REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 322 of 2005

DAVID KIARIE KAMAU ……..……..APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(An appeal against the judgment of the High court of Kenya at Nairobi (Lesiit and Ochieng, JJ.) dated 28th September, 2004

in

H.C.CR.A. NO. 1124 OF 2001)

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JUDGEMENT OF THE COURT

DAVID KIARIE KAMAU, the appellant herein, was convicted by Nairobi Chief Magistrate (B. Olao) on three counts: robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***; being in possession of a firearm without a firearm certificate contrary to ***section 4(2) (a)*** of the Firearms Act; and being in possession of ammunition without a firearm certificate contrary to ***section 4 (2) (a)*** as read with ***section 3(a)*** of the Firearms Act. Upon his conviction he was sentenced to death, the only lawful sentence under the first count, but the sentences on the other counts remained in abeyance. Being dissatisfied with that judgment, he appealed to the superior court (Lesiit & Ochieng, JJ) on the grounds that his identification was made in difficult conditions and was unreliable; the evidence relied on was contradictory; the charge was defective; and that his defence was rejected without any cogent reason. The superior court however dismissed the appeal on all the issues raised and confirmed the convictions. It stated however that the trial court committed an error of law in failing to impose sentences on the two counts and in leaving them in abeyance. For that reason, the superior court imposed a sentence of 5 years imprisonment on each of the two counts, the terms to run concurrently. The terms were then suspended. No authority was cited for that procedure, but we must state, it was erroneous. In many previous cases, this Court has set out the procedure for sentencing where capital offences are charged together with lesser offences that attract terms of imprisonment. These cases include, amongst others, **Abdihussein v R Cr. Appeal No. 47/01 (ur**), **Muiruri V R [1980] KLR 70**, **Abdul Debano Boye & Anor v R Cr. Appeal No. 19/01 (ur)** and **Samwel Waithaka Gachuru v R Cr. Appeal No. 261/03 (ur)**. We need only reiterate what was stated in the ***Boye case*** for emphasis: -

"**We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand.**

In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the Court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."

It is clear from those authorities that the trial court was right in the procedure it adopted.

As this is a second appeal, only matters of law may be raised and this Court would not interfere with concurrent findings of fact made by the two lower courts unless those findings are shown to be based on no evidence or on a pervasion of it – see **Njoroge v R [1982] KLR 388**, **Karingo v R [1982] KLR 213**. The appellant in person put forward some five grounds of appeal which were summarised in a supplementary memorandum of appeal and argued as two by learned counsel for him Mr. Wamwayi as follows: -

"*1. THAT the learned Judges of the High Court erred in law in accepting the evidence of a firearm's examiner whereas no qualifications were given to entitle the firearm examiner to be treated as an expert.*

2. THAT the learned Judges of the High Court erred in law in affirming the conviction by holding that the inconsistencies of three witnesses was neither important nor prejudicial to the appellant."

We shall revert to the submissions made on those issues presently but first, the brief facts.

At about 7 p.m. on 23rd June, 2001, three brothers were preparing to make dinner in their house at Muthurwa Estate, Nairobi. There was ***Simon Kinyua*** (PW1) (**Simon**), a businessman at Nyama Kima; ***John Mureithi*** (PW2) (**Mureithi**), a peanut seller; and ***James Njiru Wambura*** (PW5) (**James**). At the table where they sat was a lighted kerosene lamp. They suddenly heard a knock on their door and someone calling out "*Mureithi*", "*Mureithi*". Simon opened the door and someone entered and asked them whether they knew him. They said no. Just then two other strangers who were armed entered the house. They said they were policemen and ordered the brothers to lie down and remove their clothes. The intruders demanded Shs. 800,000/= which the brothers had supposedly made from their business but the brothers said they had no such money. The robbers took Shs.2000, a watch and a calculator from Simon. The robber who had entered the house first then ordered the brothers to go under a bed as they started walking out. One of the robbers took James' camera but he snatched it back, screaming. Mureithi however gathered courage and ran after the robbers. He grabbed one of the robbers as two gunshots rang out and the other two ran away. He held on, saying he would die with the robber, until some members of the public came to his help and pinned him down. In the course of the struggle, Mureithi felt an object under the robber's socks and upon removing it he found it was a pistol. Simon immediately reported the matter to ***Cpl. Solomon Simiyu*** (PW6) of Muthurwa police post who had also heard the gunshots. Accompanied by ***Pc Francis Ndegwa*** (PW3), ***Pc Ngeno*** and ***Cpl. Simiyu*** went to the scene and found the robber having been apprehended and they re-arrested him. The loaded pistol recovered from him was also handed over to Cpl. Simiyu. The matter was then placed before ***IP Alex Munyua*** of Railways Police Station for investigation.

The firearm and the ammunition were subsequently examined by ***Senior Assistant Commissioner of Police*** (SACP), ***Benson Gichuki***, a firearms examiner, and he found the pistol was a 7.62 mm caliber Tokalev firearm which was in poor mechanical condition. The one round of ammunition was found to be 9 x 19 mm caliber bullet which was live but could not be fired from the Tokalev pistol. A spent cartridge collected from the scene by Mureithi and handed over to the police was also examined and found to have

fallen from another firearm. SACP Gichuki then formed the opinion that the firearm could be adapted for discharge of a bullet and that the bullet was capable of being fired. Both therefore qualified as firearm and ammunition, respectively, under the Firearms Act.

Mureithi was medically examined by ***Dr. Zephania Kamau*** (PW8) and was found to have suffered bruises on his right fingers, left shoulder and both knees, but was healed. The doctor's assessment was that he suffered harm. However, the charge sheet did not allege any injuries on Mureithi but on Simon, an issue which was resolved by the two courts below and does not arise before us.

The man who knocked at the house of the three brothers, the man who was apprehended by Mureithi with the assistance of members of the public, and the man who was in possession of the pistol and ammunition, was ***David Kiarie Kamau***, the appellant now before us. He said in his defence that he was a maize roaster and on the day in issue he was on his way home when he heard people say he was "*one of them"*. He was then set upon and beaten up by those people before they took him to Railway Police Station. He did not commit any offence at all.

As stated earlier, the appellant now complains, in his second ground of appeal, that there were inconsistencies, discrepancies and contradictions apparent in the evidence of the three brothers which were not tested with the greatest care, otherwise the two courts below would have held that the identification of the appellant was not free from error. Mr. Wamwayi cited these flaws as: the uncertainty about who opened the door when the robbers came knocking; whether or not one of the brothers was called out by one of the robbers; whether Mureithi made the arrest alone before members of the public arrived or members of the public gave chase and arrested the robber; whether the incident took 15 minutes as asserted by the brothers and if so what part of that period was taken in observing the appellant; lack of any description of the appellant; and the erroneous assessment of the three brothers as honest witnesses. In Mr. Wamwayi's submission, the brothers could well have been honest but mistaken because the conditions favouring positive identification, inside the house and outside, were difficult.

For her part, learned Principal State Counsel Mrs. Murungi found no reason to attack the findings of the two lower courts on the identification of the appellant and his arrest. That there was sufficient light in the room to enable the witnesses to identify the appellant was a proper finding. The arrest was immediate and PW2 did not lose sight of the appellant before engaging him in a struggle. There was thus no necessity of giving any description of the appellant to the police since they found the appellant being held at the scene.

We have anxiously considered this ground of appeal owing to the gravity of the offence and the principles which this Court has set in a long line of authority on identification. Mr. Wamwayi notably referred us to **Kiarie v R. [1984] KLR 739** and **Maitayi v R [1986] 2 KAR 75**. We have considered those authorities together with the evidence on record and have come to the conclusion that the two lower courts did not commit material errors in law or in principle in making the finding that the appellant was properly identified as one of the robbers who committed the offence. In considering the issue of identification the trial court stated as follows: -

"**I have considered the evidence on both sides as I should. The accused was a total stranger to the complainant and his brothers and I see absolutely no reason why they would form themselves into a gang of liers to give evidence against a total stranger. From their demeanour which I noted, I saw nothing to doubt the credibility of those eye witnesses. They did not lose sight of the accused whom they saw enter their house, rob them but who was immediately followed outside and arrested soon after the incident. The suggestion which he seems to raise in his defence that he was an innocent maize roaster on his way home is not supported by the evidence on record. I have considered his defence together with the evidence against him, found his defence to be untrue and reject it. Not only was the accused in the company of two others but he was also armed with a pistol which was recovered hidden in his socks soon after this arrest. There is nothing to show that someone else planted this pistol on him."**

The superior court re-evaluated the evidence as it was bound to do and reached similar findings thus: -

"**On our part after re-evaluating the evidence adduced, we are satisfied that the prosecution did prove a nexus between the persons who robbed them and the appellant. We considered the identification of the appellant by the three witnesses quite safe. First we considered that the appellant had first entered the complainant's house alone and had engaged them in a conversation before his accomplices joined him to commit the offence. We find that PW1 had ample opportunity to see and observe the appellants appearance for the added reason that the appellant's direct question to him and to PW2 and 5 was whether either of them knew him before. Further, we are satisfied from the evidence of PW2 that he followed the three robbers and apprehended the appellant, while his accomplices escaped. The fact that PW2 followed the robbers out of the house and did not loose sight of them before apprehending the appellant gives assurance to his evidence that indeed there was no chance of a mistaken identity."**

"**We do agree with the learned trial magistrate's finding that the appellant was arrested soon after the offence was committed. That PW2, who was the first to arrest him had not lost sight of him from inside the house where the offence was committed, to outside where he apprehended him. We do find that from the evidence on record and the circumstances of this case that the evidence of identification was watertight and that there was no possibility of mistaken identity. The test of identification we have applied is that even though the conditions of lighting at the scene may not have been bright, considering its source was a lantern, however, given evidence of the complainant that the appellant and his accomplices took 15 minutes with them, and further considering that the appellant was arrested at the scene by PW2 who never lost sight of him at any time, the evidence of identification was safe to infer that it was correct without any possibility of mistaken of error. See <u>REPUBLIC</u> <u>vs. TURNBULL & OTHERS</u> (1976) 3 All E.R. 549, <u>REPUBLIC vs. ERIA SEBWATO</u> 1960 E.A 1974."**

The appellant before that court had complained, as he did before us, that there were material inconsistencies in the evidence of PW1, PW2 and PW5. The court however resolved that issue as follows: -

"**We noted inconsistency in the evidence of PW1, 2 and 5. Whereas PW1 the complainant in count 1 said that the appellant just entered the house and questioned them before his two accomplices joined him, PW2 and 5 said that the appellant entered first, followed immediately by two others. In our view the inconsistency does not taint these three witnesses' demeanor or raise any doubts as to their credibility. The inconsistency is not material and does not in our view go to the substance of the charge. We do not consider the inconsistency of any importance neither do we find that it caused any prejudice to the appellant.**

The appellant also submitted that their was inconsistency in the prosecution case about the recovery of the pistol. We do not find this submission merited. Pw1 who reported to the police took PW3 back to the scene was not aware of any recovered pistol. PW2 is the one who said he recovered it. From the evidence adduced, he recovered it after PW1 left to call police and before PW3 came to the scene. So by PW3 saying the report by PW1 did not refer to any recovered pistol is no contradiction in the evidence of the prosecution. We dismiss that submission as having no basis at all."

With respect, we agree with the reasoning of the superior court. Such inconsistencies as there may have been between the three witnesses did not dent their demeanor and credibility which, the trial court expressly noted on each of the witnesses, was reliable. That court was the best judge in that regard and we have no reason to impeach that finding. That second ground of appeal fails.

The first ground of appeal relates to the evidence of the ballistics expert. In Mr. Wamwayi's submission, there was no nexus between the firearm and ammunition that were examined by SACP Gichuhi (PW7) and the pistol allegedly recovered from the appellant and given to Pc. Ndegwa (PW3) and Cpl. Simiyu (PW6). The object examined by the former was in poor condition and there was no demonstration on how it could be adopted for discharge of a bullet. Futhermore SACP Gichuki was not an expert as defined by this Court in **<u>Mutonyi v R</u>. [1982] KLR 2003** and therefore his evidence ought

not to have been relied on. Proof was thus not beyond reasonable doubt.

Once again, the selfsame issue was agitated before the superior court but it was rejected on the ground that the definition of "*Firearm"* under ***section 2*** of the firearm Act was wide enough to cover the object that was examined by the ballistics expert. The section provides in part:-

"**Firearm means a lethal barreled weapon of any description from which any shot bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile."**

If SACP Gichuki was an expert therefore, and he gave an opinion that was consistent with the Act, which opinion the two courts below accepted, we would find no error of law which would compel us to interfere with his evidence. Was he an expert?

Section 48(1) of the Evidence Act provides as follows: -

"**48. (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions."**

This Court considered that section in the **Mutonyi case** (supra) and defined expert evidence as "***evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like***." SACP Gichuki gave his antecedents to the court when he testified. For 20 years he had been testing, examining and identifying firearms, ammunition and spent cartridges in the Kenya Police Force. That is what he was requested to do with the objects he received from IP Munyua of Railway Police Station. He explained the process he followed in his report which was produced in evidence. He was not challenged in cross-examination on any aspect of his evidence; except the clarification made at the instance of the trial court, that the firearm which was in poor mechanical condition could be adopted for discharge of a bullet. With respect, we think the experience and skill of the witness were satisfactorily demonstrated and the trial court was therefore entitled to accept his opinion. We therefore reject the suggestion that there was no expert opinion offered in the trial. We also find no substance in the claim that there was no connection between the objects examined by the expert and the objects found in possession of the appellant. There are clear concurrent findings of fact that Mureithi (PW2) recovered the pistol and ammunition on the appellant's person and gave them to the officers who arrived at the scene including Cpl. Simiyu and Pc. Ndegwa who confirmed receipt of the items. Cpl. Simiyu in turn handed over the items and the arrested appellant to IP. Munyua who testified that he was the investigating officer. He completed the exhibits memo and handed over the recovered items to SACP Gichuki for examination. We see no reason to doubt that evidence. That ground of appeal also fails.

In the result the appeal has no merits and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 3rd day of November, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR