IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME, & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 402 OF 2009

BETWEEN

EPHANTUS MUTAHI KAREGI …….....…….. APPELLANT

AND

REPUBLIC …… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Makhandia & Sergon, JJ.) dated 4th December 2009

in

H.C.CR.A. NO. 374 OF 2007)

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JUDGMENT OF THE COURT

1. The appellant, Ephantus Mutahi Karegi was arraigned before the Chief Magistrate's Court at Nyeri and charged with two counts. In Count I, the charge was robbery with violence. The particulars are that on the 4th day of June 2004 at Muhito Location Ngoru village in Nyeri District of Central Province jointly with another while armed with dangerous weapon namely pistol robbed David Wachira Magachi cash Ksh. 1200/-, one mobile phone make Erickson T20, one safaricom credit card all valued at Ksh. 10,450/= and at immediately after the time of such robbery used actual violence to the said David Wachira Magachi. In Count II, the charge was being in possession of a firearm without a valid license in force issued by the firearm licensing officer contrary to Section 4 (1) of the Firearm Act, Cap 114 of the Laws of Kenya.
2. The facts as established by the trial court was that on 4th June 2004 at about 10.30 pm, David Wachira Magachi (PW1) the complainant in the case drove home in his motor vehicle registration numbe KAC 147H Toyota salon from Kiahungu shopping centre. When he reached the gate to his house, he got out of the vehicle and opened the same. He drove in and stopped to close the gate. Suddenly, two men approached him; he took to his heels towards the farm as he was pursued by those people; he heard gunshots and fell down; the two people caught up with him and ordered him to sit down. He was then robbed of his Erickson phone and Ksh. 1,200/=. The robbers threatened to kill him. In the meantime, his wife (PW3) heard the commotion and set off the alarm system. They ordered him to tell his wife to switch off the alarm. The trio then went towards the house and PW 2 called out his wife and asked her to turn off the alarm and she complied. PW 2

was then taken to his car so that he could give those people another phone. Apparently, PW2 was aware that only one of them had a gun and that the one holding him was not armed. Instantly, PW2 hit the robber holding him with the elbow and entered his vehicle whose engine he had left running. He reversed into the gate and the robber who was next to the gate took off. PW2 pursued them and hit one of the robbers with the motor vehicle running over him in the process. He thereafter drove to Mukurweini police station and reported the incident. In company of police officers with a sniffer dog, they came back to the scene. The police dog picked up the robbers' scent and traced one of them about 30 metres away from where he had been hit by PW2's motor vehicle. The police also recovered a ceska pistol at the scene. PW 2 testified that he positively identified the appellants at the scene with the aid of security lights which were on and the motor vehicle lights as well. The person he hit with his motor vehicle turned out to be the appellant.

3. The appellant was arraigned before the trial court as the 2nd accused person alongside Mr. Elijah Mithamo Mutahi who was the 1st accused. The trial magistrate convicted the 1st and 2nd accused. Both accused persons were convicted on Count I for robbery with violence and sentenced to death. On Count II relating to possession of a firearm without license, the appellant was convicted and sentenced to a term of 3 years imprisonment; the sentence held in abeyance on account of the death sentence in Count I.
4. Both accused persons appealed to the High Court where the conviction and sentence of the 1st accused, Mr. Elijah Mithamo Mutahi, was set aside and quashed. In quashing the conviction against the 1st accused, the learned judges of the High Court expressed themselves as follows:

> **"Much as PW 2 managed to identify his assailants during the attack, is it possible, that 8 months later he may have been able to mistakenly identify the 1st appellant in the identification parade? We are not persuaded that this possibility is remote. We say so because the police identification parade was carried out 8 months later. PW 2 had not given to the police in his first report any description of the 1st appellant. There is no doubt at all that with the passage of time, people tend to forget the images or appearance of people particularly if those people are strangers and who were seen in difficult circumstances. It is on record that when the 2nd appellant was arrested, he volunteered the name of the 1st appellant as his accomplice. This information was extracted from the 1st appellant after his arrest and whilst in pain and had not even been taken to hospital. His limbs had been crushed. That being the case, nothing could have stopped him from blurting out any name so as to save himself from further agony. In any event, this evidence was coming from an accomplice and such evidence requires corroboration. That is not the case here."**

5. As regards the appellant who was the 2nd accused, the learned judges of the High Court in re-evaluating the evidence; upheld the conviction and sentence of the appellant for both Counts and expressed themselves:

> **"According to PW2, … the two people were not in hurry and they were not fearing. PW2's compound was lit with 10 security lights. It is not in dispute that the lights of his vehicle were on. His wife, PW 3, was in the house. Because of the security lights she was able to see through the kitchen window that her husband was in the company of two strangers. That would not have been possible unless there was sufficient light outside the house. The light must have been provided by the security lights. PW 2 spent time with the thugs in close proximity when they were frisking him in the farm and talking to him about the death of another person in the village. They never ordered him not to look at them. Again, they spent some time with PW 2 as one of them entered the car to look for the extra phone…. Because of the lengthy period of time that the thugs spent with PW2 in close proximity, he was in a position to identify them as they had not masked or disguised themselves at all. Apart from being identified at the scene by PW 2, he was pursued by PW2 in his vehicle when he ran away after the robbery and was knocked down about 300 metres or so from the scene of crime. The 2nd appellant has not disputed that PW2 knocked him down."**

6. Aggrieved by the decision of the learned judges, the appellant has lodged this second appeal. The grounds are that:

i. **The learned judges erred in law and in fact in upholding sentence without considering that the prosecution evidence was inconsistent with natural justice in that one cannot outrun a car for a distance of 300 metres while being pursued by the same especially after such a heinous crime.**
ii. **The learned judges erred in law and fact in upholding sentence upon reliance on inconsistent evidence of serial no assigned to the alleged recovered ceska pistol.**
iii. **The learned judges erred in law and in fact by failing to re-evaluate the trial magistrate judgment that shifted the burden of proof to the defence without considering that the defence was very strong.**
iv. **The learned judges erred in law and in fact by failing to note that there was no nexus between the appellant and the alleged recovered pistol as anybody could have left it there and noting the distance between the accused and the same, 35 metres was not an exclusive of the appellant alone.**
v. **The learned judges erred in law and in fact, by failing to find that the police denied the appellant his constitutional right by not taking him to hospital straight away but used torture and coercion to make him talk.**

7. Learned Counsel **Mr. KIMUNYA** appeared for the appellant while **Mr. J. KAIGAI**, Assistant Director of Public Prosecution appeared for the state.
8. Counsel for the appellant elaborated the grounds of appeal that the learned Judges failed to accord the appellant the benefit of doubt that the ceska pistol found at the scene was not positively identified; that Judges did not give due weight to the differences in the serial number of the ceska pistol; that PW1 and PW 6 gave inconsistent testimony that identified the ceska pistol with different serial numbers. He posed the question whether all these witnesses were referring to the same pistol allegedly recovered at the scene. He submitted that there may not have been a dangerous weapon, namely the ceska pistol recovered at the scene and this means that the offence of robbery with violence was not proved. This benefit of doubt should be construed in favour of the appellant.
9. Counsel for the state urged us to find that the conviction and sentence of the appellant fulfills the legal standard of proof beyond reasonable doubt. He submitted that identification of the appellant was free from error. On the differences in the serial number on the ceska pistol, it was submitted that the learned Judges found that this was a typographical error that was curable under Section 352 of the Criminal Procedure Code. That it was proved that robbery with violence did take place and the pistol was in constructive possession of the appellant who threatened the complainant with a firearm; that there had been concurrent findings of fact by the two courts below.
10. We have considered the rival submissions by counsel. ***In OKENO V. R. [1972] EA 32 at p. 36 the predecessor of this Court stated:-***

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R. [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS V. SUNDAY POST [1958] EA 424."**

11. This is a second appeal and by dint of Section 361 of the Criminal Procedure Code, only matters of law shall be considered. We are satisfied that the two courts below reached correct conclusion of fact that the identity of the appellant as the perpetrator of the crime had been established beyond

reasonable doubt. We see no reason to interfere with this finding. We agree with the statement by the learned Judges that:

> **"There is unchallenged evidence that PW 2 pursued the robbers in his motor vehicle so soon after the robbery. There is also unchallenged evidence that as he pursued the robbers he never lost sight of them particularly the 2nd appellant. There is uncontroverted evidence that the 2nd appellant was knocked down by PW2's motor vehicle about 300 metres from the scene of crime. The 2nd appellant was knocked down so soon after the robbery that PW2 could not have failed to immediately recognize him as a person who had just robbed him. There was no brake in the links in the chain regarding the chase and eventual knocking down of the appellant."**

12. Counsel for the appellant did not dispute that a robbery had taken place and that the appellant was at the scene of crime. From the submissions, the only issue at hand is whether it was proved beyond reasonable doubt that the appellant had a ceska pistol at the time of the offence. The issue for our consideration is whether the ceska pistol produced in court was actually found at the scene and how the learned judges evaluated this evidence. They stated:

"… there is evidence that during the robbery, one of the robbers was armed with a gun. A few meters from where the appellant had been hit with PW2's motor vehicle, a gun was found. It matters not whether what was found was a pistol and not a gun. To a common man, a gun connotes even a pistol. That pistol had live ammunition. PW2 was very clear that it was this appellant who was in possession of the gun during the robbery. Is it therefore a mere coincidence that a gun is found near where the 2nd appellant is hit and the same appellant was said to have been in possession of the gun during robbery? We do not think so. Secondly, during the robbery, 2 hedex tablets were taken from PW2's pockets. Those tablets were again found at the scene where the 2nd appellant was knocked. Is it also a mere coincidence? We do not think so. The 2nd appellant did not dispute the finding of the pistol and the hedex tablets near where he was lying. Nor did he claim them as his own. The 2nd appellant challenged the evidence relating to the gun on the basis that the pistol sent to ballistic expert was different from the one allegedly recovered at the scene. This is on the basis of differences in the serial number. PW1 stated that he recovered pistol serial number 40661 whereas the appellant was charged with being in possession of a pistol with serial no. 0661 whereas the pistol that was examined by PW6 was said to be serial No. G0661. We have looked at the original record and we are satisfied that the alleged difference in serial numbers if at all was a result of typographical error. What is important is whether the 2nd appellant was found in possession of the pistol and ammunition.... In other words, the pistol was found some metres away from where he was, he could not therefore have been in possession of the same.... However, in law, possession connotes physical as well as constructive possession. The appellant was nonetheless in constructive possession since he had been seen with the same a few minutes before he was knocked down. It was as a result of the impact of the accident that perhaps he parted with physical possession of the same."

13. Our analysis of the judgment indicates that the learned Judges erred in evaluating the testimony on the serial number for the alleged pistol. The statement that differences in serial numbers were typographical is not supported by evidence. PW1 is a trained police officer and he recorded the serial number as 40661; can a trained police officer fail to know and properly record the serial number of a pistol? PW6 is a ballistic examiner who recorded the serial number of the pistol submitted for his examination as G0661. When the charge sheet was drawn, the serial number given was 0661. Was it a typographical error transcribing from 40661 to 0661 or was it an error transcribing 40661 instead of G0661? There are three different serial numbers for allegedly the same pistol. All the numbers are given by trained officers; can an inference be drawn that the pistol examined by PW6 was not the one recorded by PW1; or can one draw an inference that no pistol was recovered at the scene of crime? The answer to this question reveals that there is some doubt on either the identity of the pistol recovered at the scene or that there was no pistol recovered at the scene. This benefit of doubt should be given to the appellant.

14. In his defence, the appellant contend that if indeed he was in possession of the pistol, his finger prints would have been found on it. The learned Judges in addressing this issue expressed themselves:

> **"the answer to this question was provided by PW6 under cross-examination by the appellant. He stated …it is not easy to get good finger prints from a firearm as it is at times oily and after firing the blow ball destroy the finger prints."**

15. PW6, the ballistic expert, in his testimony does not state that he conducted a finger print examination on the pistol submitted to him. This is an error; it is a misdirection to use his reply under cross-examination as an answer to the issue of finger print raised by the appellant. In addition, PW6 testified that **"he compared the spent cartridge with other cartridges submitted to our office from the area".** PW1 the arresting officer at the scene of crime did not testify he recovered any spent cartridge. We note that it was at night when the police visited the scene. PW 2, the complainant, did not testify that any spent cartridge was recovered at the scene. Where did the spent cartridges submitted to the ballistic examiner, PW6, come from? The evidence on record does not provide an answer. For these reasons, we quash the conviction and set aside the sentence meted to the appellant on Count II in relation to possession of a firearm without a license.
16. In Count I, the appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. A key ingredient of the offence is violence. The facts relating to the violence from the testimony of PW2 is that "**one of the robbers pointed a gun at me and the other ransacked my pocket and took my phone worth Ksh. 6,000/=; I had Ksh. 1,000/= in my pocket and 2 hedex tablets and one handkerchief** ***and they were taken by the person who ransacked my pockets."***
17. From this evidence, it is clear that the 2 hedex tablets were taken by the person who ransacked PW2's pocket. PW2 was categorical that it was not the appellant who ransacked his pocket. If PW2 is not mistaken, then it follows the appellant was not the one in possession of the 2 hedex tablets. We note that PW 1, the arresting officer, in his testimony stated that apart from the pistol, nothing else was recovered from the scene. The learned Judges erred in drawing an inference that the identity of the appellant was well established because it was not a coincidence that the 2 hedex tablets were found at the scene where the appellant was knocked. However, taken together with the fact that the appellant was found by the police at the scene with injuries in tandem with being knocked down by PW2"s motor vehicle, we agree that the identity of the appellant was established beyond reasonable doubt.
18. Our evaluation of the judgment of the High Court reveals some doubt as to the existence or recovery of the pistol at the scene. The absence of fingerprint examination on the pistol is critical. We are certain that the prosecution proved the identity of the appellant as one of the perpetrators of the crime and we find that due to the doubt relating to recovery and serial number of the pistol, it would be unsafe to convict the appellant for the offence of robbery with violence. We hereby substitute the charge of robbery with violence and convict the appellant with the lesser offence of simple robbery contrary to Section 295 as read with 296 (1) of the Penal Code. We accordingly quash the conviction of the appellant for the offence of robbery with violence and set aside the death sentence imposed. We substitute the conviction with the lesser offence of simple robbery and sentence the appellant to a maximum term of 14 (fourteen) years imprisonment from 14th March 2005 when the appellant was arraigned before the trial court and taken into custody.

Dated and delivered at Nyeri this 6th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……..

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR