IN COURT OF APPEAL
AT MOMBASA

(CORAM: BOSIRE, GITHINJI & AGANYANYA, JJ.A.)

CRIMINAL APPEAL NO. 154 OF 2009

BETWEEN

EVANS KIRATU MWANGI ……………………………………………… APPELLANT

AND

REPUBLIC ………………………………..……………………………. RESPODNENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Njagi & Omondi, JJ) dated 20th July, 2009

in

H.C.CR.A. NO. 92 OF 2007
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JUDGMENT OF THE COURT

The appellant was convicted by the Senior Resident Magistrate Malindi on three counts, namely, – attempted robbery with violence contrary to **Section 297 (2)** of the *Penal Code* in Count I and sentenced to death; being in possession of a firearm in Count II and being in possession of ammunitions in Count III both contrary to **Section 4 (2) (a)** as read with **Section 4 (3) (a)** of the *Firearm Act* and sentenced to 7 years imprisonment respectively. The sentences were ordered to run concurrently. His appeal to the superior court against conviction and sentence was dismissed. Thus this is his second appeal.

The prosecution case was based on the following evidence.

The complainant in the 1st count of attempted robbery **Cosmas Kadenge Charo** (Charo) was at the material time operating a taxi registration number KAM 128S, a Toyota corolla, in Malindi town owned by Tom Mongare. On 15th March, 2002 at about 7.30 p.m. a person whom he identified to be the appellant approached him at the Yolanda Taxi bay and hired the taxi to Jua Kali bar in Ngala Estate for Shs.100/=. On arrival at Ngala Estate, the appellant suddenly ordered Charo to stop and when he stopped two other men entered into the vehicle. The three people commanded Charo to leave the vehicle to them and warned him that if he did not do so they would kill him. Before he could answer he was shot and became unconscious. Meanwhile **William Karani Yaa** (PW2) (Yaa) who was walking home pushing a bicycle saw a stationary vehicle (Charo's taxi) with parking lights on. There was noise in the car. The car was then driven into the bush, then back to the road heading to where Yaa was; ran over Yaa's bicycle and then crushed into the wall of the Mosque. A tall man whom Yaa did not identify came out of the vehicle and advanced towards Yaa whereupon Yaa got scared and ran away. As he ran away somebody called for help from inside the vehicle. The tall man disappeared into the darkness. Members of public

went to the scene and took the injured person (Charo) to Malindi District Hospital. The incident was reported to Malindi Police Station and **Pc. Daniel Otieno** (PW5) (Pc. Otieno) and **Cpl. John Wesonga** (PW9) (Cpl. Wesonga) went to the scene. They found the vehicle at the scene. On inspection they found that the vehicle was stained with fresh blood on the driver's seat. Blood scrapings were later taken from the vehicle. The two police officers did a quick inspection of the vehicle and recovered a spent cartridge of 7.65 mm calibre inside the vehicle (Ex.4). The vehicle was towed to Malindi Police Station where it was thoroughly inspected again on the following day and a blood stained bullet head casing (Ex.9) was recovered on the driver's seat. Pc. Otieno later went to Malindi Hospital where Charo was admitted. He noticed that Charo had several gunshot wounds and caused his transfer to Coast General Hospital for specialized treatment where he (Charo) was admitted for one month. Charo was later examined by a doctor who found that he had sustained three gunshot wounds, one on the head, another on the left clavicle and the bullet lodged on the left chest, and, the third, on the right hand. The incident was circulated to other police stations.

Shortly after the incident **Elina Shauri Ngumbao** (PW11) (Elina) was at her groceries Kiosk at Gede near a bus stage to Mombasa when a man who she identified to be the appellant went to her kiosk at 8.00 p.m. The appellant who was wearing a heavily blood stained trouser bought a paper bag from the kiosk for shs.10/= and thereafter walked to the bus stage. At the bus stage the appellant removed the blood stained trouser and placed it in the paper bag. The appellant walked towards the direction of Mombasa after matatus failed to stop.

Several hours after the incident **Ali Mgurugeni** (PW10) (Ali) a driver employed by *"Malindi Bus"* parked his bus at Malindi bus stage at 3.00 a.m. for Mombasa bound passengers to board. As he waited for passengers to board, he went to a nearby hotel to take tea. At the hotel some taxi operators in Malindi who normally go to the bus stage to look for passengers reported to him the shooting of Charo by a man who was wearing jeans and a T-shirt. They looked for the suspect in the bus and after failing to get him they told Ali to be on look out on the way to Mombasa. Ali left Malindi for Mombasa at about 3.30 a.m. At Gede he stopped to pick Elina who was travelling to Kongowea Market, Mombasa to buy groceries for sale at her kiosk. Elina who was a regular traveller in the bus sat at the front. She reported to Ali the earlier incident. Further on at Matsangoni stage, the appellant stopped the bus, entered the bus and sat at the 2nd last seat next to the window. Before he entered the bus Elina identified him to Ali as the person who had earlier bought a paper bag from her kiosk. Ali drove on towards Mombasa and at about 5.30 a.m. he reached Mtwapa and stopped the bus at the gate of Mtwapa Police Station. Ali alighted from the bus without switching on the lights and reported the presence of the appellant in the bus at the police station whereupon **Pc. Gilbert Nato Malava** (Pc. Nato), (PW3) and two other police officers armed themselves and proceeded to the bus. When Ali entered into the bus in the company of two police officers and switched on the lights the appellant who was now wearing a pair of shorts and a vest hit the window and it came off with its frame after which the appellant jumped out and ran away. Pc. Nato who was outside the bus chased him. He was joined by **Cpl. Michael Sirere** (P.W.8), (Cpl. Sirere) and other police officers. When the police officers were about one metre behind him the appellant drew a pistol. Pc. Nato held him from behind and the appellant started shooting but the shots headed to the ground. The appellant slipped off from Pc. Nato and pointed his gun at Cpl. Sirere. The appellant's gun jammed and Cpl. Sirere hit him with a pistol on the face and the appellant fell down and dropped the gun. The pistol, a STAR whose serial numbers had been obliterated had 2 live bullets of 7.65 mm calibre. The police also recovered one spent cartridge (Ex.4) at the scene. The bus was searched and a paper bag containing blood stained jeans trouser and T-shirt were recovered under the appellant's seat. After the arrest of the appellant was circulated to all police stations **Pc. Otieno** of Malindi Police Station collected the appellant and took him to Malindi Police Station as a suspect in the shooting of Charo. In the course of investigation, blood samples were taken from Charo and from the appellant which together with the blood stained clothes and the blood samples collected from the taxi were taken to **Ali Mwenyehasi Gailwoli** (PW7) a Senior Government Analyst who found that Charo had blood group "O"; that appellant had blood group "A" and that the blood scrappings from the taxi and the blood stains on the jean trouser and T-shirt were of blood group "O". From the analysis he formed the opinion that the blood stains on the trouser, T-shirt and blood scrapping from the taxi could have originated from Charo.

The pistol recovered from the appellant; the two spent cartridges recovered one in the taxi in

Malindi and the other at the scene of arrest of the appellant at Mtwapa and two live ammunitions found in the pistol were examined and tested by **Mbogo Donald Mugo** (PW4) a Fireams Examiner who found that the pistol was a calibre 7.65mm, that the two spent cartridges, two live ammunitions were calibre 7.65 mm and formed the opinion that the spent cartridges had been fired from the same pistol.

The appellant testified at the trial, among other things, that on the material day he left his house at Mtwapa at 4.45 a.m. for the stage next to Mtwapa Police station to board a bus to Kongowea Market where he used to sell food stuffs; that as he was walking through a foot path to the bus stage a person passed him and then jumped on him and held him; and that they started struggling and other people went there and started beating him; that he later came to know that the people who arrested him were police officers. He denied that he was involved in robbery.

The trial Magistrate convicted the appellant on the basis of the evidence of visual identification of the appellant by Charo and Elina, the expert evidence of the Government Analyst and the evidence of Firearms Examiner. He dismissed the evidence of the appellant that he was not involved in the robbery as unreliable and untruthful.

In his appeal to the superior court the appellant complained that the evidence of dock identification by Charo was not reliable; that the evidence that he was in possession of firearm and ammunition was not reliable; that the paper bag allegedly found in the bus was not positively identified as the one he had allegedly bought as it had no peculiar marks; that the evidence of blood samples was unreliable as it was not proved when the sample was taken from appellant nor the doctor who took the sample called as witness; that the evidence of Charo, Cpl. Sirere and Ali was not credible and that the trial Magistrate did not comply with **section 200 (3)** of the *Criminal Procedure code* (CPC) nor swear Cpl. Wesonga before he gave evidence.

On the evidence of visual identification of the appellant by Charo, the superior court stated that Charo did not demonstrate that the circumstances were conducive to proper identification. The superior court also considered the evidence of identification of appellant by Elina. In both cases the superior court relied on the decision of this Court in **Gabriel Njoroge v. Republic** [1982-88] KAR 1134 to the effect that dock identification is generally worthless and that the court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.

The superior court concluded:

"In this case no parade was held at all and this leaves the identification of the appellant in limbo."

Regarding the evidence of the Government Analyst the superior court disagreed with submission of the State Counsel that the opinion of the Government Analyst was sufficient to connect the appellant to the attempted robbery for two reasons. Firstly, that a very fair percentage of the human race carries blood group "O" and therefore it would not be assumed that the blood stains on the appellant's clothes was from the complainant. Secondly, that there was a gap in the chain for the blood sampling and testing procedures as the prosecution failed to call as a witness the person who took the blood sample from the appellant and that without such evidence there was no proof that the blood sample was taken from the appellant. Nevertheless, the superior court believed the evidence relating to the recovery of the two spent cartridges; the recovery of the gun and the opinion of the ballistic expert and concluded:

"The evidence further discloses that even though the gun was not dusted for finger prints as it had been touched by several hands at the scene where the appellant was arrested, it was the appellant who had used it to shoot at the police. Since two cartridges were sent to the Firearms Examiner, and given that one of them was the one recovered at Mtwapa where the appellant was arrested, it stands to reason that the other cartridge was the one recovered from the complainant's car at the scene of the robbery. And granted that the two cartridges were fired from the same gun, it follows that it was the appellant who shot at the complainant, and this gives credence to the complainant's claim that he truly identified the appellant. It would also strengthen the presumption that the blood on the appellant's clothes was that of the complainant."

The appellant contends in essence that the superior court erred in law in relying on evidence of visual identification and on the opinion of the Government Analyst after having earlier rejected both; that the superior court erred in relying on the evidence of possession of the gun and recovery of spent cartridges which was discredited and fabricated and that the superior court erred in law in failing to take into account the procedural irregularities and their effect on the trial.

Starting with the complaint of procedural irregularities the appellant refers to two main procedural irregularities.

The first is failure by the trial Magistrate to comply with **section 200 (3)** CPC which gives an accused person a right to demand that witnesses who had given evidence before a magistrate who has ceased to exercise jurisdiction be resummoned and re-heard by the succeeding magistrate, and, further that such right be explained to him. And by **Section 200 (4)** the High Court has a discretion to set aside a conviction based upon evidence not wholly recorded by the convicting magistrate and order a retrial, if it is of the opinion, that the accused person was materially prejudiced thereby. Mr. Jengo, learned counsel for the appellant submitted that the record does not show that the right to re-call witnesses was explained nor did the superior court explain why it could not have been prejudicial for the succeeding magistrate to proceed from where the trial had stopped.

The case commenced before J. Manyasi then a Senior Principal Magistrate (SPM) who after receiving the evidence of five witnesses on various occasions disqualified herself on the ground that the appellant had already filed an application in the High Court to stop her from hearing the case. While disqualifying herself the SPM observed that the succeeding magistrate should decide whether to proceed under **Section 200** of CPC.

When the case next came for hearing before K. Ogolla SPM, it is recorded that the appellant indicated that he wanted the case to be heard *de novo* and the court so ordered. The appellant complained in that court that he had not yet been supplied with the copy of the proceedings as he had requested. The trial Magistrate ordered that proceedings be supplied, and, it was later confirmed that the appellant had been supplied with the proceedings.

The record shows that after Ogolla, SRM received the evidence of four witnesses on various occasions another Magistrate, D. Ogembo, SRM took over and when the case next came for hearing the appellant stated:

"I would want the case to proceed from where it had reached."

The trial magistrate (Ogembo, SRM)recorded in his judgment that when he took over the case the appellant confirmed that he wanted the case to proceed from where it had reached before his predecessor. The appellant in his written submissions filed in the superior court did not deny that he said so before the trial magistrate. He only complained that the trial magistrate did not record the section of the law and that the trial should have started from the beginning. The appellant did not in his written submissions in the superior court specifically deny that his rights to have the case start *de novo* was explained. To hear the case *de novo* is the same thing as re-calling witnesses. The right of the appellant under **section 200 (3)** CPC had been explained on previous occasion by Ogolla SRM and on that occasion the appellant had specifically demanded that the case should start *de novo*. It is a reasonable inference to be drawn from the appellant's statement before Ogembo, SRM that he wanted the case to proceed from where it had stopped; that the Ogembo SRM explained the rights of the appellant under **section 200 (3)** to the appellant, a fact that the Magistrate has confirmed in his judgment.

Furthermore, the appellant did not complain to the superior court that he had been materially prejudiced and the superior court did not make such a finding.

It is not apparent from the record that the appellant would have been materially prejudiced. Only 4 of the 11 eleven witnesses called by the prosecution gave evidence before Ogolla SRM. The rest of them, all material witnesses, including Pc. Otieno who was the investigating officer, the Government Analyst,

Cpl. Sirere, Cpl. Wesonga, Ali and Elina gave evidence before Ogembo SRM. The other witnesses Charo, Yaa, Pc. Nato and the Ballistic Examiner had earlier given evidence twice before Manyasi SPM and Ogolla SRM. The appellant had the typed proceedings and at the close of both the prosecution and defence case the appellant ably submitted before the trial magistrate on the entire evidence relied on by the prosecution.

The other procedural irregularity is omission in the record to show that Cpl. Wesonga was sworn. It is true that the record does not show that the witness was sworn. However the record shows that the witness was cross-examined by the appellant. The appellant did not raise the issue in his submissions in the trial court.

All the other ten witnesses are shown to have been sworn. The superior court made a finding that failure to show that the witness was sworn was probably accidental especially when the witness was a police officer who should know the court procedures in criminal matters. Mr. Jengo submitted that failure to swear the witness renders the entire trial a nullity. We agree with the finding of the superior court that in the circumstances this was a case of accidental omission to show that the witness was sworn – a mere irregularity which is curable under **Section 382** CPC.

Furthermore, as Mr. Muteti, the learned Senior State Counsel has submitted, if the evidence of Cpl. Wesonga is excluded there is still the overwhelming evidence of Pc. Otieno – the investigating Officer relating to recovery of a spent cartridge from Charo's taxi.

In our view the two grounds of procedural irregularities have no merit. The superior court dismissed the appeal mainly because, it was satisfied from the evidence that the appellant was at the time of arrest found in possession of the gun which was used to shoot at police officers pursuing him and which had been used on the previous day to shoot the complainant. The appellant denied at the trial that he was arrested in possession of the gun. He gave evidence of the circumstances of his arrest which is totally different from the prosecution case. The trial magistrate systematically evaluated the evidence and believed the evidence of Pc. Nato, Cpl. Sirere, Ali and Elina relating to the circumstances of the appellant's arrest; the evidence relating to the recovery of the gun and a spent cartridge at the scene of arrest, and, the recovery of a paper bag containing blood stained clothes in the bus. The trial magistrate also believed the evidence of PC Otieno and Cpl. Wesonga of Malindi Police Station relating to the recovery of a spent cartridge from the taxi and also a bullet head casing.

The superior court re-evaluated the evidence and came to the same conclusion as the trial magistrate. The appellant claims that the evidence was fabricated and unreliable.

In this case, there are concurrent findings of fact by the two courts below. An appeal to this Court is on points of law only. The appellate court has loyalty to accept the findings of fact of the lower courts and should not interfere with the concurrent findings of fact unless it is apparent on the evidence that no reasonable tribunal could have made such findings. (See **M'Riunga vs. Republic** [1983] KLR 455). In our view, there was overwhelming and credible evidence to support the concurrent findings.

Lastly, the two courts below believed the forensic evidence of the Firearm Examiner which linked the gun recovered from appellant to the shooting of the complainant. This was strong circumstantial evidence which irresistibly and inextricably linked the appellant to the attempted robbery. There are no co-existing circumstances to weaken or destroy that inference.

It is true that the superior court tested the evidence of visual identification and forensic evidence tending to indicate that the appellants clothes were tainted with the complainant's blood and found the evidence unsatisfactory. In particular, the superior court found that the evidence of visual identification which was not preceded by a properly conducted identification parade left the identification of the appellant in *limbo*. The concise *Oxford Dictionary* of *Current English 9th Edition* defines the word *limbo* as *"an intermediate state or condition of awaiting decision"*. It seems to us that what the superior court meant was that the evidence of visual identification was uncertain and inconclusive. The case of **Gabriel Njoroge** relied on by the superior court did not say that evidence of visual identification which is not

backed by an identification parade is completely useless. The superior court did not say so either.

In **Muiruri & 2 Others vs. Republic** [2002] 1 KLR 274, this Court held that not all dock identification is worthless and stated at page 277 paragraph 35

"We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification".

(See also **Grace Wambui Njoroge Alias Wanancy & 2 Others vs. Republic** – *Criminal Appeal No. 201 of 2006* Nakuru (unreported).

In this case, the superior court found in effect that neither the evidence of visual identification nor the evidence indicating that the appellant's clothes were tainted with the complainant's blood would on its own without more, have supported the conviction. The superior court nevertheless found that the evidence of ballistic expert reinforced such evidence. We cannot find fault with such a finding. In our view, weak evidence can be strengthened by an equally strong evidence to form a watertight case against an accused person. That is the approach that the superior court, quite correctly, adopted.

As regards sentence the superior court quite correctly ordered that sentence for possession of firearm and ammunitions in counts II and III be held in abeyance.

The appellant was armed with a gun which is a dangerous weapon, and, he in addition shot the complainant three times and seriously wounded him. One bullet was in fact lodged in the complainant's chest. In such circumstances, **Section 297 (2)** of the Penal code provides for a sentence of death. The sentence of death was therefore lawful.

For the foregoing reasons, the appeal is dismissed.

Dated and delivered at Mombasa this 4th day of March, 2011.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR