



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI - PCA, MWERA & MURGOR, JJA)

CRIMINAL APPEAL NO.70 OF 2004

BETWEEN

DAVID MUVENGEI.....APPELLANT

AND

REPUBLICRESPONDENT

(An Appeal from a sentence of the High Court of Kenya at Nairobi (Rawal, J.), dated 22nd October, 2003

in

HC.CR.C. No.36 of 2003)

JUDGMENT OF THE COURT

The trial of the appellant was preceded by what were then called committal proceedings, but since removed from the statute book. The proceedings started on 29th January, 1999 in the Chief Magistrate's Court, Nairobi. On 6th October, 1999 the appellant was committed to stand trial for the offence of murder contrary to Section 203 as read with section 204 of the Penal Code. It is not necessary to restate the statutory provisions in play then. They were all complied with and on 3rd June, 2003 **Rawal, J.** as she then was, commenced the trial with the aid of three assessors. That was the mode of conducting murder trials, but it, too, has since been removed from the Criminal Procedure Code. In the information presented to court by the Director of Public Prosecutions, it was alleged that on 11th December, 1997 at Mbotela Estate, Nairobi the appellant murdered **George Ng'ang'a Chege**.

After hearing twelve witnesses, the learned judge summed up the case to the assessors as was then required. They returned the opinions that the appellant was guilty of murder as charged. The learned judge reviewed the evidence adduced and found that four witnesses who were at the scene:

“...specifically and categorically identified the accused being a member of the three men who had terrorized or had raided Mbotela Shopping Centre on the said date and time. Apart from PW1, all other three witnesses had known the accused prior to the incident being the person from the area.”

Since this is the first appeal whereby we will review, re-evaluate the evidence on record then come to our own conclusions, suffice it at this juncture to note that the trial judge took evidence that the incident took place in the afternoon and the appellant was arrested and the revolver used to shoot and kill **George Nganga Chege** was recovered. The death occurred during an aborted robbery. The learned judge citing the case of **Republic vs Betts and Ridley 22 Criminal Appeals R.141**, concluded:

“In my view, firing a lethal weapon while running away together to escape mob justice is a direct consequence of their joint venture and even if the accused might not be the person who actually shot the deceased, he definitely aided and abated in that crime.”

And with that the appellant was found guilty of the offence of murder, convicted and sentenced to suffer death as by law mandated.

Aggrieved by that decision, the appellant has brought the present appeal. He filed a home-made memorandum of appeal with five grounds. **Mr. O. Onalo**, learned counsel for the appellant adopted and argued three of those grounds together, while abandoning the rest. **Mr. C. O. Orinda**, the learned Assistant Director of Public Prosecutions opposed the appeal on behalf of the State.

Mr. Onalo started off by noting, without dispute, that **George Nganga Chege**, the deceased, died after he was shot. But he contended that the evidence on record was not clear whether or not the gun used and said to have been recovered and later examined by the firearms examiner, bore serial number 263092 which was typed on the Exhibit Memo (Exh.4) and then crossed out and indicated in hand as No.110330. Evidence of the police witnesses and the firearms examiner was gone into and even as the examiner’s report spoke of the Colt revolver serial number 110330, counsel urged us to find that there were sufficient contradictions as to the actual pistol used in shooting the deceased. To his client, there were two guns involved. **Mr. Onalo** added that allegedly recovered, were 3 spent cartridges and three live rounds of ammunition as well as the pistol, which were never produced in court.

Turning to the cause of death, counsel referred to the P3 form which contained information that the deceased sustained a wound caused by a bullet which entered his left side shoulder. And that the eyewitnesses had told the learned judge that following the aborted robbery they, together with members of the public, gave chase to catch the thugs. During the chase, the deceased (a brother, to **Thomas Chege** (PW2) was shot. Emphasis was put on the PW2’s evidence that:

“He was shot in the chest.”

And that during the chase, police joined in and randomly shot at the fleeing gangsters. The probability placed before us was that the deceased died from police fire. Counsel put in an argument, which we were not able to easily comprehend, that the deceased was shot from the back. We were not given the source of this position.

Mr. Onalo appeared also to argue that there was no proof by evidence, but only a claim, that the appellant was shot while running away and then arrested. This ground did not appear to have much bearing on the trial or the appeal and counsel did not press it.

Then it was **Mr. Orinda’s** turn to reply. In opposing the appeal, counsel grouped the twelve prosecution witnesses into three categories – the eyewitnesses, the experts and the police officers.

We heard that the incident which took place at about 3.00 p.m. was witnessed by **Stephen Mutiso** (PW1), **Thomas Chege** (PW2) and **Daniel Muthama** (PW3). Thugs entered the PW3’s shop, armed with a pistol intending to carry out a robbery. When that was foiled, they shot PW3 in the ear as they fled. Members of the public gave chase including the 3 witnesses. The gang, including the appellant, shot at their chasers. The appellant was a local boy known to the witnesses. Police officers on patrol, **P.C. Felix Leboo** (PW7) and **P.C. Ali Abdi** (PW9) joined in the chase, while shooting. The appellant was shot, injured and caught. **P.C. Abdi Ali** recovered a gun from him which was handed over to the firearms expert to examine. The gun with spent cartridges and live ammunition, were produced in court where it was apparent that the

gun's serial number or numbers was not easily legible – reading No.116388 or 110330. But the serial number – 110330 was listed on the exhibit memo and in the firearms examiner's report.

Even as counsel remarked that it was not clear whether the gun's serial number was 110330 or 263092, depending on what part of the firearm one focused on, **Mr. Orinda** submitted that the most cogent evidence came from the eye-witnesses who stated that they saw and identified the appellant, a local person known to them, who was with the gang and participated in shooting and running away from the scene.

Counsel continued that the bullet that killed the deceased entered his left side shoulder but did not exit. So there was no wound of exit. The position held by **Mr. Orinda** is that no matter who had the gun among the fleeing gang, including the appellant, they were all acting with the same criminal intent and in so doing shot at **George Ng'ang'a Chege** who died from gunshot injuries. Such was the state of things and so the appellant was properly found guilty, convicted and sentenced. It did not matter much that the injuries said to have been sustained by the appellant were not certified and exhibited in a P3 form. It made no difference to the case.

Counsel concluded by reiterating that the issue of the specific gun used and categorically by who, was not central in determining the case in the High Court. The eyewitness evidence did.

With **Mr. Onalo** having nothing to say in response, we rose to consider our judgment. This being the first appeal we are enjoined by the principle laid out in **Okeno vs Republic [1972] EA 32**, and many other decisions of this Court to the effect that:

“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”

On that account we are duty-bound to go over the evidence of the witnesses ourselves.

Stephen Mutiso Kiinga (PW1), told the trial court that at 3.00 p.m. on the material day, 11th December, 1997 he was in his father's shop or Mbotela Estate, when 3 people knocked at the door. He opened it and saw strangers. They did not answer why they were there. One of them removed a gun from his waist area. PW1 started to close the door but they pushed the door in and fired at him. He screamed, pushed the door shut and his father arrived. The thugs began to leave; PW1's father followed but a few minutes later returned bleeding from the ear. He had been shot. The two went out, raised an alarm and members of the public started chasing the thugs who were shooting. PW1 told the court that he could recognize any of those thugs, and in court he identified the appellant.

In cross-examination, PW1 said that the incident took 10 – 15 minutes and he had seen the appellant at the shop and during the chase. He told the police that he could recognize the thugs although he did not give a description of any of them in the statement he gave to the police. Called to an identification parade, he picked out the appellant. He told the court that when three police officers on patrol heard the alarm, they joined in the chase, and shot one of the thugs who was later taken to hospital for treatment. PW1 did not see the appellant shoot anybody.

Thomas Chege (PW2) was at Mbotela Social Hall on the material day at 3.15 p.m. relaxing and playing games. He heard gunshots and went out, only to witness three people trying to rob a shop. They shot someone in the ear, and at the same time there were shouts of “*thieves, thieves.*” The thugs began to flee with members of the public giving chase. Then he came upon his brother who had been shot in the chest. He took him to hospital where he later died. The witness added:

“I could recognize the person who shot my brother as I knew him before for many years. I knew him by the name “Daudi”.

In cross-examination PW2 maintained that running some 40 metres behind, he:

“...saw accused firing a short (sic) at my brother ... I knew him before”

Daniel Kiinga Muthama (PW3), a wholesaler at Mbotela Estate recalled that on the 11th December, 1997 at 3.30 p.m. he was at the shop with his son **Stephen Mutiso** (PW1). While Stephen was in the shop, PW3 was relaxing in the car outside. He heard gun shots and ran to the shop. Stephen told him that robbers had been trying to force their way into the shop. PW3 went outside. As he talked to one **William Nzomo**, a fellow shopowner, three people approached them. One took out a gun and shot PW3 in the ear. PW3 then told the court:

“After I was shot, I heard his name from others and I realized he was born in the area. I know him.”

People including PW3 began to chase the thugs. He came across **George Nyanga**, the deceased; he had been shot and was bleeding from the chest. PW3 was taken to hospital. When he went to the police station he found the appellant in the boot of a car.

There wasn't much PW3 said in cross-examination. The next witness was **Samuel Hinga Karanja** (PW4) who together with a relative identified the deceased body to the doctor who performed the post mortem.

CPL. Samuel Gichera (PW5) escorted the appellant to **Dr. Ng'ang'a** to ascertain his mental status and age. He also witnessed the post mortem of the deceased. P3 forms were accordingly filled.

P. C. **Felix Leboo** (PW6), while on patrol duties with other officers in Mbotela area on the material day, saw members of the public chasing 3 people, who he was told had tried to rob traders at Mbotela Estate. The police officer joined in the chase. One of the fleeing thugs shot at them and they, too, fired back and the one who was armed was injured. He was arrested when he fell and a gun was recovered from him with three live bullets. Three spent cartridges were also recovered. PW6 could not recall the serial number of the firearm that was recovered, but there was a firearm in court, from which he read out its number – 110330. The arrested thug was taken to hospital for treatment.

Cross-examined about the recovered firearm, PW6 told the court that, police officers did not use revolvers no.45 while on duty. They used the Colt. Shown some note attached to the firearm in court it had a serial number 116388. But for him, after rechecking the firearm, whose serial number he could not read properly, he settled on the number 110330. He had even been unable to read the gun's serial number at the time it was recovered.

William Mutungi Nzomo (PW8), another businessman at Mbotela, was sitting in his car outside his shop, when **Daniel Kiinga** (PW3) went to inform him that thieves had attacked his shop. As they talked, three men came by and asked PW3 “*why he was following*”. Before PW3 answered, one of them took out a gun and shot him in the ear. The thieves started to run, with members of the public in hot pursuit. PW8 told the learned trial judge:

“I know one of them who used to stay within there. His name is David Muvenge. I know him since (sic) one year.”

The witness took PW3 to hospital for treatment. He identified the appellant in court, adding in cross-examination:

“I have seen the person before.”

P. C. Abdi Ali Abdi (PW9) was attached to Makongeni Police Station in 1997. On 11th

December, 1997, he was with **P. C. Felix Leboo** (PW7) with other police officers, on patrol duties. When they got near Likoni Road, they saw members of the public chasing 3 men and shouting “*thieves, thieves.*” These police officers joined the chase and when they got to a place called Bahati, one of the thugs who was armed fired one shot. The police returned fire, injured one and recovered a pistol from

him. The other two continued in flight but one was later found dead near Nairobi River. The injured man was taken to Kenyatta National Hospital. The recovered pistol was a Colt 45, American Model 1917 serial No.9. Shown the gun before court, PW9 recognized it. To him, it bore the number 11088 which was not very legible. The pistol, three live rounds of ammunition and 3 used cartridges were also recovered. Later, the appellant was charged with being in possession of firearms at Makadara Law Courts where, the cartridges and bullets were produced. After a short exchange between counsel as to whether the character of PW9 could be put into question regarding non-production of the bullets and cartridges, the learned Judge ruled that nothing adverse should be inferred against him in the circumstances, and the witness continued with his evidence.

P. C. Abdi Ali then told the court that he handed the firearm to **CPL Gichie**, the investigating officer. He identified the appellant as the suspect who was shot.

In cross-examination the witness told the court that among the five police officers on patrol, only 3 of them, himself included, were armed. When the exchange of fire started between the fleeing robbers and the police, no members of the public were between them and the fleeing robbers. They were all behind the police officers. PW9 had a pistol used by Kenya Police – not the .45 revolver that they recovered. It was not the police officers that shot the deceased in the shootout. This witness, too, had some difficulty in stating whether the 1917 revolver model bore the serial number 116388 or other member.

Next, on the witness stand was **Donald Mbogo** (PW10), a firearm examiner, brought into the trial by virtue of section 77 as read with section 33 of the Evidence Act, to produce the report compiled by one **William Lubang'a** who was said to have been a firearms examiner who had since retired from the police.

PW10, told the court that his duties involved testing and examining of fire arms, ammunition, fired bullets and spent cartridges. He had worked alongside **Mr. Lubang'a** and was familiar with his handwriting and signature. **Lubang'a** was the author of the report before court which was produced as Exh.4. **Lubang'a** had narrated that he received a revolver 45" caliber serial no.110330, three fired cartridges and 3 rounds of bullets to examine. The revolver which had been marked (MFI 3) was in court. It was capable of firing the cartridges 45" caliber. On examination, the revolver was found to have fired the 3 cartridges. The report dated 14th January, 1998 was produced along with the pistol. **Mr. Mbogo** then told the court:

"Apart from serial No. at the back of this type or revolver, there would be other numbers on the yoke which is a part number."

PW10 was cross-examined. He referred to some red paper attached to the gun but he told the court that, the handwriting thereon was not that of **Lubang'a**. The writing on that paper spoke of **Peter Ng'ang'a Chege** as the deceased. It also bore the name of **David Muvenge**; and serial number 113688, model 1917. As for the exhibit, PW10 told the court that, the same was filled/written by the presenting officer –one **P. C. Waruhi**. **Mr. Mbogo** told the court that in his 30 years experience, he had not come across interference with exhibits, theirs being straight forward procedures. But he noted that on the exhibit memo, the serial number 263092 had been cancelled and number 110330 entered by hand.

He said:

"It was 263092. Inserted number was 110330 which is the correct number of the exhibit. Apart from the serial number, there were other numbers. The weapons and from my experience we (sic) correct"

At this point PW10, not having his reading glasses, was helped by the police officer present to read no.263082, with the cancelled number being 263092. Both the judge and **Mr. Njanja** learned counsel for the appellant tried to read the serial number on the subject gun, but with difficulty. The learned judge, then ordered, inter alia,

"Ref. Number is given on the memo and the same is put on (sic) the report as well as the exhibit. It is not a practice to attach a flap paper with the exhibit."

Next to be called was **Benson Maingi Mutahi** (PW11). He ran a butchery at Mbotela. On the material day, while seated in his car, he heard gunshots. When he came out PW3 with another businessman were discussing something. Three men ran to the spot and one of them fired at PW3 injuring him. People ran about with shouts of “*thieves, thieves,*” in the air. They chased the 3 men. As PW11 joined in, one of the 3 thugs shot a man. The witness was not:

“...able to see the person firing the gun. But he was a familiar face in Mbotela.”

PW11 returned to take the shot man to hospital. He then went to Makongeni Police Station to report:

“While there I heard that three people were caught up (sic) by the police and I saw one.”

Dr. Samuel Odera (PW12) performed the post mortem on the body of the deceased on 19th December, 1992. It had a bullet wound entry on the left shoulder. It caused a tear in the lung followed with massive bleeding which was the cause of death (Exh.5). **Dr. Odera’s** opinion was that the deceased was shot from the back. The bullet did not exit; it was recovered but the doctor could not remember if he handed it to the police.

The last witness was **Dr. Zephania Kamau** (PW13) who once worked with **Dr. Francis Njoroge** and was familiar with his handwriting and signature. He produced the latter’s report bespeaking the appellant’s age and mental fitness. The doctor had himself examined **Daniel Muthama** (PW3) regarding the bullet injury he suffered to his left ear, as earlier narrated. The two P3 forms were produced. That closed the prosecution case and the appellant was heard in his defence.

He denied participating in the murder of the deceased. At the material time on 11th December, 1997 he was staying with his mother at Bahati Estate. He heard noises outside and when he went to check, somebody fell by their door. People gathered there. They told the appellant that the fallen man was shot with a gun. Police officers arrived. They searched the fallen man and recovered a gun. The person was taken to the police station and then to hospital.

Then:

“I was put in cells and then was taken to court. According to the witness who arrested me, I was not involved in this offence.”

After submissions by counsel and the summing up to the assessors, which we have perused and noted, here now follows our determination:

It is not in doubt that there was an attempted robbery at the shop of PW3 at Mbotela Estate at about 3.00p.m. on the material day wherein 3 men took part, one of them armed. The armed person fired and injured PW3 on the ear. The thugs began running away; whereupon they shot and killed **George Ng’ang’a Chege**. That much is not in dispute. Then as the thugs fled, the public gave chase including the witnesses – PW1, PW2, PW3 and PW8 who are all local people at Mbotela. These witnesses were categorical and firm in their testimony that the appellant, also a local boy known to them, was among the 3 fleeing thugs. They recognized him and PW1 picked him out of the members of an identification parade. As for PW2 he was categorical that it was the appellant whom he saw shooting his deceased brother. PW2 gave his name as “**Daudi**”, while PW8 knew his name **David Muvenge** who used to live in the locality.

Then, as the chase progressed, police officers joined in - PW7 (he ought to be PW6) **P. C. Felix Leboo** and **P.C. Abdi Ali** (PW9). When the fleeing thug shot at the police, the police returned fire. They shot and injured the appellant. He fell down, he was arrested and a revolver recovered from him. Three live rounds of ammunition were recovered together with 3 spent cartridges. When examined by **Mr. Lubang’a**, the bullets were found to have been fired from the recovered revolver. The revolver was produced in court and the judge, lawyers and witnesses tried to read its serial number with varying degrees of success. But, it did not occur to the learned judge, and indeed to us, that the revolver recovered from the appellant was

not the one examined by **Mr. Lubang'a** along with the bullets. The serial number was entered on the exhibit memo and also the examination report. The fact that the typed no.263092 on the exhibit memo was cancelled and thereby inserted no.110330, did not appear to cast any doubt on the prosecution case that the revolver in question was the one recovered, examined and produced in court. About the differing numbers, PW10, **Mr. Mbogo** told the trial court:

“P. Exhibit 3 apart from the serial No. at the back in this type of revolver, there would be other numbers on the yoke which is a part number.”

That means that different witnesses could take any number appearing on the pistol, and state it but not that there were two guns involved. And the trial judge was satisfied, as we are, that the reference number given on the memo and the same appears in the report, should do. There was no misdirection on this. As we have spent quite some time on this issue, we have come to the finding that the pistol used to kill the deceased and injure PW3, was the one the gangs had on the material when they attempted to rob shops or Mbotela. One of those gangsters was the appellant. As they made to flee, witnesses who knew him recognized him among the three fleeing thugs.

In the light of the foregoing, we have looked at the defence tendered. The appellant denied being among the robbers at Mbotela. He told the trial court that he was at his mother's house at Bahati Estate when he heard noises from outside. When he got out to see, someone fell dead at their door way. Then police officers arrived and recovered a gun from him. Without more, he was placed in cells and later charged in court. The story definitely does not add up. It is not clear, and nor do we believe, that for getting out of his mother's house and seeing a man shot and lying at the door, led to his being placed in the cells and later charged. Occurrences do not just happen like that. Usually in affairs of man, there is a cause and effect. There must be a nexus to the events to make a story logical or even reasonable. There is no nexus between standing in the doorway and being hauled to the cells only to be charged with the serious offence herein. In sum, we reject the defence as devoid of reason or merit.

In this case, the appellant with others were engaged in criminal act, namely, robbing traders at Mbotela Shopping Centre. While armed, they began by confronting PW1 in his father's shop (PW13). As he tried to close them out, they shot at him, but missed. PW3 came to the shop and the three moved off. As he discussed the incident with **William Nzomo** (PW8) the thugs accosted the two and shot PW3 in the ear. Whilst escaping, they shot at the members of the public who, chased them, and in the process killed the deceased. Then the police joined in the chase. The appellant was shot and arrested while his two mates ran on. The police shot one dead, the third escaped. The conclusion to be drawn is that three robbers, including the appellant, were executing a common enterprise of criminality. They had a common intent, so to speak. In the result we agree with the learned judge's conclusion whereby she cited the case of **Mulati Wamocha vs Republic Cr. Appeal No.19 of 1999** where this Court cited, with approval, the passage in the English case of **Republic vs Betts** (supra) that:

“If several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means and one of them in the prosecution of its kills a man it is murder in all who are present whether they actually aided or abated or not, provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”

In the present case, the circumstance is even more specific to the appellant. He was in a gang executing a common criminal act, namely robbery. He was armed; he shot and killed the deceased herein. He was shot at, arrested and the offending revolver recovered from him. Being of the same mind like the trial judge, we are minded to dismiss this appeal in its entirety, which we hereby do.

Dated and delivered at Nairobi this 8th day of May, 2015

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR