



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 79 OF 2005

BETWEEN

JACKSON NJOROGI GITAU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Onyancha & Kubo, JJ.) dated 4th May, 2004

in

H.C.C.R.A. NO. 224 OF 1998)

JUDGMENT OF THE COURT

The appellant before the Court is **Jackson Njoroge Gitau**. He was tried and convicted by a Principal Magistrate at Nyeri on one count of robbery with violence contrary to **section 296(2)** of the Penal Code and was duly sentenced to death. The particulars of the charge against him were that during the night of *1st and 2nd January, 1994* at Othaya Township in Nyeri District within Central Province, while he was armed with a dangerous weapon namely a pistol, he had robbed No. 38611 Police Constable Antony Nzomo of his G3 rifle Serial No. 674074 with 20 rounds of “life” (sic) ammunition of calibre 7.62 mm, all valued at K.Shs.10,000/=, the property of Kenya Government and that during the said robbery, the appellant shot dead **Constable Nzomo** and **Police Corporal Mutunga Angaine**.

Following the conviction and sentence by the magistrate, the appellant appealed to the High Court, but by its judgment dated and delivered on *4th May, 2004*, the High Court (Onyancha and Kubo, JJ.) dismissed the appeal against the conviction and confirmed the sentence of death. The appellant now comes to this Court by way of a second appeal and that being so, only matters of law can be raised before the Court – see **Section 361** of the Criminal Procedure Code.

The brief facts relevant to the appeal and upon which the prosecution relied in support of its case were that on *1st January, 1994*, the appellant was in Othaya Township and that during his stay there he was seen by various witnesses among them John Nyaga Munyoku (P.W.3. – “**John**”), Paul Nganga Kinyanjui (P.W.4. – “**Paul**”), Lydia Warukira (P.W.5. – “**Lydia**”), Samwel Ndirangu Gachanja (P.W.6. –

“**Samwel**”), Gerald Wagatu Wambui (P.W.7. – “**Gerald**”) and an Administration Police Officer Corporal Moses Githaiga Macharia (P.W.8. – “**Moses**”).

John was a welder in Othaya and testified that on *1st January, 1994* at about 11:00 p.m. he met the appellant whom he knew as “Mohamed”. John had been drinking with friends at “Silent Bar”; he left the bar at 10:00 p.m. and met the appellant at 11 p.m. John and the appellant proceeded to Kaga’s bar. The appellant had a white vehicle but John could not remember its registration number. The two drank some beer and at about 1 a.m. John left the bar and went home.

Paul (P.W.4.) was a teacher by profession and lived in Othaya Township. He also operated a “motorbike” which he used as a “taxi”. On *1st January 1994* at about 10 p.m., the motor bike developed a clutch problem and Paul started to look for means to take him home. He approached one, Peter but Peter said Paul should buy a beer for him first. They went to “**WAINOGA MAKARA Night club.**” While in that bar, Paul saw the appellant whom he had known before as “Mohamed”. The appellant was in a room with two police officers, the deceased Nzomo and another. Paul went to them and joked with Nzomo whom he told he (Paul) could not afford to buy them a beer. As Paul left the other police officer with Nzomo followed him and asked if he (Paul) knew the appellant. Paul said he knew the appellant and that the appellant was called Mohamed. As it turned out, the other police officer with Nzomo was Constable Edward Imana (P.W.1. – “**Edward**”).

Samuel (P.W.6.) was the manager at Othaya Night Club. It was the same bar where Paul met the appellant. According to Samuel, the appellant and two police officers knocked at the door of his bar at around 1 a.m. The bar had closed but there were some nine or so customers still drinking inside the bar whose doors were closed. According to Samuel the civilian who was with the two police officers was the appellant though Samuel admitted he did not know the appellant before. They asked him if he could serve them with drinks; he took them into a room and served them with beers. The two police officers Samuel referred to were obviously the deceased Nzomo and Constable Edward Imana (P.W.1.). After about one hour, Samuel heard another knock on the door and when he opened it he found it was the late Corporal Angaine knocking. Angaine went to the room where the appellant was with the other two police officers and Angaine joined them in their drinking. At about 2:50 a.m. the appellant requested Samuel to open the door for him so that he could leave. **Corporal Angaine** told Samuel not to open the door as the police officers wanted the appellant to identify himself. The appellant nevertheless went out and was followed by Angaine. Constable Edward remained with Samuel in the room and according to Samuel, after a short while he heard a gunshot. He closed the door and remained inside till about 3 a.m. Constable Edward requested that he be let out and Samuel opened for him. The two went out and according to Samuel, he found one police officer writhing in pain while the other one was already dead. After about thirty minutes other police officers came to the scene and asked Samuel if he knew the person who had gunned down the two officers. Samuel said he did not know the person who had done so. We must at this stage point out that when the appellant was eventually arrested in Nairobi early in the morning of *4th September, 1994*, and taken to Nyeri the police failed to conduct an identification parade to see if Samuel was in a position to identify the appellant as the person he had dealt with during the night of *1st and 2nd January, 1994*. Samuel, as we have said, was the manager of the bar around which the incident took place. The person who actually served the appellant and the police officers with their drinks was in fact Gerald (P.W.7.). He also did not know the appellant before and the only relevant piece of evidence he gave was that shortly after the shooting, he saw a small white saloon car zoom off.

Before we recite the evidence of Constable Edward, we must deal with that of Moses (P.W.8.). Moses was an administration police Corporal attached to the District Commissioner’s Office at Nyeri. He was given three days off-duty from *31st December, 1994* and he went to Othaya Town. He spent the night of *1st January, 1994* at Othaya town. He took beer at Kaga’s bar and at other bars. He met the late Angaine at Kaga’s bar at around 11 p.m. They continued drinking there until around 12:30 a.m. when the appellant entered the bar. The appellant was in the company of ex-councillor John (P.W.3.) and his wife. The appellant ordered a beer for John and then went to join Moses and Angaine. The appellant asked Moses why he (appellant) had not seen Moses for a long time. Moses then continued as follows:-

“..... I had known him since the time I was attached to Gatugi Chief’s camp. He ordered for beer for me and Cpl Angaine and barmaid. We continued drinking. Later Cpl. Angaine asked him which countries he knew. The accused said he knew a number of countries. The two started exchanging words. I told Cpl. Angaine to continue drinking and leave the accused alone. He agreed. Later the accused left and went out.

When cross-examined by the appellant, Moses answered some of his questions as follows:-

“I had known you as Mohamed. That was the name people used to call you. I first came to know you when I was attached to Gatugi Chief’s Camp. We used to drink with you at Othaya town. There were various bars. I first knew you in 1993. You come from Gatugi area. I came to Kaga’s bar at 11 p.m., you entered at 12:30 a.m., you exchanged words with Cpl Angaine. I did not know if you knew Angaine before.

So this witness swore he knew the appellant before and that he (witness) knew him as **“Mohamed”**. He saw the appellant in Othaya during the night in issue and they drank beer together during which the appellant and Angaine had a dispute.

We can now come to the evidence of Constable Edward. He was the first witness for the prosecution and though his evidence was lengthy, we shall quote him verbatim whenever we feel necessary.

During the night of 1st January, 1994, he and constable Nzomo left Othaya Police Station at 10 p.m. for “beat” duties within Othaya town. By around 12 midnight, they approached Kaga’s bar which had not closed. The front door had been closed but inside there were four people. He continued:-

“..... One of them was the accused person. He was a regular customer in this bar. I had known him before. I used to meet him in this bar. There was a police officer called Nyingi and another AP. whose name I did not know. We called the barmaid through the window. We told her to close the bar since time was over. The late Cpl. Angaine was also in the said bar. We later continued with our duties.”

As the two officers carried on, around 12:30 am they noticed a motor vehicle, Reg.No. KAC 367U which they had left parked outside the bar. The vehicle was then going round the town with two occupants one of them being the appellant. They saw the vehicle near or by Muiro Bar. At around 1:45 a.m. they saw the vehicle parked outside Wainoga Day and Night Club. The appellant was then alone in the vehicle. When the officers reached the vehicle, the appellant came out and greeted them. Edward continued:-

“By then, I was with the late PC Nzomo. He asked PC Nzomo whether he had worked at JKIA sometime back. PC Nzomo said he had worked there. The accused used to call himself “MOHAMMED”. The accused told us he could buy cigarettes at the said night club. We agreed. We all entered into the said night club. When we entered the manager of the club a Mr. Ndirangu showed us room No. 5. We entered. We were three of us (me, Pc. Nzomo and the accused). The accused person ordered three beers and a packet of cigarettes. We sat down and started drinking.”

Fifteen minutes later, the appellant ordered a second round of three beers and in the course of time a teacher by the name Kinyanjui (PW4) came into the room. He greeted them and Paul (PW4) called the appellant “Mohammed”. Edward asked the appellant where he worked, though the appellant had previously told him (Edward) that he was a Special Branch Officer attached to Nyayo House. Owing to his curiosity, Edward followed Paul outside and asked Paul if he really knew the appellant. Paul told him he knew the appellant because the appellant was a regular customer and that at times if the appellant did not come in his vehicle, Paul would take him home in his taxi. We must not forget Paul said he operated a motor-bike as a taxi. Edward then went back into the room and shortly thereafter the late Angaine appeared. The appellant ordered a beer for Angaine and when he was about to finish the beer, Angaine asked the appellant what sort of an officer he was. Angaine then told the appellant that the appellant was a robber. The appellant kept quiet, stood up and said he was leaving as he was to drive himself home. Angaine stood and followed the appellant and the appellant asked the manager to open for him. The

manager did so and Angaine followed him outside. Edward continued:-

“After a short moment, we heard a gun-shot. On hearing the gun-shot, we all stood up. By then, I was armed. On going out of the room Pc Nzomo snatched a G3 rifle S/No. 6740174 from me. It was loaded with 20 rounds of ammunition. He ran towards the stairs. I was left at the door we were. The gunshots continued for about 3-4 minutes. I told the manager of the bar to close the door. We went to the main bar. The gun shots stopped. I peeped through the window and saw the accused person carrying a G3 rifle in his left hand and a pistol in his right hand. There was a lot of security light both inside and outside. He opened his motor vehicle KAC 367U and entered. He put the alarm on and drove away.”

When Edward went outside he found his two colleagues lying in the corridor in a pool of blood. The G3 rifle which Nzomo had snatched from Edward had disappeared. Pc Nzomo died on the way to hospital while Corporal Angaine died in hospital while undergoing treatment.

Corporal Wycliffe Marua (P.W.9.) arrested the appellant in Nairobi on 4th September, 1994 in connection with another robbery with which we are not concerned. That was nearly nine months after the incident in Nyeri but the prosecution’s case as understood by the two courts below was that on the night of 1st January, 1994, the appellant was in Othaya Town, driving a motor vehicle Reg. No. KAC 367U, white in colour and that during that night he was in various bars where he was met and dealt with various witnesses who knew him as “Mohammed”. Among such witnesses were ***Edward*** (P.W.1.), ***John*** (P.W.3.- the ex-councillor), ***Paul*** (P.W.4. – the teacher), Lydia (P.W.5. – the barmaid at Kaga) and ***Moses*** (P.W.8. – the Administration Police Officer at DC’s office, Nyeri). ***Samuel*** (P.W.6.) and ***Gerald*** (P.W.7.) also said they dealt with him at their bar where he bought beers for the two slain police officers and Edward.

When Edward reached the spot where the two officers had been shot dead, the G3 rifle which Nzomo had taken away from Edward was found missing. Edward swore he saw the appellant carrying a G3 rifle and a pistol as the appellant entered his car and then drove away. ***Chief Inspector Kiragu*** (P.W.2.) who at the relevant time was stationed at Muranga Police Station was on 9th January, 1994 shown the rifle at the police station. It was brought to the station by two persons whose names were given as Fred Wekesa and Francis Mwaniki; these two told Kiragu that they had found the rifle on a road outside Ihuria Stadium in Muranga. The two were not called to testify but they led Kiragu to the place where they had found the rifle and Kiragu was satisfied with their explanation. We are satisfied that those two were basically honest citizens and that was why they took the gun to the police station. Kiragu gave the serial No. of the gun as 6740194 and said it had twenty rounds of live ammunition. Edward said in his evidence that Nzomo snatched from him a G3 rifle S/No. 6740174 which was loaded with 20 rounds of ammunition. We stress the issue of the Serial Number of the rifle because it has always been contended that because ***Corporal Simon Bwaringa*** (P.W.12.) in his evidence said he prepared the exhibit memo form in respect of a rifle S/No. 6740114 which was not the S/No. of the gun Edward was armed with and which was handed over to Chief Inspector Kiragu in the manner we have described. It was contended on behalf of the appellant both here and in the superior court that the charge was not proved as laid because of the discrepancy in the two numbers. We think there is no substance in this complaint. The Exhibit Memo Form which we have in the record and which was prepared by Corporal Simon on 3rd March, 1994 clearly shows the serial number of the rifle to be examined as S/No. 6740194. The serial number shown on the charge-sheet is not very clear to us but with respect the appellant was not charged with using the rifle to shoot and kill the two officers. He was charged with robbing one of the dead officers of his rifle and Edward swore he had been issued with a rifle which the deceased Nzomo snatched from him moments before the shooting and which Nzomo did not have when Edward found him lying in a pool of blood. The superior court dealt fully with the issue of discrepancy in the serial number and we fully agree with and endorse their views on that point.

Mr. Ondieki on this point relied on the case of ***YONGO vs. REPUBLIC*** [1983] JKR 319. In that case Yongo was charged with the offence of creating a disturbance in a manner likely to cause a breach of the peace by uttering certain words in the presence and hearing of one, Robert. The words stated in the charge-sheet as having been uttered by the appellant were that “*Moi’s Government is finished and will*

not come back to power.” When Robert came to give evidence, he stated Yongo had said *“no, we need a change in the government”* and in cross-examination Robert said *“the accused said we need a change.”*

It is to be noted that in YONGO’s case, the gravamen of the charge was the words which had been uttered and which could have led to a breach of the peace which formed the basic charge against Yongo. No issue like that arises in the appeal before us. Even if the gun stolen from the deceased officer had not been recovered but the evidence of Edward that a gun was so stolen was believed, as indeed it was, that would not have changed the position. The discrepancy in the serial number of the gun was a matter curable under the proviso to **section 382** of the Criminal Procedure Code and if the appellant thought the discrepancy was an obstacle to his defence, he would have raised it with the Magistrate. In our view, the discrepancy caused to him no discernable prejudice and we reject it.

What was the appellant’s answer to the prosecution’s case?

In a sworn statement which was supported by that of **Peter Mwangi Gichia** (D.W.2.) the appellant set up an alibi and the substance of it was that on *1st January, 1994*, he arrived at his Nairobi house at around 9 p.m. and after about fifteen minutes some woman called Lucy Wanjiru told him that he was wanted in Ol Kalou where his father was said to be sick. That same night, he took the taxi of Peter (D.W.2.) to his home and together with other members of his family they visited Ol Kalou District Hospital. Having seen his father he returned to Nairobi with Peter and he stayed there until *3rd September, 1994*, when Corporal Maina of Pangani Flying Squad visited him. Maina demanded money from him. They were business partners and the money had got lost. He asked Maina to give him time to look for the money and Maina said he would return on *4th September, 1994*. On *4th September, 1994*, Maina duly returned but this time round, Maina was accompanied by Marua (P.W.9.) and Ndungu. They took his Shs.18,000/=, arrested him and took him to Central Police Station. On *25th September, 1994*, Maina and other police officers asked him about his home and he told them it was in Kirina Location in Othaya. They went with him to his home in Othaya searched it but found nothing. He was then taken to Othaya Police Station where a police officer was asked if he knew the appellant. The officer said he did not know him. On *27th September, 1994* he was taken to court in Nairobi for an offence of robbery. He denied having been in Othaya on *1st January, 1994*. He continued.

“Both P.W.1. and P.W.6. were telling lies. They said they saw a white car. I deny having been involved in the robbery. The police officer Imana told lies. My name is not Mohammed or Ali. My name is as appears in the ID (Exh 1 (defence). I wish to produce my written submissions (Exh 2). That is all.”

Peter (D.W.2.) said he took the appellant to Olkalou on *1st September, 1994*, that he stayed with the appellant in one room that night and they returned to Nairobi on *2nd January, 1994*, arriving at 1 p.m. At the time he gave his evidence, he was a prisoner and that he knew the appellant in 1993 and the appellant used to hire his taxi.

Before we go into a consideration of the recorded evidence we must dispose of some preliminary issues of law raised by Mr. Ondieki, learned counsel for the appellant.

Mr. Ondieki’s first point was that at some stage after the prosecution had closed its case and the Magistrate ruled that the appellant had a case to answer, the appellant asked the magistrate to supply him with a photocopy of the proceedings

“so that I can make my defence,”

The Magistrate ordered:

“Photocopy of proceedings so far to be provided to the accused.”

That was on *18th August, 1997* and the hearing was then adjourned and did not resume until *23rd*

January, 1998. Most of the adjournments in between were due to the fact that the appellant was apparently being tried in Nairobi as well and would fail to appear before the Magistrate at Nyeri. When the hearing resumed before the Magistrate on 23rd January, 1998, the appellant did not tell the magistrate that he had not been supplied with the proceedings as the magistrate had ordered on 18th August, 1997 and that he was, therefore, not in a position to offer his defence. As we have seen, he fully defended himself and even called witnesses in his defence. No constitutional right of his was breached in the circumstances we have narrated and we reject that complaint.

Mr. Ondieki next contended that the appellant was denied the right to summon two other witnesses to testify on his behalf. When placed on his defence the appellant told the magistrate that he would call three witnesses. One of those witnesses was obviously Peter (D.W.2.), the other two whom he named on 26th November, 1997 were:

“(i)

1. **Muchiri Gitonga c/o Standard Newspaper, Nyeri;**

2. **Lucy Wanjiru.”**

The magistrate ordered that witness summons was to issue to **Muchiri Gitonga** while **Peter Mwangi Gichia** who was at Nyeri Prison was to be produced.

On 1st December, 1997 the court prosecutor Inspector Auma told the magistrate:-

“The witness from Standard Newspapers has gone to Dar es Salaam. He could not therefore be traced and served with summons. The other (a convict) was taken to Naivasha G.K. Prison. He had not been brought back.

Accused: I still need those witnesses.

ORDER: Case fixed for defence on 19th December, 1997. Production order extended.”

On 19th December, 1997, the case was not heard because

“The accused has another case in Nairobi”,

and the hearing was then rescheduled for 16th January, 1998. On that date the appellant was present and told the Magistrate:-

“I am applying that the Occurrence Book of 1st January, 1994 and arms movement register of 1st January, 1994 of Othaya Police Station be brought.”

The magistrate adjourned the hearing to 21st January, 1998. On that date, the magistrate directed:-

“The OCS Othaya to be summoned to appear on 23rd January, 1998 to produce the Occurrence Book of 2nd January, 1998 and fire-arms movement register of 1st January, 1994.”

On 23rd January, 1998, the appellant himself testified and was followed by the convict, Peter (D.W.2.). Then Inspector Moses Munene (D.W.3.) of Othaya Police Station testified and produced the Occurrence Book entry made by Constable Edward. Apparently, the purpose of the Occurrence Book was to prove if Edward had mentioned any names in the Occurrence Book. The arms movement register was also produced and it showed that Nzomo had not been issued with any firearm while Edward had been issued with a gun. Thereafter the appellant closed his case and no mention was made either of Lucy Wanjiru or Muchiri Gitonga of the Standard Newspapers. It is clear from the record that the appellant was fully

aware of his rights and whenever he wanted something to be done, he always asked the magistrate to order it to be done. At no stage did the magistrate refuse to either record or grant the requests made by the appellant. Before closing his case, the appellant did not tell the magistrate that he still required the two persons he had mentioned as his witnesses. Once again we find this complaint unjustified and we reject it. No constitutional right of the appellant was violated by the magistrate. We have already dealt with the issue of the guns serial number and rejected that complaint as well.

On the question of whether the two courts were justified in concluding on the recorded evidence that the appellant was in Othaya during the night of *1st January, 1994*, and in rejecting his alibi that he was either in Nairobi or in Ol Kalou, we are ourselves in no doubt that the recorded evidence fully justified the findings of the two courts below. We have set out the evidence of **Edward** (P.W.1.), **John** (P.W.3.), **Paul** (P.W.4.), **Lydia** (P.W.5.) and **Moses** (P.W.8.) and those witnesses said they knew the appellant, either as **“Mohammed”** or **Ali**. None of them swore that that was the true name of the appellant as recorded in his official identification documents. They only swore that was the name they knew him by. Their evidence and the circumstances of how they came to know him either as Mohammed or Ali were so detailed that it would be unreasonable to think that any of them could have dreamt up the circumstances from thin air. Edward knew him as Mohammed because he (Edward) had been seeing him in Othaya and had heard him say that he was a Special Branch Officer. True, Edward did not record the name **“Mohammed”** in his OB entry of *2nd January, 1994* but it was never contended that Edward did not even mention the name in his first statement he recorded with the police. Edward himself had not claimed in his evidence that he had recorded the name in the OB; if he had said so and the OB was being produced to contradict that assertion, that would have been a different matter altogether.

John (PW3) knew the appellant and when he met the appellant that evening, they went to a bar and the appellant bought beer for John and his wife. Then there was the teacher, Paul (PW4) who operated a taxi. The appellant was his regular customer and the appellant bought beer for him that evening. Then there was Lydia (P.W.5.) the barmaid. She also swore she served the appellant with beer that evening and that the appellant used to visit the bar and was being called Mohammed. The evidence of Moses was similar to those of the other witnesses. The appellant agreed his home was in Othaya and all the witnesses knew him as such.

Even if the evidence of **Samuel** (P.W.6) and that of **Gerald** (P.W.7.) were to be ignored, there was still overwhelming evidence from witnesses who said they had known him previously, that the appellant was in Othaya during the night of *1st January, 1994* and not in Nairobi and then at Olkalou as he and his witness claimed. This Court, on a second appeal, can only interfere with concurrent findings of facts where it is shown either that there was no evidence at all upon which such conclusions could be based, or that if there was some evidence, the same was of such a nature that no reasonable tribunal could be expected to base its decision on such evidence. Nobody contended before us that any of the two propositions was applicable in this appeal.

On our own assessment of the recorded word, we are satisfied that the appellant was convicted upon overwhelming evidence which proved beyond any reasonable doubt that he robbed constable Nzomo of a G3 rifle and that in the course of that robbery, he shot and killed Constable Nzomo and Corporal Angaine.

Mr. Ondieki, cited to us cases such as WAMUNGA VS. REPUBLIC [1989] KLR 424, KARANJA & ANOTHER VS. REPUBLIC [2004] 2KLR 140 and KIARIE VS. REPUBLIC [1984] KLR 739, all of which considered the issue of identification of recognition. Those decisions do not help the appellant in any way in the circumstances of his appeal. There was overwhelming evidence of at least four witnesses who swore they knew him and saw him in Othaya during the relevant period.

We dismiss his appeal against the conviction. We believe that like all the other convicts sentenced to death, the President must have commuted his sentence of death to one of life imprisonment and if we are correct in that view, the appellant must continue to serve that sentence. We also dismiss the appeal against the sentence.

Dated and delivered at Nairobi this 11th day of February, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR