of the prosecution before the trial court did not give a proper first report to any police officer identifying their

assailants. Counsel contended that Edwin gave a report on 19th June, 2008, but the same did not contain any description of their assailants; and that it was the only report made of the incident of attempted robbery. Counsel further submitted that Gerishon never made any initial report, nor did he attend any ID Parade for that matter, and that all he did was make a dock identification which is unreliable.

Contradictions in Gerishon's statement with regard to the number of assailants on the material date came under the spotlight with counsel's submission being that whereas Gerishon testified that two robbers had emerged from the bushes on the roadside, his statement to the police put the number of assailants at three. Learned counsel submitted that Joseph never made a first report to the police, in the absence of which any ID Parade amounts to guesswork or based on information passed to him by other people. Counsel further submitted that under cross-examination Joseph testified that he saw the face of their assailant and the jacket he wore, but had not given a description; and that under cross-examination by the 2nd appellant he said he saw the ears of one assailant which "were flared".

The said description was not given to the police.

The description of the assailant's clothing was next with counsel contending that although Joseph had testified that one of their assailants wore greenish trousers, he later recanted this testimony. It was also submitted that during the ID Parade, only the 2nd appellant had a jacket on.

Edwin's evidence came under attack with learned counsel querying the variations in the number of assailants cited therein. He submitted that while Edwin testified that he had seen two assailants; his written statement indicated that he had only seen one man. Counsel wondered aloud how the said witness could identify two people at the subsequent ID Parade yet he had written a statement to the effect that he had seen one robber? Counsel also faulted Edwin's description in testimony of a jacket which was allegedly worn by one of their assailants, contending that he never described it to the police. On the question of identification, counsel urged us to be guided by the cases of:-***SIMIYU&ANOTHER V REPUBLIC*** ***[2005] 1KLR 192*** and ***TEKERALI s/o KORONGOZI&4 OTHERS V REPUBLIC*** ***[1952] EACA 259***; wherein the importance of a first report has been emphasized.

We were also addressed by Mr. Ngure on what he termed as an erroneous sentence on the part of the first appellate court. He submitted that the sentence of 20 years was contrary to **Section 389** of the **Penal Code** as read with **Article 50** of the **Constitution**. Moreover, he submitted that the sentence was unlawful, since **Section 297 (2)** of the **Penal Code** prescribes death as the punishment for attempted robbery with violence. We were urged to consider the holding in ***BONIFACE JUMA KHISA V REPUBLIC[2011] eKLR*** in this regard. Counsel submitted that the appellants should therefore have the benefit of the least severe

sentence which in this case should be no more than 7 years in case the convictions are not quashed as he urged us to Miss Ngovi opposed the appeal and submitted that whereas the first report to the police was important, it did not form part of the substantive evidence. She submitted that where no description is given, it is not fatal and, moreover, should not be held against the complainants as it is the police who record the 1st report and they may have left out some of the information given. Accordingly, dock identification was not applicable herein as the witnesses saw the appellants clearly.

Counsel strongly refuted allegations to the effect that the prosecution witnesses had been coached during the ID Parade. She submitted that the parade was properly conducted and the appellants were satisfied with the same as can be seen from their respective entries in the comment section of the parade form namely: -*"nimetosheka"* (I am satisfied). It was submitted that ***PC LENAIYAR*** arrested the appellants after they were found to be strangers in the locality.

On sentence counsel submitted that **Section 389** of the **Penal Code** was repealed in February of 2010. In the circumstances, the case of ***BONIFACE KHISA V REPUBLIC*** (Supra) which had been cited by the appellants was *per incuriam*. At any rate, counsel submitted that the said section applied in instances where there was no other sentence provided. **Section 297 (2)** prescribed a sentence.

It was further submitted that the sentence of death was proper and should be reinstated. For this proposition we were urged to consider the case of***JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC [2013] eKLR*** which confirmed the validity of the death sentence for attempted robbery with violence. We were urged to correct and reinstate the sentence. We state straightaway that **Section 389** of the **Penal Code** has not been repealed and remains in force but the proper sentence for attempted robbery with violence is death.

In response Mr. Ngure reiterated that the first statement to the police is relevant especially where the testimony in court did not reflect what was in the statements but was full of contradictions. Without a first report there can be no proper identification parade and other than the identification parade, nothing else connected the appellants to the offence.

As this is a second appeal we are only allowed to consider issues of law only. See **Section 361 (a)** of the **Criminal Procedure Code** and cases such as ***NJOROGE V REPUBLIC [1982] KLR 388 and THIONG'O V REPUBLIC [2004] 1 EA 333***. We remain conscious of the need to respect the concurrent findings of fact by the two courts below, interfering only if they are bad in law; either for want of evidence; a misapprehension of evidence; or that no reasonable tribunal directing its mind to the evidence would have arrived at such findings. See ***CHRISTOPHER NYOIKE KANG'ETHE V REPUBLIC[2010] eKLR***.

This appeal turns on the question of identification. The holding of this Court in ***WAMUNGA V REPUBLIC [1989] KLR 424***is relevant in our consideration of the matter.

Therein the Court held that:-

> ***"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".***

The evidence on identification primarily revolves around the testimonies of Gerishon, Joseph, Edwin, Ag. IP Wambua and that of Ag. IP Langat. The evidence of the civilian trio qualifies as direct evidence, while that of the police officers can be termed as a derivative of the same in form of the respective identification parades. It would be worthwhile to pause at this juncture and consider the purpose of an identification parade. The case of ***NJIHIA V REPUBLIC [1986] KLR 422*** comes to our aid at page 424:-

> ***"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not possible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime"***

We are ill- at- ease with the testimonies of Gerishon, Joseph and Edwin with regard to identification and now reproduce some of the troubling portions thereof;

> ***Gerishon -under cross-examination by 2nd appellant:***
>
> ***"…. 3 robbers emerged from the side road bushes and one was armed with a gun…."***

Joseph's rendition under examination-in-chief:

"As we went up the hill- I saw 2 people-one had a gun".

Under cross-examination by the 2nd appellant:

"I saw you-your face-your whole face-I saw you in your jacket".

Under cross-examination by the 1st appellant:

"I saw you. I even noticed your ears- the way your ears are flared".

"I did not record the way your ears looked like."

"I can see even now the way they are flared".

"I first noticed your jacket." "I saw your trouser-it was greenish".

"I did not record that".

"At the parade no one else had your jacket". "I would still identify you even if others were in the same jacket".

Edwin's rendition under examination-in-chief:

"It is Accused 1 (2nd appellant) who had the gun. He is the one who shot at us. The other one had something black. I did not see it well-because when they came out-I lay on the dashboard. The gun appeared like it was made with wood".

Under cross-examination by the 2nd appellant:

"You were in a jacket that was grayish with stripes of red, yellow and white".

Under cross-examination by the 1st appellant:

"During the identification parade I managed to identify the two gangsters who waylaid us on the road…."

The trial court observed on identification as follows:-

"Thus though the evidence of PW 1 (Gerishon) and PW 3 (Edwin) cannot be relied on whole on identification-PW 2 (Joseph) appeared more sober-and his act of trying to run down the shooting robber shows that he was alert……"

The first appellate court stated as follows:-

"The evidence as outlined in the foregoing passages of this judgment, and particularly that of PW 1 (Gerishon), PW 2 (Joseph), PW 3 (Edwin) and PW 5 (Luke) as tied up by that of PW 12 (CI Sang) clearly shows the appellants were properly identified, as the persons who attempted to rob the complainants".

It rendered itself as follows on the question of 'flared ears':-

"And of the 2nd appellant PW 2 (Joseph) testified that he saw him 30 meters away, as he jumped from the bush on to the road, he noticed his "flared ears", he saw the face of the 2nd appellant,

his greenish trouser, more importantly, PW 2 (Joseph) identified both appellants at the Police Identification Parade".

We have gone to great lengths to settle the question of identification as the same has to be determined beyond reasonable doubt. See ***WANJOHI &2OTHERS V REPUBLIC[1989] KLR***. Whereas the trial court had its doubts with the evidence on identification as recounted by Gerishon and Edwin, it accepted the version tendered by Joseph on account of his 'soberness'. On its part, the first appellate court endorsed the testimonies of Gerishon, Joseph and Edwin on identification, and even tied up the same with the 'flared ears' which did not feature in Joseph's first report or the subsequent identification parade.

Upon consideration of this limb of evidence and the record as a whole, we are left with lingering doubts as to the identity of the would-be robbers on the material date. The discrepancies are far too many in our considered view. Accordingly; we find and hold that the question of identification was not settled beyond reasonable doubt. Would our finding warrant a departure from the findings of fact by the two courts below?

In ***DANIEL KABIRU THIONG'O V REPUBLIC-NYERI CRIMINAL APPEAL NO 131 OF 2002 (Unreported)*** this Court stated that:-

"An invitation to this court to depart from concurrent findings of fact by the trial and first appellate court should be declined by the second appellate court unless it is persuaded that there are compelling reasons for doing so".

We answer in the affirmative.

What is the effect of our finding in the preceding paragraph? Simply put the appellants conviction was unsafe and should not stand. The upshot is that the appellants' identification was not free from possibility of error and their convictions were thus unsafe.

We accordingly quash them and set aside the sentences imposed. The appellants shall be set at liberty forthwith unless they be otherwise lawfully held.

Judgment delivered under Rule 32(2) of the Court of Appeal Rules.

Dated and delivered at Nakuru this 17th day of November, 2016

R. N. NAMBUYE

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JUDGE OF APPEAL

P. M. MWILU

……..……

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