JOHN MUGO KAMAU ……...……... APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Njagi, J) dated 19th February, 2007 In H.C. Criminal Appeal No. 273 of 2004)

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JUDGMENT OF THE COURT

This is a second and final appeal. The appellant, **John Mugo**, alias **John Njoroge Kamau**, was charged before the Senior Resident Magistrate's Court at Taveta with two offences of preparation to commit a felony contrary to **section 308(1)** of the Penal Code, being the first and third counts in the charge sheet before the court, and with one count of having suspected stolen property contrary to **section 323** of the Penal Code. That was the second count in the charge sheet. He pleaded not guilty to all the counts and the trial proceeded. At the completion of the hearing, the learned Senior Resident Magistrate (K. Muneeni), in a lengthy and well considered judgment found the appellant guilty of all the offences as charged, convicted him under **section 215** of the Criminal Procedure Code and sentenced him to serve ten (10) years in jail on the first and third counts and to pay a fine of Ksh.5,000/= on the second count, in default of which he was to serve a sentence of six months in jail. The appellant was dissatisfied with the convictions and sentences awarded by the court. He appealed to the superior court at Mombasa by way of Criminal Appeal Number 273 of 2004. The learned Judge of the superior court (Njagi J.) in another lengthy judgment dismissed the appellant's appeal on the first two counts but allowed the appeal on the third count. He still felt dissatisfied and hence this appeal before us, which, as we have stated, is a second and final appeal.

The charges in respect of which the appeal before us is brought are first, preparation to commit a felony contrary to **section 308(1)** of the Penal Code, the particulars of which are that:

"**On the 19th day of March, 2004 at about 5.00 p.m. at Chachewa Village in Taita-Taveta District within Coast Province jointly with others not before court, armed with dangerous weapons, namely a riffle and pangas in circumstances that indicates that you were so armed with intent to commit a felony namely Robbery with Violence."**

And the second count was having suspected stolen property contrary to **section 323** of the Penal Code in that:

"**On the 23rd day of March, 2004 at about 4.00 p.m. at Russia Village in Taita-Taveta District within Coast Province, having been detained by No. 5833 Pc. Zakaria Shitanda and No. 67179, Pc. James Kirwa and on the exercise of the powers conferred by section 22 of the criminal procedure Code, had in your possession four radios, one walkman and six wrist watched (sic) reasonably suspected to have been stolen or unlawfully obtained."**

The brief facts as can be deciphered from the record are that Pc James Kirwa (PW 2) and four other police constables, namely Pc Walubwa, Pc Optat Daniel (PW 3), Pc Kingi and Pc Kinyanjui were on patrol duties within Chachewa area on 19th March 2004 at 5.00 p.m. As a result of some information they received, they proceeded to a certain house in Chachewa which was suspected to be a hideout for four armed men who, according to their informer, were preparing to attack buses plying Taveta - Voi Road. As they approached the house, a person was seated outside the house at the door-step. That person, who Kirwa identified as the appellant, on noticing the presence of the police officers, shouted that the person they (police officers) were looking for had left. On being asked who the person was, the accused is alleged to have told Kirwa that Mutua had gone a certain way. Immediately two men emerged from the house. One was armed with a rifle. That man with a rifle started shooting at the police. The policemen took cover and responded. They shot dead one Mackenzie Kyalo Lita. The other man, together with the appellant escaped. Policemen interrogated Lita before his death and he allegedly told them the persons who had escaped were Njoroge and Ouma. The police called for reinforcement and when more policemen came, they followed those who had allegedly escaped but apparently did not arrest them. Kirwa and others searched the house and recovered a temporary E.A. Passport, which was not identified, a sharp knife from Lita, three torches, three pangas, one simi, one metal bar, a pair of pliers, four jackets, a tin full of break fluid, two caps, a muffin, a pair of shoes and assortment of drugs. They found out that the house belonged to an old woman who had moved elsewhere. The body of the deceased was photographed and removed to the mortuary by the police. They reported these matters to Pc Zacharia Shitanda (PW 1) of Taveta Police Station who later investigated the entire incident though he was also one of the arresting officers as will be clear later herein.

Later after four days, on 23rd March 2004, the police, acting on information went to a rented house in Russia Village. This time Pc Shitanda (PW 1) was among the police officers who went to Russia Village. Others were I.P Mbeche, Pc Kuto, Pc Musembi, Pc Kirwa and Pc Konde. They found a woman asleep by the door-step. The room was partitioned. The appellant was found sleeping under a bed. Pc Kirwa identified him as he had seen the appellant on 19th March 2004 at which time, the appellant wore a blue track suit trouser. The police found the blue track suit in a bag in the house. They recovered three torches, four radios from a box, one walkman, a remote control for JVC radio TV, six wrist watches, three pairs of pliers, one tin ship cutter, three Islamic caps, two pangas and one simi. The police took photographs the appellant took with one suspect. The watches were in socks while some of the radios were wrapped in a lesso. Some of the items were in a bag. The appellant told the police the room was his and the lady was his wife. According to the police, the appellant could not give any satisfactory account as to why he was possessing dangerous weapons but denied that he was at the shooting scene. He was arrested and taken to Taveta Police Station. Later he was charged in court.

In his defence, the appellant stated that he was in the business of selling second hand shoes in Nairobi. On 23rd March 2004, he was in his house with his wife and children. At 1.00 p.m. he asked his wife to place a mattress on the floor, as it was very hot and he was not feeling well. At around 3-4 p.m., police officers went to his house; arrested him; handcuffed him and searched his house. One police officer asked him for a gun saying he was with Lita. He replied that he never knew Lita. He stated further in his defence:

"**Some took my mattress 2x4, Panasonic radio cassette, 6 batteries, - 4 watches, Oris, 2 disco, one Seiko (Quartz) – one bag with compacts ext. 33. The receipts, photographs were there. ……. I asked for my receipts and my pictures in vain. …….. They refused to give me the receipts for my goods."**

And ended his defence by asking that his goods be returned to him by the police.

The above is the summary of the evidence upon which the appellant was eventually found guilty, convicted and sentenced as we have stated above. Before us, he was unrepresented and he conducted his appeal in person. On the main, he referred us to his home made memorandum of appeal which contains eight grounds of appeal.

Mr. Ondari, the learned Assistant Deputy Public Prosecutor, in his address to us supported the convictions

and sentences maintaining that the appellant was properly recognised on 19th March 2004 as one of the people who were in a house where several items, some of which could be used for robbery were found and although he ran away and was not arrested then, he was nonetheless one of the criminals who were preparing to commit a felony. On the second count, Mr. Ondari's position was that the appellant did not claim the items found in his house and thus they could not have been legally or properly obtained. In his view, the appellant was therefore guilty of the offence of having suspected stolen property contrary to **section 323** of the Penal Code as charged in the second count.

As we have stated above, this is a second appeal. We are in law enjoined to consider mainly matters of law. The trial court is in law required to delve into evidence, analyse it, evaluate it and arrive at its own findings based on the same evidence. The superior court, likewise, has a duty on first appeal to revisit the evidence afresh, analyse it, evaluate it and come to its own independent conclusion but being always aware that the trial court had the advantage of hearing the witnesses and seeing their demeanour and giving allowance for that – see the case of **Okeno vs. Republic (1972) EA 32**. Once the two courts have reached concurrent findings of facts on the evidence on record, this Court would, in law, be reluctant to interfere with the same findings of facts.

In the case before us, the offence with which the appellant was charged in the first count was that of preparation to commit a felony contrary to **section 308(1)** of the Penal Code. The particulars as we have stated were that on 19th March 2004, at about 5.00 p.m. at Chachewa Village in Taita Taveta District, he jointly with others not before court, they were arrested with dangerous weapons namely a rifle and pangas in circumstances that indicated that they were so armed with intent to commit a felony namely robbery with violence. That is the charge that the prosecution set out to prove in respect of the first count. The evidence that was adduced was that as Pc Kirwa and Pc Optat Daniel Sangawe (PW 2 and PW 3 respectively) approached a certain house, they saw the appellant seated outside that house. No one was with him at that time. The appellant is then alleged to have shouted words to the effect that the person they were looking for had left. When asked who that man was he said that man was Mutua. Pc Daniel added that the appellant explained that Mutua was a gangster whereas Pc Kirwa said that the appellant started by saying the person they were looking for had left and offered the name Mutua on being prompted by Kirwa as to who had left. There was clearly a contradiction between Pc Kirwa's evidence and that of Pc Daniel as to the conversation. Be that as it may, immediately after their exchanges, some two people emerged from that house and one of those people shot at the policemen. The policemen responded and shot down one person whom they later came to know as Mackenzie Kyalo Lita. At that time, the appellant and the other person from the house escaped. Before Lita died, Pc Kirwa and others interrogated him and he is alleged to have told them that those who escaped were Njoroge and Ouma. After all that, is when the police got into the house and started searching it. They then recovered three torches, three pangas, one simi, metal bar, a pair of pliers, four jackets, a tin of break fluid and other items not material to the case. Six questions spring to mind. First, was the appellant one of those armed in preparation to commit a felony? Second, is there evidence connecting him to the deceased Lita and another both of who must have been in the house when the appellant was outside the house? Thirdly, is there any connection in law, between the items recovered in that house in the absence of the appellant and the appellant?,

Fourthly, is there acceptable evidence that the appellant was in company with Lita and another person who is alleged to have emerged from that house together with Lita. The fifth question is, is it proper to conclude that the utterances allegedly made by the appellant that Mutua had left, were meant to hoodwink the police officers and lastly, to what extent could the alleged dying declaration of the deceased Lita be relied on in law to convict the appellant?

We have decided to consider the above in the light of what we have stated above that in law, we are bound to accept the concurrent findings of fact by the trial Magistrate and the superior court. We therefore accept that the appellant was outside the relevant house where the relevant exhibits were found and that when shooting started, he escaped as indeed none would continue staying at such a place with shooting going on all around. We cannot therefore read much in his running away when the shooting started. In our view, and with respect to the learned Magistrate and the learned Judge, that the appellant was at the scene of shooting, whereas it may be of some evidential value, does not in itself mean that he

was also armed with dangerous weapons in preparation to commit a felony; neither would it mean that he knew others were so armed. Hence the questions posed above.

It is not in dispute that when Pc Kirwa and Pc Daniel first saw the appellant, he was outside the subject house where Lita and another later emerged with a rifle and where pangas, simi, metal bar and other items were found later. He was however not physically in possession of any of the items nor was he physically armed with them. The learned Magistrate and the learned Judge of the superior court however felt the appellant must have been acting jointly with Lita and the other man who escaped. What gave rise to that feeling is that the appellant said Mutua had left, which the police felt was a way devised by the appellant to mislead the police and thus to divert their movement towards the house where the other thugs were. In our view, that was the opinion of witnesses which should not have been admitted in evidence. In any event, there is no evidence as to whether that statement was investigated and proved to be wrong. The learned Judge, in dealing with that aspect of the case stated:

"**By telling the police that their prey had already left, the appellant could only have had at least three reasons in mind – to divert the attention of the police officers from the house and mislead them into going towards Russia Village; to warn the people in the house of the danger posed by the presence of the police; and to demonstrate to the police that he was innocent of involvement in any wrongdoing. By so doing, he betrayed himself as being in league with the suspects inside the house."**

He thus found from the above that the appellant was therefore operating jointly with the others and since one of those in the house was armed with a rifle, the appellant was also taken to have been jointly in possession of a rifle as well as the panga and other items which were recovered from the house. In our view, with respect, that finding was arrived at through consideration of extraneous matters that had not been canvassed before the court. The learned Judge incorporated into the judgment theories not canvassed in evidence before him, namely that the appellant in stating Mutua had left, wanted to divert the attention of the police from those in the house and because of that, he was one of the thugs. As we have stated, that alleged statement was never investigated and none knows whether it was based on facts or not and it was, in our view, dangerous for the learned Judge to attach his own theory to it and use that theory to come to a finding adverse to the appellant. In the well known case of **Okethi Okale and others vs. Republic (1965) EA 555**, the predecessor to this Court stated, *inter alia*, as follows:

"**(1) In every criminal trial a conviction can only be based on the weight of the actual evidence addressed and it is dangerous and inadvisable for a trial Judge to put forward a theory not canvassed in evidence or in Counsel's speeches."**

The other reason, the Magistrate and the Judge relied on to convict the appellant, was that Mackenzie Lita, who was gunned down gave the names of Ouma and Njoroge as the names of those who had escaped. The learned Judge says the name Njoroge was one of the appellant's names. That is correct, but it is also a common name for people mainly from central Kenya and so we attach no importance to that. Further, this was an alleged dying declaration given to Pc Kirwa and Pc Daniel. It was made in the absence of the appellant. In the case of **Aluta vs. Republic (1985) KLR 547**, this Court stated:

"**A trial Judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration."**

We do not attach much importance to the statement allegedly given to Pc Kirwa and Pc Daniel in their interrogation of Mackenzie Lita in the absence of the appellant. In any case, Pc Kirwa and Pc Daniel being police constables could not have been allowed to adduce such evidence against Mackenzie Lita had he been alive and on trial for the offence as the one with which the appellant was charged.

In our view, whereas, it was clear that the appellant was present in front of a house outside which shooting took place, we cannot see enough evidence to show he was there armed and jointly with others

preparing to commit a felony. Neither do we read much in one of his names being mentioned by Lita nor in his saying Mutua had left that scene. The learned Magistrate did not consider the several aspects to which we have given attention and the learned Judge also did not consider them. We would not hazard what conclusion they would have come to had they considered them. It is possible, they may have acquitted the appellant on the first count. The benefit must go to the appellant.

On the second count, Pc Kirwa was required to comply with the provisions of **section 22** of the Criminal Procedure Code. There is no evidence that he so complied with that section. The appellant was found in his house on 23rd March 2004. He could not thus have been detained by Pc Zakaria Shitanda as is alleged in the charge sheet. In any case, the articles found in the house of the appellant namely radios, one walkman, and wrist watches are articles of common usage and there was no evidence that they were in any case not peculiar to the needs of the appellant and his family. They were all found in his place of residence. In his defence, part of which we have reproduced hereinabove, the appellant stated that his goods were taken by police and receipts for the same were also taken by the police and had not been returned by the time the hearing in the subordinate court was proceeding. Noting that the appellant was not represented at the hearing, it would not be proper to ignore such defence and proceed to say the appellant never made any claims to the items found in his house. The goods he claimed were taken from his house, together with the receipts which he claimed were his property, could very well have included the items he was charged with possessing in the second count. We see no offence proved in respect of that charge.

The sum total of the above is that this appeal succeeds in its entirety. The convictions of the appellant on the first and second counts are hereby quashed and the sentences set aside. As his appeal on the third count had been allowed by the superior court, the appellant is set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 18th day of January, 2008.

J.E. GICHERU

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CHIEF JUSTICE

P.K. TUNOI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR