



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 320 OF 2011

BETWEEN

JOHN MWANGI KAMAU..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Sergon & Wakiaga, JJ.)

dated 2nd December, 2011

in

H.C.CR. A NO. 204 OF 2006)

JUDGMENT OF THE COURT

1. **John Mwangi Kamau alias Musendu alias Robert Githinji Murigi**, the appellant and Joseph Ndungu Kiruri were jointly charged with three counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63, Laws of Kenya; the appellant was also charged with one count of 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**, Chapter 114, Laws of Kenya and one count of being in possession of live ammunition without a valid license in force issued by the firearm licensing officer contrary to **Section 4(1)** of the **Firearm Act** in the Chief Magistrate's Court at Nyeri.
2. The particulars of the first count of robbery with violence were that on 27th June, 2003 at Gachatha along Karangia/ Mathakwaini road in Nyeri District within the then Central Province the

appellant and his co-accused jointly with others not before the court while armed with dangerous weapons namely pistols, robbed John Mureithi Theuri of cash Kshs. 35,000/=, one mobile phone make Motorola valued at Kshs. 7,900/= and at or immediately after the time of such robbery threatened to use actual violence to the said John Mureithi Theuri. The particulars of the second and third counts of robbery with violence were that the appellant and his co-accused jointly with others not before the court on the above mentioned date and place while armed with the above mentioned dangerous weapons robbed Lawrence Nyingi Mureithi and Wilson Mathenge Ndungu of Kshs. 200/= and Kshs. 500/= respectively and immediately before or immediately after the time of such robbery threatened to use actual violence on the said Lawrence Nyingi Mureithi and Wilson Mathenge Ndungu.

3. On the count of being in possession of a firearm without a valid license, the particulars were that on 27th June, 2003 at Seven Star Bar in Nyeri Township in Nyeri District within the then Central Province the appellant was found being in possession of a Colt Revolver S/No 146386 without a valid firearm certificate in force issued by firearms licensing officer. Lastly, the particulars of the count of being in possession of live ammunition without a valid license were that on 27th June, 2003 in the above mentioned place the appellant was found in possession of six rounds of .45 mm ammunition without a valid firearm certificate in force issued by a firearm licensing officer.
4. The appellant and his co-accused (Joseph) pleaded not guilty to all counts. Following a chequered history of the matter being heard by several magistrates and a series of orders directing the trial to start *de novo* and/or to proceed from where it was left, the prosecution called a total of seven witnesses pursuant to an order issued on 4th February, 2005 directing the trial to be heard *de novo*. It was the prosecution's case that PW5, Wilson Mathenge Ndungu (Wilson), John Mureithi Theuri and PW2, Lawrence Nyingi Mureithi (Lawrence) worked for Farmland Limited a distributor of Kenya Breweries; they would sell and distribute beer in Nyeri with a lorry provided by their employer; John was the driver of the said lorry while Wilson and Lawrence were the salesmen. On 27th June, 2003 at around 2:00 p.m while Wilson in the company of Lawrence and John were heading to Mathakwaini to sell beer they were attacked by three robbers. Wilson testified since they were all seated in the front cabin and the lorry was being driven slowly because the road was steep, they noticed three people in front of them armed with pistols; John, the driver, stopped the lorry and two of the robbers entered into the lorry using the passenger's door and sat in the front cabin while the third robber went to John's door and started demanding money from them. Wilson was able to identify the robber who was on the driver's door as the appellant. The appellant ordered the driver to continue driving the lorry while he was still hanging on the driver's door. Wilson testified that the robbers stole Kshs. 500/= from him, over Kshs. 30,000/= and a mobile phone make Motorola T. 190 from the driver and Kshs. 100/= from Lawrence.
5. Wilson testified that he had never seen any of the robbers prior to the incident. He testified that the robbers asked for the keys to the safe which was in the lorry but they did not have the keys with them. Wilson testified that when they arrived at Mathakwaini Primary School the robbers ordered the driver to stop and they alighted from the lorry; the robbers then ordered the driver to continue driving. Wilson, Lawrence and John reported the incident on the same day at Gachatha Patrol Base.
6. On 27th June, 2003 PW 4, CPL Fabian Wanjohi (CPL Fabian), received a report over the above mentioned incident from Gachatha Police Base. At around 9:00 p.m on the same day, CPL Fabian went to the Police Base where he saw the report made by the complainants. CPL Fabian proceeded to patrol the area in an effort to trace the robbers but was not successful. CPL Fabian testified that at around 10:00 p.m on the same day he was informed by an informer that there were suspicious persons at Seven Stars Bar who the informer believed were armed. CPL Fabian, called PW 1, C.I Alfred Nyaga Aphiod (C.I Alfred), and informed him about the incident and the information he had received about the suspects. C.I Alfred in the company of CPL Fabian, PW 3, PC Gideon Makori (PC Gideon) and PC Maya on the same day headed to Seven Stars Bar; C.I Alfred and PC Makori went into the bar while PC Gideon and PC Maya waited outside. It was the prosecution's evidence that the said police officers had been given the description of the suspicious persons. C.I Alfred and PC Makori headed straight to where the appellant and Joseph were seated; C.I Alfred got hold of the appellant by his trousers and took the pistol that was on the appellant's waist. The appellant started struggling with C.I Alfred forcing PC Makori to let go of Joseph in order to assist C.I Alfred. C.I Alfred, PC Makori and the members of the public who were present eventually

managed to overpower the appellant and he was arrested. It was C.I Alfred's evidence that he recovered a Revolver which was loaded with six rounds of ammunition and Kshs. 20,800/= on the appellant which he believed was stolen from the complainants. While C.I Alfred and PC Makori were struggling with the appellant Joseph managed to escape but he was arrested by CPL Fabian and PC Maya outside the bar. Kshs. 600/= and a mobile phone make Motorola were recovered from the appellant's co-accused. Wilson was able to pick out the appellant from an identification parade conducted at Nyeri Police Station as one of the robbers who had attacked them on the material day.

7. PW6, Johnston Musyoki Mwongeri (Johnston), a firearm examiner attached to the firearms department at the C.I.D headquarters, gave evidence that on 1st July, 2003, Anthony Wahome Kamunyi (Anthony), who had since retired, received I calibre 045 US gold Revolver Serial No. 146386 and 6 rounds of ammunition from one CPL Andrew Kingori. He stated that according to the report prepared by Anthony, the Revolver was capable of being fired as a firearm and confirmed that the 6 rounds of ammunition which were availed to Anthony were .45 inches and were live ammunition capable of being fired. However, he testified that based on the report the ammunition which had been produced before the trial court was not the ammunition which had been tested by Anthony. The appellant and his co-accused were charged with the above mentioned counts.
8. The appellant in his defence gave a sworn statement and called two witnesses. He testified that prior to his arrest he used to sell tobacco with his business partner one Francis Githae Wairimu outside Nyeri Police station. On 27th June, 2006 he left his home very early in the morning and went to Ndaragwa to purchase tobacco. He testified that he looked for tobacco but did not find any and he decided to go back to Nyeri. At the bus terminus he was not able to get a bus heading to Nyeri; he saw a lorry and requested the driver to give him a lift to Nyeri; it was agreed between him and the driver that he would pay Kshs. 100/= as fare to Nyeri. The appellant testified that as they were travelling the lorry kept on experiencing mechanical difficulties and they stopped several times to add water to the lorry's engine. When they arrived at Nyeri, the appellant alighted at the upper stage and started heading towards the lower stage to get a vehicle to his home. While he was walking he stopped at a petrol station when he saw a group of people approaching him; he testified that upon the policemen who were amongst the crowd inquiring about his identity, he gave them his identity card; the police men searched him and took Kshs. 20,800/= which was in his wallet. The appellant testified that when he refused to give the police men any money he was arrested and taken to Nyeri Police Station. The appellant maintained that the said money was what he intended to purchase the tobacco with. He stated that he participated in an identification parade and the members in the parade were not similar to him in height and complexion. He testified that he informed the police officer who conducted the identification parade that he was not satisfied with the same. The appellant denied committing any of the offences he was charged with.
9. DW3, Duncan Mwangi Ngatia (Duncan), testified that prior to his incarceration in March, 2003 he used to sell tobacco in Nyeri. He stated that he knew the appellant and that both he and the appellant used to sell tobacco in the same place; when he was arrested in March, 2003 he left the appellant still selling tobacco. DW4, Francis Githae Wairimu (Francis), testified that the appellant was his business partner and they used to sell tobacco prior to his arrest; on 26th June, 2003 they had agreed that the appellant would go to Ndaragwa the following day to purchase tobacco; he escorted the appellant to the stage to board a vehicle heading to Ndaragwa; he returned to the business and stayed there until late in the evening.
10. Joseph, the appellant's co-accused, also gave a sworn statement and called one witness. He testified that he was a peasant farmer prior to his arrest. He stated that on 27th June, 2003 he got up early and went to his farm to harvest tomatoes; on the same day at around noon, a tomato dealer went to his farm and purchased the tomatoes he had harvested and he accompanied the dealer to Nyeri town; at Nyeri town the dealer had so many customers to attend to and requested Joseph to wait for him at 7 Stars Bar. It was Joseph's evidence that he went to the said bar and started drinking alcohol; he stayed in the said bar until 7:00 p.m when the tomato dealer came and they continued drinking together; at 10:30 p.m police officers came to the bar and started searching the patrons. Joseph stated after PC Makori searched him he found Kshs. 600/= in his pocket and released him; when he got out of the bar he saw another police man who searched him and took the Kshs. 600/=; the police officer claimed that Ndungu was too drunk and arrested him;

he spent the night at Nyeri Police station. He testified that the following day he participated in an identification parade wherein he was not identified by any of the witnesses; he was then informed by the police that he was free to go without the Kshs 600/=; when he protested he was taken back to the police cells and later charged with three counts of robbery with violence. He further maintained that apart from the Kshs. 600/= no other item was recovered on him; he denied being in possession of the mobile phone make Motorola.

11. DW5, Stephen Lolotony Lopokani (Stephen), testified that he used to work as a guard at Seven Stars Bar; he knew Joseph as a customer at Seven Stars Bar and as a farmer as he used to deliver tomatoes to the bar on several occasions; on 27th June, 2003 at around 10:00 p.m police officers went to the bar and started arresting the patrons who were inside and also those who were leaving the bar. Stephen testified that he heard one police officer telling the other police men that Joseph was very drunk and that he should be escorted to the police station; he saw the police men removing money from Joseph's pocket but he did not know how much it was.
12. After hearing the evidence, the trial court convicted the appellant on the third count of robbery with violence and of the offence of being in possession of a firearm without a valid license; the appellant's co-accused was acquitted of all offences for lack of evidence. The trial court sentenced the appellant to death for the offence of robbery with violence and to three years imprisonment for the offence of being in possession of a firearm. Aggrieved with the trial court's decision the appellant filed an appeal in the High Court. The High Court (Sergon & Wakiaga, JJ.) in a judgment dated 2nd December, 2011 dismissed the appeal. It is against that decision that the appellant has filed this second appeal based on the following grounds:-

- ***The learned trial magistrate and the first appellate court erred in law and fact by failing to resolve the inconsistencies apparent in the prosecution's evidence and the particulars of the charges.***
- ***The learned trial magistrate and the first appellate court erred in law and facts in relying on untrustworthy evidence of prosecution witnesses, which made them unreliable and their evidence unsafe to found a conviction.***
- ***The learned trial magistrate and the first appellate court erred in law and fact in relying on unsatisfactory evidence of identification and basing their judgments on the same whereas it was not safe to found a conviction.***
- ***The learned trial magistrate and the first appellate court erred in law and fact in failing to note that the trial proceedings were procedurally improper with fatal defects thus a miscarriage of justice was visited upon the appellant.***

13. Mr. C.M Kingori, learned counsel for the appellant submitted that there were inconsistencies in the prosecution's case which were never resolved by the two lower courts. He argued that there was no proper description of the firearm; PW1, C.I Alfred testified that he recovered a US Colt Pistol from the appellant while PW6, Johnston, testified that according to the report prepared by Anthony the firearm that was tested was a Revolver. Mr Kingori stated that a Pistol and Revolver were different. He also contended that according to Johnston's evidence the ammunition which was produced at the trial court could not be used with the firearm that was allegedly found in the appellant's possession. According to Mr. Kingori, the foregoing created doubt as to whether any firearm was recovered from the appellant. He also submitted that no finger prints examination was done on the firearm.

14. Mr. Kingori argued that the evidence of identification was not safe to warrant the conviction of the appellant. He submitted that PW5, Wilson, testified that he was not able to identify the robbers who were inside the vehicle. Mr. Kingori stated that it was not possible for Wilson to identify the appellant who was allegedly hanging on the driver's door yet Wilson could not identify the robbers who were in the lorry with him. He argued that Wilson neither gave the description of the appellant to the police nor gave evidence of what physical attributes of the appellant enabled him to identify him. Mr. Kingori submitted that Wilson testified that the appellant's co-accused was one of the robbers yet the trial court acquitted him of all offences he was charged with. This to Mr.

- Kingori called into question the credibility of the testimony given by Wilson. He urged us to allow the appeal.
15. Mr. E. W. Makunja, Senior Prosecuting Counsel, in opposing the appeal supported the appellant's conviction and sentence. He submitted that the prosecution's evidence was consistent and adequate to support the appellant's conviction. He argued that the doubt which existed as to whether the ammunition produced at the trial court was the one examined by the firearm expert is the reason why the appellant was acquitted of the offence of being in possession of ammunition without a valid license. He emphasised that the appellant was only convicted of one count of robbery with violence and being in possession of a firearm without a valid license. Mr. Makunja submitted that the inconsistency as to the description of the firearm found on the appellant was addressed by the High Court in its judgment; the main issue was that a firearm was recovered on the appellant.
16. Mr. Makunja maintained that there was no error in identification and the circumstances that were prevailing during the incident were favourable for a positive identification. He stated that the incident took place at around 2:00 p.m; the appellant was the one who was demanding for money while hanging on the driver's door. He argued that the appellant was arrested on the same day and positively identified by Wilson the following day. According to Mr. Makunja the appellant did not displace the prosecution's evidence. He urged us to dismiss the appeal.
17. We have considered the grounds and the record of appeal, able submissions by counsel and the law. This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -vs- R [1984] KLR 611*. In *Kaingo -vs- R (1982) KLR 213 at p. 219* this Court said:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)”

18. The charge sheet indicates that on 27th June, 2003 the appellant was found in possession of a Colt Revolver Serial No. 146386 ; PW1, C.I Alfred testified that on 27th June, 2003 he recovered a U.S.A Colt Pistol Serial No. 146336 from the appellant; PW6, Johnston, testified that according to the report which was prepared by Anthony, a firearm expert, Anthony received from the police and examined a Revolver Serial No. 146386. From the foregoing evidence there are clearly discrepancies as to the description of the firearm found on the appellant and the Serial Number of the firearm. According to the appellant's counsel these discrepancies cast doubt as to whether the appellant was actually found in possession of the firearm. This Court has on several occasions expressed that discrepancies in evidence are not considered material if they do not cause prejudice to the accused or if they are inconsequential to the conviction and sentence; such discrepancies are curable under **Section 382** of the **Criminal Procedure Code**, Chapter 75, Laws of Kenya. **Section 382** of the **Criminal Procedure Code** which provides;

“Subject to the provisions herein-before 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 a 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.”

In *Joseph Maina Mwangi -vs- Republic – Criminal Appeal No. 73 of 1993* this Court held:-

“In any trial, there are bound to be discrepancies. An appellate Court in considering those discrepancies must be guided by the wording of Section 382 of the Criminal Procedure Code vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

We are of the considered view that PW6, Johnston's evidence regarding the report prepared by Anthony, a firearm expert, was clear that the firearm which was examined was a Revolver Serial No. 146386. Based on the foregoing we find that the discrepancies in PW1, C.I Alfred's evidence on the description and Serial Number of the firearm curable under **Section 382** of the **Criminal Procedure Code**.

19. Mr. Kingori argued that there was no finger prints examination conducted on the firearm alleged to have been found in the possession of the appellant; the doubt created by the fact that the ammunition produced in court was not the one which had been presented to firearm expert and further the fact that the ammunition which was produced could not be used in the said firearm clearly cast doubt as to whether the said firearm was found on the appellant. We have considered the submission by counsel on the issue of possession of firearm by the appellant. PW 1, Chief Inspector of Police Alfred Nyaga Aphod, testified that together with two police officers they went to Seven Stars Night Club and having been given description of the appellant by an informer he went straight to the appellant whom he had been informed was armed. That he held the appellant by the waist and got the pistol from him. That a struggle ensued and PC Makori joined to assist him. PW 3, PC Gideon Makori, testified that he saw the OCS struggling with the appellant and together they managed to disarm him. The testimony by PW 1 and PW 4 was not shaken by the defence. We are satisfied that the two lower courts properly evaluated this item of evidence and established the fact that the appellant was found in possession of a firearm. We see no reason to interfere with the finding of fact by the two courts below.
20. On the issue of the ammunition recovered on the appellant, we find that the trial court correctly disregarded the prosecution's evidence on the issue. PW6, Johnston, a firearm expert, testified that the ammunition which was produced at the trial court was not the ammunition which had been examined by the firearm expert. This evidence clearly cast doubt as to which ammunition was found on the appellant, whether it was the ammunition which was presented to the firearm expert or the ammunition which was produced at the trial court. These set of circumstances cannot support a conviction for the offence of being in possession of ammunition without a license; the trial court correctly acquitted the appellant of the said offence.
21. On identification of the appellant, there is a concurrent finding of fact by the two courts below that the appellant was positively identified as one of the robbers by PW 5, Wilson Mathenge Ndungu. In **Wamunga vs. Republic (1989) KLR 424** this Court held at page 426:

“..it is trite law that 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.”

22. In the present case, it was the prosecution's evidence that the incident took place in broad daylight at around 2:00 p.m and PW 5 was able to get an impression of the appellant's physical attributes when he was hanging on the driver's door. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In **Abdulla Bin Wendo & Another -vs- Reg (1953) 20 EACA 166**, it was held that,

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult.”

See also **Roria -vs- Republic (1967) EA 583** and **Ogeto -vs- Republic (2004) 2 KLR 14**.

23. PW 5, Wilson Mathenge Ndungu, is a single identifying witnesses and it is imperative to test whether the evidence by the witness is free from the possibility of error. In Maitanyi -vs- Republic (1986) KLR 198, this Court at page 201 held,

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made...If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description.”

24. In his testimony, PW 5 stated that he was the driver of the lorry and at about 1.50 pm, while driving, he saw three people standing by the road side. Two of them entered the vehicle using the co-drivers door but the appellant did not enter the vehicle but was hanging on the driver’s door. The three persons robbed them. The robbery took ½ hours. He testified that the appellant who was hanging by the driver’s door did not have his face covered. That he saw the face of the appellant and who was talking and demanding money. That for the entire ½ hour of the robbery, he was able to clearly see the appellant as it was daylight and his face was not covered and he was hanging near him at the driver’s door.

25. It is not in dispute that the appellant was identified by PW 5 at an Identification Parade that was conducted in Nyeri Police Station. The purpose of an identification parade is to test the ability of a witness to identify an accused person. This test can only be properly carried out if the witness had prior to the identification parade made a report that he could identify the accused and given a description of the accused. In Njoroge -vs- Republic (1987) KLR 19, this Court at page 23 held,

“Dr. Macharia was a single identifying witness, whose evidence had to be tested with the greatest care..... That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade.”

26. We have considered the evidence of PW 5 as a single identifying witness and warned ourselves of the dangers inherent in relying on such testimony to convict. The robbery took place in broad day light. The offence took place over a duration of ½ hours which was long enough for PW 5 to clearly see the person who was hanging by the driver’s door. The person who was hanging by the driver’s door did not have his face covered. This lends credence to the testimony that PW 5 that he clearly saw face of that person. PW 5 identified that person as the appellant. From

the foregoing facts, we are satisfied that the evidence of PW 5 as the single identifying witness is credible and there is no possibility of error. The learned Judge did not err in confirming the conviction and sentence of the appellant on the charge of robbery with violence.

27. The upshot of the foregoing is that we find that the appeal has no merit and consequently we dismiss the same. We hereby confirm and uphold the death sentence meted to the appellant in respect of the offence of robbery with violence. The sentence on possession of firearm shall be held in abeyance.

Dated and delivered at Nyeri this 10th day of December, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR