



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)**

**CRIMINAL APPEAL NO. 77 OF 2012**

**BETWEEN**

**DENIS MWAMBELA MWAWASI..... 1<sup>ST</sup> APPELLANT**

**MICAH MWANGWALE MWATA.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of High Court of Kenya at Mombasa (Odero, J.) dated 14<sup>th</sup> February, 20112*

in

H.C.Cr.A. No. 297 of 2008)

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**JUDGMENT OF THE COURT**

[1] This is a second appeal lodged by the two appellants **Denis Mwambela Mwawasi** and **Micah Mwangwale Mwata** (hereinafter referred to as 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant respectively). The two appellants were tried and convicted by the Senior Resident Magistrate's Court at Voi on two counts of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, in addition, the 2<sup>nd</sup> appellant was also charged with two counts of being in possession of a firearm without a firearm certificate contrary to **section 4(1)** as read with **section 4(3)** of the Firearm Act Cap 114 Laws of Kenya. The particulars in regard to count I, alleged that the two appellants jointly while armed with a pistol robbed **Michael Mukua** (*Mukua*) who is the complainant in count 1 and threatened to shoot him. In count 2, the two appellants were similarly alleged to have robbed **James Githae** (*Githae*) who is the complainant in count 2 and threatened to shoot him. In count 3 and 4, the 2<sup>nd</sup> appellant was alleged to have been found in possession of a browning pistol serial No. 29796 and 11 rounds of live ammunition respectively without a Firearm certificate.

[2] During the hearing of the case ten witnesses testified for the prosecution. Briefly, the two complainants were on the material night at the house of **Lawrence Mwata-PW3** (*Lawrence*), in Wundanyi. Lawrence had at the request of his cousin **Nancy** accommodated the two complainants from

10<sup>th</sup> June 2006. The duo who were from Nairobi had come to Wundanyi to do some renovation work on the graves of Nancy's parents. Prior to the material night, the 2<sup>nd</sup> appellant had passed by Lawrence's home, and greeted the complainants. On the material day, the 1<sup>st</sup> complainant met the two appellants at around 6p.m. as he was coming from the shops. Later at around 7.30p.m. while the complainants were inside the house using a lantern light, the 2<sup>nd</sup> appellant came asking for Lawrence. He was told that Lawrence was not in although he was expected. The 2<sup>nd</sup> appellant then went outside the house, and the complainants heard him talking to someone in Kitaita language. He then came back into the house accompanied by the 1<sup>st</sup> appellant who was wearing a hat and holding a pistol. The 2<sup>nd</sup> appellant picked a knife from the table. The 1<sup>st</sup> appellant then cocked the gun and demanded Kshs.10,000/- from the complainants. The complainants pleaded that they did not have any money but the 2<sup>nd</sup> appellant ordered them to go to the bedroom and look for money. The 2<sup>nd</sup> appellant picked the lantern and the complainants together with the appellants went into the bedroom. The 1<sup>st</sup> complainant gave the appellant Kshs.500/- while the 2<sup>nd</sup> complainant gave them his wallet which contained Kshs.50/-.

[3] At that juncture, Lawrence opened the main door and entered the house. On hearing him enter, the appellants dropped the lantern and rushed out. Lawrence met the two men as they came out of the bedroom, he addressed them, but they did not respond but merely rushed out of the house. He recognized one of the two men as the 2<sup>nd</sup> appellant who was well known to him as "**Micah**". Lawrence and the two complainants reported the matter at Wundanyi Police Station. They thereafter led police officers including the **OCS Chief Inspector David Mwangangi (PW9)** and **Cpl Robert Muringa (PW6)** to the house of the 2<sup>nd</sup> appellant. Upon the 2<sup>nd</sup> appellant being questioned as to where the firearm was, he informed the police that it was underneath the mattress. The police searched and recovered a browning pistol serial No. 28976 loaded with 11 rounds of ammunition from underneath the mattress.

[4] The 2<sup>nd</sup> appellant was arrested and taken to the police station. Upon interrogation, he gave the police the name of the 1<sup>st</sup> appellant. The following day, he took Chief Inspector Mwangangi and other officers to where the 1<sup>st</sup> appellant works and the 1<sup>st</sup> appellant was arrested. Upon being questioned about the knife, the 1<sup>st</sup> appellant took the police officers including **Cpl Morris Kithuku (PW10)** and **PC James Thuva (PW5)** to a place near Lawrence's house where the knife was recovered. The browning pistol that was recovered from 2<sup>nd</sup> appellant's house was identified by **Sgt Dickson Mjomba (PW8)** as the pistol issued to him and of which he was robbed together with 18 rounds of ammunition on 9<sup>th</sup> April, 2006.

[5] On 17<sup>th</sup> June, 2006 at the request of Cpl Kithuku, **Chief Inspector Jackson Kieti (PW7)** conducted an identification parade during which the 1<sup>st</sup> appellant was positively identified by both the 1<sup>st</sup> and 2<sup>nd</sup> complainants. The pistol and the 11 rounds of ammunition were later forwarded to the ballistic expert and were examined by **Inspector Alex Mudindi Mwandawiro (PW4)** who prepared a report which he produced in evidence. In his report, IP Mwandawiro confirmed that the pistol was capable of being fired and that the pistol and the ammunition were firearm and ammunition as defined under the Firearms Act Cap 114 Laws of Kenya. The pistol, rounds of ammunition and the knife were all produced in evidence as well as a grey jacket and a t-shirt which CIP Mwangangi identified as what the 2<sup>nd</sup> appellant was wearing at the time of his arrest.

[6] Each appellant gave unsworn statement in their defences. The 1<sup>st</sup> appellant stated that on the 16<sup>th</sup> June at around 9a.m. he was at his place of work when he saw police officers arrive in a vehicle. The police officers asked for Denis and he identified himself as Denis. He was then handcuffed and taken to Wundanyi Police Station. Later he was taken to Voi Police station where he was locked up. On 17<sup>th</sup> June, he was made to attend an identification parade, in which he was identified by the two complainants. He was subsequently charged. The 1<sup>st</sup> appellant challenged his identification explaining that the two complainants admitted that they were able to identify him because they had seen him when he was under arrest at Wundanyi Police Station. He pointed out that he had a particular mark near his right ear.

[7] The 2<sup>nd</sup> appellant explained that he was asleep in his house when he heard a knock on the door and

upon opening saw Lawrence who is his neighbor. Before they could talk, police officers appeared and ordered the 2<sup>nd</sup> appellant to sit down. They handcuffed him and ordered him to go out of the house. They then entered the house and came out with a grey jacket and a red t-shirt. He was taken to Wundanyi Police station where he was locked in. The next day he was taken to the office of the OCS where he found Lawrence and the two complainants whom he did not know. He was then taken to Voi CID offices where he was kept for twenty days. It was only after he complained about his incarceration that he was charged in court. He denied having been in possession of the pistol and claimed he saw it for the first time in the trial court. He maintained that on the night PW8 is alleged to have been robbed of the pistol, he (that is the 2<sup>nd</sup> appellant) was admitted at Wesu Hospital. He produced a Hospital Discharge Summary.

[8] In her judgment, the trial magistrate found that the 2<sup>nd</sup> appellant was identified as one of the robbers through recognition by the two complainants and Lawrence; that the identification parade in regard to the 1<sup>st</sup> appellant was not necessary as both complainants had confirmed that the 1<sup>st</sup> appellant had robbed them; that the identification of the 1<sup>st</sup> appellant was corroborated by the recovery of the knife by police officers who were led to where the knife was by the 1<sup>st</sup> appellant; and that the pistol and rounds of ammunition were recovered from the 2<sup>nd</sup> appellant's house. The trial magistrate therefore convicted each of the two appellants of the offences as charged and sentenced each appellant to death in regard to count I and 2 and also sentenced the 2<sup>nd</sup> appellant to five years imprisonment in each of count 3 and 4.

[9] Being aggrieved by the conviction and sentence, the appellants appealed to the High Court. The appeal in the High Court was heard and dismissed by **Odero & Tuiyott, JJ**. The 1<sup>st</sup> appellant then lodged this second appeal in which he challenged the judgment of the High Court on five grounds through a memorandum of appeal prepared by **J. O. Magolo & Co. Advocates**. When the appeal came up for hearing, it transpired that the 2<sup>nd</sup> appellant had also filed an appeal and it was therefore desirable that the appeals be heard together. Subsequently, **Mr. Ngumbao** was instructed to appear for both appellants and he filed a memorandum of appeal for both appellants dated 16<sup>th</sup> October, 2014 in which he raised the following grounds:

“i). *That the 1<sup>st</sup> appellate court judges erred in law by failing to*

*arrive at the finding that count III and count IV against the appellant was fatally defective and contravened **Article 50(2)** of the Constitution of Kenya.*

ii). *That the 1<sup>st</sup> appellate court judges erred in law by failing to re-analyse and re-evaluate the evidence on record exhaustively.*

iii) *That the 1<sup>st</sup> appellate court judges erred in law by failing to meticulously examine the issue of identification of both the appellants.”*

[10] During the hearing of the appeal, Mr. Ngumbao abandoned the grounds that had been earlier filed by Mr. Magolo except for the following ground which he adopted and added to the grounds he had filed:

*“That the learned judge of the superior court erred in law in finding that the charge as laid was proper and not defective”.*

[11] In arguing the appeal, Mr. Ngumbao submitted that the information in Count 3 and 4 of the charge revealed no offence in terms of **section 137(a)** and **134** of the Criminal Procedure Code since **section 4(1)** of the Firearms Act is merely a definition section and does not create any offence; that without **section 4(2)** of the Firearms Act being incorporated in the charge, the appellant was prejudiced as he could not be availed of the defence provided under **section 77(b)** of the Constitution of Kenya which was then in force; he maintained that the charge against the appellants was therefore fatally defective.

[12] On the issue of identification, Mr. Ngumbao submitted that the attack having occurred at night, the

identification of the assailants was not free from the possibility of error; that the intensity of the source of light that is the lantern was not interrogated; that Lawrence met with the appellants in the sitting room when the lantern was in the bedroom and that his evidence of recognition was not free from error; that Lawrence contradicted himself with regard to who was wearing the hat. Counsel therefore urged the court to find that the evidence before the trial judge was not sufficient to justify a conviction.

[13] **Mr. Musyoki**, Senior Principal Prosecution Counsel who appeared for the State urged the court to uphold the conviction arguing that **section 4(1)** of the Firearms Act defines and creates the offence of being in possession of a Firearm, and that the charge was therefore not defective; that the evidence of identification was overwhelming as 2<sup>nd</sup> appellant was identified by the 1<sup>st</sup> complainant and Lawrence; that Lawrence had known the 2<sup>nd</sup> appellant for quite some time; that the 2<sup>nd</sup> appellant was arrested just a few hours after the robbery; and that it is the 2<sup>nd</sup> appellant who led the police to the 1<sup>st</sup> appellant who in turn led the police to the recovery of the knife.

[14] This being a second appeal, **section 361** of the Criminal Procedure Code limits the jurisdiction of this Court to matters of law only. In addition, this Court has also an obligation to pay homage to the concurrent findings of the lower court on matters of facts unless it is established that the same is not anchored on evidence or that the findings were of such a nature that no reasonable tribunal could be expected to base a decision upon it (see ***Boniface Kamande & 2 Others v Republic [2010] eKLR***).

[15] The appeal has raised issues of law regarding the propriety of count 3 and 4 of which the 2<sup>nd</sup> appellant was convicted, secondly, two other issues have arisen that is: whether the appellants were positively identified as having participated in the robbery, and whether the first appellate court discharged its required obligation of analyzing and reevaluating the evidence in order to arrive at its own independent conclusions.

[16] In counts 3 and 4, the 2<sup>nd</sup> appellant was charged with possession of a firearm without a firearm certificate contrary to **section 4(1)** as read with **section 4(3)** of the Firearms Act. **Section 4** of the Firearms Act states as follows:

**“4. Penalty for purchasing, etc., firearms or ammunition without firearm certificate.**

1. ***Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he owns a firearms certificate in force at the time.***

***(2) If any person -***

- (a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized;***
- b) fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to this Act, be guilty of an offence.***

***(3) Any person who is convicted of an offence under subsection (2) shall -***

- a) if the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years; or***
- (b) if the firearm is any other type or the ammunition for any weapon not being a prohibited weapon be liable to imprisonment for a term of not less five, but exceeding ten years.”***

[17] From the above, it is evident that while **section 4(1)** of the Firearms Act prohibits any person from being in possession of a firearm without a certificate, it is **section 4(2)** of that Act that creates an offence. Indeed **section 4(3)** of the Act provides a penalty for the offence created under **section 4(2)** of that Act. Therefore, learned counsel Mr. Ngumbao was right in arguing that the charge against the 2<sup>nd</sup> appellant ought to have incorporated **section 4(2)** of the Firearms Act. The question is whether the omission is fatal.

[18] **Section 382** of the Criminal Procedure Code provides as follows:

“382.

*Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission, or irregularity has occasioned a failure of justice.*

*Provided that in determining whether an error omission or irregularity has occasioned the failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”* (Emphasis added)

[19] Therefore, the issue to be addressed herein is whether the 2<sup>nd</sup> appellant was prejudiced by the omission to include **section 4(2)** of the Firearms Act in the charge, and whether that omission occasioned a failure of justice. It is noteworthy that although the appellants were represented by counsel both during the trial in the lower court and at the hearing of the first appeal, neither in the trial court nor in the High Court did counsel raise any objection to counts 3 and 4 or challenge the legality of the charges. The record of the trial court reveal that evidence was adduced with regard to the 2<sup>nd</sup> appellant’s alleged possession of the pistol and rounds of ammunition. Evidence was also adduced to establish that the 2<sup>nd</sup> appellant’s possession of the firearm and ammunition was illegal, by demonstrating that the firearm was in fact issued to Sgt Dickson Mjomba a police officer who was robbed of the same a few days before the complainants were robbed. The 2<sup>nd</sup> appellant was well aware of the charge that was facing him and the evidence adduced in regard to that charge. Thus, he did not therefore suffer any prejudice nor was any failure of justice occasioned, and the omission to include **section 4(2)** of the Firearms Act in the charges relating to counts 3 and 4 can be cured by **section 382** of the Criminal Procedure Code. Further, the 2<sup>nd</sup> appellant’s attempts to distance himself from the firearm by alleging that he was admitted at Wesu Hospital on the date Sgt Mjomba is alleged to have been robbed of the firearm, was properly rejected as the charge against him was that of possession of the firearm and ammunition, and not the robbery of the firearm.

[20] With regard to the evidence of identification, the two lower courts made concurrent findings that the two complainants were robbed on the night of 15<sup>th</sup> April, 2006. The issue was whether the identity of the two persons who robbed the complainants was positively established. In ***Wamunga v Republic [1989] KLR 424***, this Court (differently constituted) held that:

“1. *Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*

2. *Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”*

[21] We also take note of ***Anjononi & Others v Republic [1976-80] 1 KLR 1566***, where this Court

(differently constituted) observed that:

***“Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other.”***

[22] In this case, the evidence of identification in regard to the 2<sup>nd</sup> appellant was primarily that of Lawrence who maintained that he had seen him and recognized him when he came out of the house. Lawrence arrived at his house and interrupted the robbers during their mission. In his evidence Lawrence stated that he had known the 2<sup>nd</sup> appellant for a long time as he had “grown up with him”. It is evident that when Lawrence entered the house, the complainants and the assailants were in the bedroom with the lantern and therefore the light at the door where Lawrence met with the men as they went out may not have been very bright as it was filtering through the ceiling and the corridor. However, Lawrence knew the 2<sup>nd</sup> appellant well as he was not only a neighbour but someone he had grown up together with. Lawrence’s insistence that he saw and identified the 2<sup>nd</sup> appellant was consistent with the recovery of the pistol and ammunition from the house of the 2<sup>nd</sup> appellant. The fact that the 2<sup>nd</sup> appellant also led the police to the 1<sup>st</sup> appellant who in turn led the police to the recovery of the knife, also lends credence to the evidence of Lawrence. Moreover, the complainants were also able to describe the 2<sup>nd</sup> appellant whom they had opportunity to see well with the assistance of the lantern lamp when he first entered the house and innocently asked for Lawrence. We find that although the circumstances were not very favourable for identification, the 2<sup>nd</sup> appellant’s identification through recognition by Lawrence did not stand alone but was reinforced by the recovery of the pistol and the evidence of the complainants.

[23] As for the 1<sup>st</sup> appellant, he was implicated by the 2<sup>nd</sup> appellant who led the police officers to where the 1<sup>st</sup> appellant works. Upon arrest, he led the police officers to recovery of a knife which was identified by the complainants as one of the weapons used to threaten them during the robbery. We note that although an identification parade was carried out during which the 1<sup>st</sup> and 2<sup>nd</sup> complainants purported to identify the 1<sup>st</sup> appellant as one of the persons who robbed them, both the trial court and the High Court rejected the evidence of the parade identification as both witnesses were found to have seen the 1<sup>st</sup> appellant before the identification parade. In light of the concurrent findings of the two lower courts, the evidence of identification of the 1<sup>st</sup> appellant by the complainant remained mere dock identification which was of little value.

[24] From the evidence of the complainants, they only saw the 1<sup>st</sup> appellant at the time he allegedly entered the house with the firearm. It is apparent that the circumstances were not favourable for a positive identification as the robbery took only a short time, the light in use in the house was a hurricane lamp, and the complainants were being harassed by the robbers. The learned Judges being alive to this fact stated as follows regarding the 1<sup>st</sup> appellant who was the 2<sup>nd</sup> appellant in the High Court:-

***“We do agree that if the only evidence linking the 2<sup>nd</sup> appellant to this crime was the evidence of the 1<sup>st</sup> appellant, then certainly his conviction would stand faulted. However, in our assessment of the evidence apart from the visual identification by PW1 and PW2 placing the 2<sup>nd</sup> appellant at the scene of the crime there exists the more compelling evidence of the recovery of the knife used during the course of the robbery PExhibit 4. PW4 PC James Thuva told the court that he and other officers went to Taratibu Hotel where the 2<sup>nd</sup> appellant was working. They arrested him and the 2<sup>nd</sup> appellant showed the police where he had hidden the knife...”***

[25] The knife which was described in the trial court as a small knife with a wooden handle tied with a black tyre band was positively identified by Lawrence as his knife. We concur with the trial court that there is no way the 1<sup>st</sup> appellant could have known the exact location of the knife in the bush without having been an active participant in the robbery where the knife was used.

[26] We come to the conclusion that the learned Judges cannot be faulted as they properly subjected the evidence to a fresh analysis and came to the correct conclusion that there was sufficient evidence upon which the 1<sup>st</sup> and 2<sup>nd</sup> appellants' convictions could be sustained. As regards the sentence, the appellants were sentenced by the trial court to the mandatory death sentence in regard to count 1 and 2, and in addition 2<sup>nd</sup> appellant was sentenced to five years imprisonment on counts 3 and 4. These sentences are all lawful. The learned Judges rightly ordered the sentence in regard to count 3 and 4 to be held in abeyance in light of the death sentence imposed. Nonetheless, it is obvious that the death sentence in regard to count 1 and 2 cannot both be executed. Accordingly, we order that the death sentence in regard to count 2 be also held in abeyance.

The upshot of the above is that the appeals are both dismissed.

*Dated and delivered at Malindi this 20<sup>th</sup> day of March, 2015*

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**