REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1155 OF 1995
(from original conviction and sentence of the Senior Resident's Magistrate' s Court at Nairobi in Criminal Case No. 429 of 1995)
GERALD MACHARIA GITHUKU ….……. ……APPELLANT
VERSUS
REPUBLIC ……..…….. RESPONDENT
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 1154 OF 1995
ALFRED MUCHIRI MACHARIA …… APPELLANT
VERSUS
REPUBLIC ……..….. RESPONDENT
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 1153 OF 1995
JOHN WANJOHI NDEGWA ……..…….. APPELLANT
VERSUS
REPUBLUC ……..…….. RESPONDENT

J U D G M E N T

On 7th August 1995 in Chief Magistrate's Court at Nairobi the Appellants – JOHN WANJOHI NDEGWA, ALFRED MUCHIRI MACHARIA AND GERALD MACHARIA GITHUKU were convicted on the offence of robbery with violence contrary to Section 296 2) of the Penal Code and were all sentenced to death in the manner prescribed by law.

Being dissatisfied with the conviction and sentence they simultaneously lodged Appeals to this Court to wit:-

- CR. APP. NO. 1153 OF 1995 BY JOHN WANJOHI NDEGWA
- CR. APP. NO. 1154 OF 1995 BY ALFRED MUCHIRI MACHARIA
- CR. APP. NO. 1 155 OF 1995 BY GEALD MACHARIA GITHUKU

As the Appeals arose from the same Criminal Case below and the original record to be used was one, the Appeals were consolidated for purposes and ease of hearing. However before the Appeal could come up for hearing JOHN WANJOHI

NDEGWA and ALFRED MUCHIRI MACHARIA passed on whilst in prison custody and consequently their Appeals

abated. In the result we are only left to deal with GERALD MACHARIA GITHUKU in this Appeal.
In his petition of Appeal, the Appellant listed 6 grounds namely:-

1. That the Appellant was not identified by the Complainant as having participated in the crime.
2. That the Learned Magistrate erred in Law in convicting the Appellant on conflicting and contradictory evidence of the Police Officers.
3. That the Learned Magistrate erred in law in failing to appreciate that the Appellant was not charged with being in possession of the pistol and consequently cannot be connected with the offence.
4. That the Learned Magistrate misdirected herself in Law in failing to consider that the evidence of finger prints expert was not tendered – that would have linked the

Appellant with the toy pistol.
5. That in totality the evidence adduced fell short of proving the charge of robbery with violence.
6. That the Learned trial Magistrate erred in Law and fact in not adequately considering the Appellants defence.

At the commencement of the hearing of the Appeal the Appellant was with the leave of Court allowed to tender his written submissions in support of the Appeal. We have heard the benefit of reading the same and must say they were very illuminating. We shall revert to them in detail in the course of this Judgement. In his oral submissions, the Appellant invited us particularly to consider the contradictions in the evidence of PW3 and PW4. He submitted that at page 19 line 23 – 25 of the Learned Magistrate's Judgment, PW3 stated that he took the gun together with the exhibits from the Complaint whereas PW4 in his testimony started that the gun was found in his possession. It was his contention therefore that such evidence should not be believed. He complained that he was framed and urged this Court to consider his

written and oral submissions in totality and allow his Appeal.

The State was represented by Miss M.L. Okumu Learned State Counsel. In her submissions, she supported both the conviction and sentence. She referred us in detail to the evidence of PW1, PW2 and PW3 and PW5 which basically was that PW1 was carjacked and robbed at about 7.30 P. M. PW2 and PW5 were Police Officers who saw the Complainant's Motor Vehicle being driven in a suspicious manner and decided to chase it until it was involved in an accident. In the meantime PW3 and PW4 having been alerted of the robbery by the 999 Police system joined in the chase of the motor vehicle. The Complainant's vehicle was involved in an accident in the course of the chase and the Appellant together with the deceased Appellants came out of the vehicle and ran off in different directions. The Appellant was chased and arrested 30 metres from the *locus in quo*. PW4 further testified that there was sufficient street lights at the scene. That there were no other persons at the scene and that a toy pistol was recovered from the Appellant. During the chase of the Appellant PW3 and PW4 never lost sight of him. It was her further submissions that the Appellant was properly identified; and that the ingredients of the offence were met. The Appellant was with others when the offence was committed and was armed with a toy pistol the time of the robbery. There was common intent by the three to commit the offence. The Learned State Counsel concluded by submitting that the prosecution evidence was credible and watertight. The Appeal should in the result be dismissed.

We propose to deal with the grounds of Appeal advanced by the Appellant seriatim and draw our conclusions upon evaluation of the evidence on record. We shall combine grounds 1 and 2 of the Appeal as they all relate to the issue of identification. It was the Appellant's submissions that the circumstances under which he was arrested did not rule out the possibility of mistaken identity. Was the chase and eventual arrest of the Appellant free from possibility of any error or mistake? The Complainant in his testimony stated that he was unable to identify any of the suspects from the time he was carjacked and robbed to the point where his motor vehicle was involved in an accident and the suspects nabbed. Consequently, the only evidence of identification was that given by the Police Officers who were involved in the chase and subsequent arrest of the Appellant. He further submitted that the chase occurred at night and visibility was poor. Although the Police Officers admitted that the area was illuminated by electric light nonetheless they were unable to tell the nature of the said light, its source, location vis a vis the fleeing Appellant. That all circumstances considered the possibility that the Police Officers apprehended innocent persons engrossed in their daily chores could not be ruled out. In support of his contention that the possibility of mistaken identity could not be ruled out the Appellant referred us to what he claims to be contradictory testimony of PW3 and PW4 regarding the number of persons they saw running away from

the stalled motor vehicle – were they 2 or 3, and also whereas PW3 claimed that they passed the culprits in their motor vehicle for a while before they stopped and chased them on foot for a while before their arrest, PW4 testified to the contrary. He stated that they merely chased them on foot. The Appellant therefore challenges the credibility of the witnesses. He concluded his submissions by stating that he was a victim of mistaken identity as his chase and eventual arrest did not rule out a possibility of the real culprits having escaped by mingling with other members of the public to conceal their identity; more so when the valuables allegedly stolen from the Complainant like money and the watch were not recovered from any of the suspects.

It is common ground that the Complainant was car jacked and robbed of valuables enumerated in the charge sheet. It is also common ground that soon after the incident the subject motor vehicle was spotted by PW2 and PW5 who were Police Officers on patrol duties within industrial area being driven suspiciously and they started to trail it. It is also not denied that the Complainant's Motor Vehicle was subsequently involved in an accident when in an attempt to shake off the patrol car of PW2 and PW5, the carjackers overshot the round about linking Dakar road and Dar-essalaam road. It is also not in dispute that once the subject motor vehicle stalled after the accident some occupants came out and ran in different directions leaving the complainant in the motor vehicle injured. It is also common ground that all the Appellant were arrested within the vicinity of the incident. It is also common ground that the scene where the accident occurred and the Appellants arrested was well lit. The street was deserted save for the Appellants and the activities of PW2, PW3, PW4 and PW5 leading to the arrest of the Appellant. On arrest one of the Appellants was found in possession of the jacket belonging to the Complainant together with valuables whereas the other was found with a toy pistol. What is in dispute is whether the three Appellants who were arrested within the vicinity were the same people who car jacked the Complainant. The Complainant's evidence is of little help in this regard for he admitted that he was unable to identify any of the Appellants due to the manner in which he was handled soon after the car jacking.

We are therefore left with the testimony of PW2, PW3 and PW4 in so far as the identification of the Appellant is concerned. PW2 and PW5 gave vivid account of how they spotted the vehicle that had been commandeered by the robbers, the ensuing chase which was very close up to the time the subject motor vehicle crashed. They had been joined in the chase by PW3 and PW4. It was the evidence of these witnesses that at no single time did they loose sight of the motor vehicle. And that when it crashed into the round about three people came out and ran in different directions. They were chased and arrested within the vicinity. As the streetlights were on, the said witnesses confirmed that they never lost sight of the people who had jumped out from the

motor vehicle and ran in different directions until they were arrested. The Learned Magistrate formed the opinion that these witnesses told the truth and did not waver at all under intense cross-examination. Indeed their testimonies taken together not only complemented each other but was also consistent. It is important to note that in his defence the Appellant did not deny that he was arrested in the vicinity of the accident. All he says was that he was arrested at 10.00 P. M. whilst on his way home from duty. He had nothing to do with the crime and that he was therefore framed. The Learned Magistrate having observed the demeanor these witnesses chose not to believe, and rightly so in our view, the Appellant's defence. The Appellant in his written submissions complained that since their arrest occurred at night and visibility was poor and even though the area was illuminated by street lights, nonetheless the Learned Magistrate did not appreciate how intense the street lights were, their location and position relative to the fleeing fugitives. However, we do not think that this Complainant has any merit. The testimony of the Police Officers was cogent. When chasing the Appellant which was for a very short distance they never lost sight of him. The electric light illuminated on the Appellant through out. We are satisfied on the evidence that the conditions prevailing were favourable to the positive identification of the Appellant bearing in mind that other than the Appellant and the other co-accused there were no other people in vicinity.

We now turn to consider grounds 3 and 4 of the Appellants jointly. In these grounds the Appellant complains that the Learned Magistrate did not consider that the Appellant had not been charged with being in possession of a toy pistol. Consequently there was no nexus between him and the offence of robbery with violence; and that the evidence of a finger print expert that could have linked him with the toy pistol was not tendered.
The evidence on record is that the Appellant was upon arrest and search found in possession of the toy pistol. He had been seen dashing from the stalled motor vehicle dangling what appeared to be a pistol. The Appellant need not have been charged with the alternative count involving the toy pistol to connect him with the charge he was facing nor was finger print expert evidence necessary in the circumstances. Indeed nowhere in the entire evidence recorded does he deny possession of the toy pistol. If it is established that what appeared to be a pistol is indeed a toy pistol, is the evidence of a finger print expert really necessary? We think that in the circumstances of this case it was not. The nexus connecting the Appellant to the offence is provided by the fact that he came out of a stalled vehicle, attempted to run, was chased and arrested. Upon arrest he was found in possession of the toy pistol tacked in his waist. When taken with the testimony of PW1 as to how he was car jacked – someone thrusting what appeared to be a gun to his temple, the nexus is complete.

We now turn to consider ground 5 of the Appeal. The complain here is that the totality of the evidence adduced fell

short of required standard of proof for the offence of robbery with violence. We disagree. The prosecution led evidence which showed that the Complainant was violently robbed of his vehicle and valuables. A gun was used. That gun turned out to be a toy gun. Three people were involved in the transaction. A toy gun was subsequently found on the Appellant. When arrested one of the co-accused had in his possession valuables that had just been stolen from the Complainant. All these circumstances taken into consideration we are persuaded as the Learned State Counsel submitted that the ingredients for the offence of robbery with violence contrary to Section 296 (2) were met and we see no merit in this ground.

In conclusion we deal with the ground of Appeal in which the Appellant complains that the Learned Magistrate erred in law and fact in not adequately considering the Appellant's defence. The Appellant gave unsworn statement in which he detailed his movements on the material day. In a nutshell he denied his involvement in the crime and offered an alibi. He complains that the Learned Magistrate failed to address herself adequately to the defence before rejecting it. The Appellant referred us to Section 169 (1) of the Criminal Procedure Code. Unfortunately the Section is of little help to the Appellant. The Section deals with the contents of the Judgment. Our perusal of the Judgment leaves us in no doubt at all that the Learned Magistrate fully complied with the requirements of the Section. We are also satisfied that the Learned Magistrate in her well considered Judgment reverted to the Defence put across by the Appellant and rejected it. She was not persuaded by the Appellants story that he was walking home when he was accosted by Police officers and arrested. The Learned trial Magistrate discounted the Appellant story that although where he was allegedly working, transport was provided he opted not to use the same but walk home on foot at 10.000 p. m. This ground of Appeal therefore fails.

In the result we find no fault by the Learned Magistrate in the manner in which she conducted the proceedings. We are satisfied that the evidence on record linking the Appellant to the perpetration of the crime was watertight and overwhelming.
Consequently we dismiss the Appeal.

Dated and delivered at Nairobi this …… day of …… 2004.
M. S. A. MAKHANDIA
Ag. JUDGE
L. K. KIMARU
Ag. JUDGE