



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: MUSINGA, GATEMBU & J. MOHAMMED, J.J.A)**  
**CRIMINAL APPEAL NO. 102 OF 2013 (R)**

**BETWEEN**

**JAMES KAMAU WAWERU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Ruling of the High Court of Kenya at Nairobi (F.A. Ochieng & Achode, JJ.)  
dated 30<sup>th</sup> July, 2012*

**in**

**H.C. CR. A. 41 of 2008)**

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**JUDGMENT OF THE COURT**

1. The appellant was charged with two counts of robbery with violence, one count of being in possession of a fire arm without a firearm certificate and one count of being in possession of ammunition without a firearm certificate. After full trial before the Chief Magistrate's Court at Thika, the appellant was found guilty on all the counts and, in respect of the counts of robbery with violence, he was sentenced to death, whilst for being in possession of a firearm and seven rounds of ammunition, the appellant was sentenced to 10 years' imprisonment.
2. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court (Ochieng & Achode, JJ.). The first appellate court carefully analysed the evidence that was adduced before the trial court and came to the conclusion that the appellant's convictions and sentence were safe, save for the death sentence on the second count that was held in abeyance since a person cannot suffer death twice. The first appellate court also held in abeyance the 10 years' imprisonment.
3. The appellant was again dissatisfied with that determination and moved to this Court on a second appeal.
4. This being a second appeal, the Court can only consider matters of law in such an appeal as stated

under **Section 361 (1)** of the **Criminal Procedure Code**. The Court cannot interfere with concurrent findings of fact by the two courts below, unless such findings are based on no evidence or on a misapprehension of the evidence or where the courts below are shown to have taken into account wrong principles in making their findings, see **CHEMAGONG v REPUBLIC [1984] KLR 611**.

5. Although the appellant had prepared and filed a memorandum of appeal by himself, **Ms. Khaemba**, the appellant's learned counsel, abandoned the initial memorandum of appeal and filed a supplementary one raising three grounds as follows:

*“1. That the 1<sup>st</sup> appellant court (sic) erred in law by failing to uphold the appellant conviction (sic) on the ground that there was procedural flaw when the identification parade was carried out.*

*2. That the 1<sup>st</sup> appellant court (sic) erred in law by failing to reevaluate the evidence adduced by the prosecution at the trial and thus came to a wrong conclusion.*

*3. That the 1<sup>st</sup> appellate court erred in law in upholding the appellant's conviction and sentence whereas the appellant constitutional right (sic) to a fair trial was contravened contrary to section 72 (3) (b) and 77 (1) of the former Constitution.”*

6. Before we determine the aforesaid grounds of appeal, it is necessary that we summarize the evidence that was adduced before the trial court. On 25<sup>th</sup> March, 2004 at about 11.30 a.m., **Bundi Baruthi, PW1**, a licenced firearm holder, was talking to **Edward Richu Mwaura, PW2**, outside the gate to Metal Box Factory, Thika. PW1 and PW2 saw about five to six people walking on the road, about 10 feet from where the two stood.

7. As there were other people also walking along that road, PW1 and PW2 did not take any particular interest in the group of men, until one of them suddenly stood behind PW1 and pointed a gun at his head. PW1 turned round and faced that person and then ducked to the side. The other five men surrounded both PW1 and PW2.

8. A struggle ensued between the men and PW1 and in the process PW1's firearm which had 3 rounds of ammunition as well as Kshs.4,000/= that he had were stolen. PW2 was also robbed of kshs.7,800/= and a Nokia mobile phone. Thereafter the robbers walked away without raising any commotion.

9. PW1 and PW2 reported the incident at the C.I.D. offices in Thika. They said that they could identify two or three of the robbers. PW1 said that he was able to identify one of the robbers, the appellant herein because he had a twisted left ear and a mark on his face. PW2 said that the appellant had a scar on his face and another on his left ear. An identification parade was held and PW1 and PW2 picked the appellant.

10. **Julius Ndolo, PW3**, was attached to Thika G.K. Prison as a Prison Officer. On 18<sup>th</sup> August, 2004 at about 3 p.m. he was standing near the prison dispensary when he saw the appellant being allowed to enter through the prison gates. PW3 had known the appellant before that date because the appellant had previously been imprisoned at that same prison. The witness noted that something was protruding from the left side of the appellant's waist. The appellant told PW3 that he had gone there to visit a prisoner. PW3, being suspicious of the appellant's movements, alerted security personnel who were armed.

11. PW3 then got hold of the appellant and realized that the thing that was protruding inside his clothes was a pistol that had seven rounds of ammunition. When a further search was conducted on the appellant, a police head badge was found in his possession. The appellant tried to bribe PW3 and the other security personnel so as to let him go but they declined to accept the bribe and instead informed their superiors, who handed over the appellant, the pistol and the ammunition to the police. The recovered firearm turned

out to be the one that had been stolen from PW1.

12. In his defence, the appellant stated that he was arrested on 16<sup>th</sup> February, 2004 outside a supermarket in Thika. He was taken to the gate of Thika G.K. Prison and was asked if he knew one John Njuguna. He said that he did not know him. He was questioned at length and thereafter a search was conducted on him. It was alleged that a firearm had been recovered from one of his trouser pockets. The appellant further alleged that the police and the prison officers tried to blackmail him by demanding Kshs.50,000/= for his release but he was unable to raise that money. He denied having committed the alleged offences.

13. Regarding the first ground of appeal that challenges the conduct of the identification parade, we note that PW1 had told the police that he had clearly seen one of the robbers who was armed with a pistol. He said that his left ear was twisted and that he also had a mark on his face. PW2 had also given a similar explanation to the police. The two witnesses saw the appellant in broad daylight. The trial court that had the advantage of seeing the appellant when the two witnesses testified concurred with them regarding the appellant's description.

14. PW7, the police officer who conducted the identification parade, explained in great details how the exercise was conducted. There were nine people who were paraded and PW1 and PW2 were able to identify the appellant. The appellant did not cross examine PW7 which, in our view, implies that he did not dispute his evidence. We do not therefore agree that there was any procedural flaw in the manner in which the identification parade was conducted. Consequently, ground 1 of the appeal is hereby rejected.

15. Turning to the second ground of the appeal, the appellant contended that the first appellate court erred in law by failing to re-evaluate the evidence that was adduced by the prosecution at the trial and as a result came to a wrong conclusion. We have carefully perused the judgment by the first appellate court and are satisfied that the learned judges discharged the legal burden of a first appellate court as required, see **OKENO v REPUBLIC [1972] E.A. 32**. The learned judges carefully analysed all the evidence and came to their own conclusion.

16. Ms. Khaemba further argued that the drafting of the charge sheet was in contravention of **sections 134 and 137** of the **Criminal Procedure Code** which stipulate how charges are to be framed. She submitted that the words "**immediately before or immediately after**" the time of commission of the robbery, which are ordinarily inserted in a charge of robbery with violence, had been cancelled such that the charge read that on the 25<sup>th</sup> day of March 2004 at Industrial area within Thika District, the appellant jointly with others not before court while armed with a pistol robbed Bundi Baruthi cash Kshs.4,000/=, one pistol serial number VJF 7103 and 8 rounds of ammunition and at the time of such robbery threatened to use actual violence to the said Bundi Baruthi.

17. We do not agree that the charge as framed was defective in law. In cancelling the words, "**immediately before or immediately after**", the police were specific that the threat of violence was at the time of the robbery and not immediately before or immediately after. There is nothing wrong in specifying the exact manner or time in which an accused person threatened to use violence in the course of a robbery. We must therefore reject the second ground of appeal.

18. Lastly, the appellant's counsel submitted that the first appellate court erred in law by upholding the appellant's conviction and sentence despite the fact that the appellant's constitutional right to a fair trial as protected under **Section 72 (3) (b)** and **77 (1)** of the repealed **Constitution** had been contravened. It was contended that there had been a delay of 24 days in arraigning the appellant in court. The appellant was arrested on 18<sup>th</sup> August, 2004 but was taken to court on 8<sup>th</sup> September, 2004. Our computation of time shows that from 18<sup>th</sup> August to 8<sup>th</sup> September, both days inclusive is a period of 22 days. A person charged with the offence of robbery with violence was required to be arraigned in court within 14 days of his arrest or as soon as practically possible, but where there was any delay beyond the 14 days' period the burden of explaining the delay lay upon the prosecution.

19. As rightly pointed out by **Mr. Mule, Assistant Director of Public Prosecutions**, ideally, this

ground of appeal ought to have been raised before the trial court at the earliest opportunity so that the prosecution could have been afforded an opportunity to explain the delay. That was not done. We also agree with Mr. Mule's submission that an appeal cannot be allowed on the basis of violation of a constitutional right because **Section 72 (6)** of the repealed **Constitution** gave a right to anyone who alleges that his constitutional right had been violated to move to the High Court and seek compensation by way of damages for such violation. This Court has so held in several decisions including, **JOSEPH ONYANGO OWUOR & ANOTHER v REPUBLIC, Criminal Appeal No. 353 of 2008.**

20. Having carefully considered the entire record of appeal in light of the three grounds of appeal that were argued before us, we find no merit in this appeal and dismiss it in its entirety.

*Dated and Delivered at Nairobi this 14<sup>th</sup> day of March, 2014.*

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**REGISTRAR**

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