**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**
**AT NAKURU**

**Criminal Appeal 14 of 2005**

**KENNEDY MAINA ……………………………………… APPELLANT**

**AND**

**REPUBLIC ……………………………………………. RESPONDENT**

**(*Appeal from a judgment of the High Court of Kenya***

***at Nakuru (Musinga & Kimaru, JJ) dated 16th December, 2004***

**In**

**H.C. Cr. A. No. 292 of 2001)**

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**JUDGMENT OF THE COURT**

In this appeal only two points of law have been raised, namely:

**(1) Whether the appellant, Kennedy Maina, was positively identified as one of three or four men who robbed Jane Muthoni and attempted to rob David Cherop, on the night of 28th June, 2001.**

**(2) Whether the charges against the appellant were properly framed when they omitted the time of the alleged robbery counts.**

The appellant was charged, tried and convicted of one count of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, and a second count of attempted robbery with violence contrary to ***section 297 (2)*** of the Penal Code. He was, however, acquitted for lack of evidence of a third count which alleged that jointly with others not before the court while armed with pistols robbed one Joseph Kahura Mwangi of his motor vehicle, registration No. KSG 119, Chevrolet pick-up.

In convicting the appellant, the Senior Principal Magistrate, at Naivasha, Mr. Muya, relied on the appellant's visual identification by five witnesses, and also the evidence of a tracker dog handler. The trial Magistrate held that these witnesses had ample opportunity to see the appellant and there was ample light which enabled them to identify the appellant. He also relied upon the evidence of a dog handler who testified that he went to the scene of the robberies and from there tracked the appellant to a certain car in which were many people who on seeing the police took to their heels. The police dog went after the appellant and arrested him.

The superior court, on first appeal, correctly applied the decision in **Okeno vs. R. [1972] EA 32**, in which the predecessor of this Court authoritatively set out what the duty of a court on first appeal is. By citing that case the superior court was reminding itself of the duty which was squarely on it to re-evaluate the evidence and draw its own conclusions on the case. The court also cited **R vs. Turnbull [1976] 3 ALL ER. 549** on the question of identification. In the end that court concluded that the appellant was properly convicted and sentenced.

The appellant having raised the point of law with regard to the propriety of the charge as drawn, it is important for us to deal with it first before dealing with other issues raised in the appeal.

The particulars of the charge in count 1 read as follows:

"***KENNEDY MAINA, on the 28th Day of April 2001 at Corner Bar, Gilgil township in Nakuru District of the Rift Valley Province jointly with others not before court while armed with a toy pistol and axes robbed JANE MUTHONI cash Kshs.3120 and 10 pilsner beer all valued at 3670/- and immediately before or immediately after the time of such robbery used personal violence against the said JANE MUTHONI."***

Count II is similarly worded except that the offence is attempted robbery with violence. The complaint raised is that the particular time when the offences were committed should have been stated after the date. Mr. Gakinya for the appellant submitted before us that a failure to include the time the offence was committed is fatal to the charge and that on that account alone, we should allow the appellant's appeal. He cited the case of **Jackson Namukoa Munyasi vs. R**, Bungoma High Court Criminal Appeal No. 81 of 2004, as persuasive authority for that proposition.

In the **Munyasi Case** (supra), the offence charged was burglary. It is axiomatic that the time of the offence is an essential element of that offence and should be included in the particulars of the offence. Otherwise there would be no distinction between that offence and housebreaking which is a similar offence but which is committed during day time. The standard form of the charge of burglary as contained in the 2nd schedule of the Criminal Procedure Code opens as follows in the particulars "*A.B, in the night of the* ---" That clearly shows that time is an essential component of the particulars of the charge of burglary. That is not true of the offence of robbery. The relevant standard form in the aforesaid schedule reads as follows:-

"***Robbery with violence, contrary to section 296 of the Penal Code.***

***PARTICULARS OF OFFENCE***

***A.B., on the ------- day of ------ 19 ------- in ------ District within the ----- Province robbed C.D., of a watch, and at, or immediately before or immediately after, the time of such robbery did use personal violence to the said C.D."***

The drafters of the charges against the appellant used that format, and they were right. That is the format prescribed and it would be absurd to fault them. There is clearly no merit in the complaint raised, and the authority cited is clearly distinguishable and has no application in this matter.

We now come to the main legal point raised in this appeal. The offence against the appellant was allegedly committed at night time. Jane Muthoni, a barmaid, at Corner Bar, was closing the bar premises when a person entered posing as a customer. He wanted some cigarettes, but on being told the bar did not normally sell cigarettes, he changed and said he wanted some beer. At that point, she said, she saw the appellant closing the door. She testified that "l*ights were on at the time*", but never indicated the intensity of the light or its nature.

Miriam Wangui, like Muthoni, testified to the same effect and herself stated that "--- *At the scene of the robbery there was light*." Similarly she did not describe the type or quality of the light. Sergeant David Cherop, from the parachute battalion of the 2nd Military Brigade, like the other two witnesses, testified

that he identified the appellant as one of the robbers and that he had a green jacket on. He did not however, indicate the quality of light at the scene which enabled him to identify the appellant.

Rachel Wangui Njenga's evidence does not add anything to the foregoing evidence. She testified that "*There was light inside the bar*" and with the aid of that light she was able to identify the appellant. He had a green jacket on. Needless to deal with the evidence of the remaining identifying witness, namely James Kamau, as he does not state how he was able to identify the appellant.

What emerges from a careful scrutiny of the evidence is that both the trial and first appellate courts perfunctorily dealt with the issue of identification. The authorities, among them **R vs. Turnbull**, (supra) cited by the Judge on first appeal are clear that in cases of identification among the important factors to consider is the intensity of the light at the scene. Neither the trial nor the first appellate court, adverted to that factor. The trial Magistrate appears to have been quite impressed with the evidence of the dog handler, that he overlooked this important factor in his evaluation of the evidence relating to identification. The superior court did not make any reference to the issue.

P.C. Kennedy Marau, was the dog handler. He testified that he proceeded to the scene of the robberies almost immediately they occurred. He had his police tracker dog with him. From the scene, he said, the dog led him to a certain place where he found several people in a vehicle. The appellant with others came out of it and started running away. Police officers accompanying him fired their weapons. One of the bullets met him on the knee. The dog went for him and caught him. Nothing was recovered from him. The trial Magistrate in his judgment remarked that the appellant was tracked by a dog to a car where he was with other people. The superior court apart from restating evidence as to how the appellant was arrested said nothing about the evidence of the dog handler. That court appears to have accepted the evidence and acted on it.

The use of evidence of dogs is not common in our courts. The issue arose in **Abdallah bin Wendo & Another vs. R [1953], 20 EACA 166**. In that case two main issues arose relating to evidence of dogs. First, the admissibility of that evidence, and second its evidential value. The court there said:-

"***We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by (a human). We do not wish it to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dog did and how they did it is most scanty."***

In 1967 the issue arose again in the case of **Omondi vs. R [1967] EA 802 (K) Ainley**, C.J, discussed the issue and came to the following conclusion:-

"***It is evidence which we think should be admitted with caution, and if admitted should be treated with great care. Before the evidence is admitted the court should, we think, ask for evidence as to how the dog has been trained and for evidence as to the dog's reliability. To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing. Clear evidence that the dog had repeatedly and faultlessly followed a scent over difficult country would be required, we think, to render this kind of evidence admissible. But having received evidence that the dog was, if we might so describe it, a reasonably reliable tracking machine the court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible."***

It is quite clear from the two authorities above, that evidence of tracker dogs may be admissible in certain circumstances. It is in the nature of opinion evidence, and like all types of opinion evidence, the basis of its admission has to be established . We respectively accept and adopt, the aforesaid statement by Ainley, C.J, and ourselves state that such evidence is worthless unless a proper foundation is laid for its admissibility. In some jurisdictions it is admissible almost as a matter of course, but in others it is not

admissible at all like in India.

In England, the court in the Hertfordshire Quarter sessions relied upon the evidence of a tracker dog without any hesitation in the case of **R vs. Webb [1954] Crim. L.R 49**.

In Sarkar's Law of Evidence, Tenth Edition, by S.C. Sarkar, at page 495, appears the following passage with regard to evidence of dogs:-

"***The behaviour of a dog is not admissible in evidence (*****Said Ali vs. R a 1940, Pesh 47*****). Such evidence is however admissible in America on certain conditions . It is conceded by most courts that the fact that a well tested bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked definitely to the accused is admissible to show that the accused was the doer of the criminal act. Nevertheless, in actual usage, this evidence is apt to be highly misleading, to the danger of innocent men."***

This country has not gone the Indian way, for good reason. It is possible at times for the dog to track a suspect and lead to recovery of stolen items. We believe, to obviate the danger pointed out in the passage in Sarkar, the Court of Appeal for East Africa considered and adopted the principle that corroboration of such evidence would be essential. Likewise we think that the caution with which such evidence should be considered is an essential safeguard.

This Court in a similar case as this one considered this issue in the recent case of **David Njeru Kibuthu & Two others**, Criminal Appeal Nos. 7, 8 and 9 of 1999 and in a judgment delivered on 20th May, 2005 rendered itself thus:-

"***However, we are concerned at the lack of evidence as to both the experience of Omas (police dog) as a tracker dog and as to the ability of tracker dogs to distinguish between the scents of a number of persons at a scene of a robbery such as this. It is probably the case that a competent experienced dog can do so but there should be evidence adduced from a tracker dog expert as to these sort of issues."***

As for the evidence of the dog handler in our case, it is worthless as it was not preceded by an inquiry as to the training and antecedents of the dog. The evidence did not in any way advance the prosecution case a whit.

It is quite clear from what we have stated above that evidence on the identification of the appellant as one of the participants in the robberies at the two bars we mentioned earlier is insufficient to sustain his conviction. In the result, we do not agree with Mr. Gumo, Assistant Deputy Public Prosecutor, that the appellant's conviction was based on sound and sufficient evidence. His conviction is accordingly quashed and the sentence imposed upon him set aside.

Before we leave this matter we would like to say something about the way the trial Magistrate meted out sentences against the appellant. The trial Magistrate rendered himself thus:-

"***The accused is sentenced to suffer death as per law authorized on each of the two counts. Sentence to run concurrently."***

This Court has said time without end that a person cannot hang more than once. It is inconceivable how two or more sentences of death can run concurrently. The superior court did not see this anomaly as we expected they should have done. The proper approach the trial magistrate should have adopted was to sentence the appellant to death in the first count and either order any other sentence to be in abeyance or not sentence him at all.

The appellant should be set at liberty forthwith unless otherwise lawfully held. It is ordered.

Dated and delivered at Nakuru this 22nd day of February, 2008.

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**J. ALUOCH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**