



**IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: KWACH, SHAH & O'KUBASU JJ.A)  
CRIMINAL APPEAL NO. 107 OF 1999**

**BETWEEN**

**JOSEPH MUNGA KIRAGU.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at  
Nairobi (Aluoch & Githinji, JJ) dated 29th October,  
1998**

**in**

**H.C.CR.A. No.130 of 1997)**

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**JUDGMENT OF THE COURT**

Joseph Munga Kiragu (the appellant) was tried and convicted by the Chief Magistrate's Court at Nairobi on the following three counts:-

***i)robbery with violence contrary to section 296(2) of the Penal Code .***

***ii)being in possession of a firearm without Firearms Certificate contrary to section 4(2)(a) of the Firearms Act - Cap 114.***

***iii)being in possession of ammunition without a Firearms Certificate contrary to section 4(2)(a) of the Firearms Act Cap. 114.***

As a result of the foregoing the appellant was sentenced to suffer death as mandatorily required by law in respect of the first count while on the second count the appellant was sentenced to five (5) years imprisonment and three years imprisonment on count 3. The sentences on counts two and three were ordered to run concurrently.

The appellant's appeal to the High Court was considered and subsequently dismissed. He now comes to this court by way of a second appeal.

When the appeal came up for hearing before us on 1st March 2001 Mr Otenyo for the appellant told us that although there were six grounds of appeal he would rely only on one ground which related to identification. Mr. Otenyo's submission was that the person who attacked PW1 had glasses but the appellant had no glasses although he was found in the stolen vehicle an hour after the robbery. In his view the inference ought to have been to the effect that the appellant was guilty of handling stolen property.

As regards the two counts under the Firearms Act Mr Otenyo argued that the gun which was produced in court was different from the one mentioned in the charge sheet and so convictions on counts two and three. The Public Prosecutor Mr. Bwonwonga supporting the conviction of the appellant on all the three counts stated that PW1 identified the appellant and that the same appellant was arrested in the stolen vehicle. In Mr. Bwonwonga's view evidence of identification left no doubt that the appellant was the person who robbed PW1. As regards the pistol Mr Bwonwonga pointed out that this was found in appellant's trouser pocket. He therefore invited us to dismiss the appeal. There are concurrent findings by both the trial court and the first appellate court. The evidence connecting the appellant with the offences with which he was charged was to the effect that on 13th February 1995 Benson Chira Gicho (PW1) a driver with East Africa Industries was driving company car registration number KAE 915E - Toyota Hiace dropping several members of staff at their homes. At about 8 p.m. P.W.1 dropped his last passenger at Kangemi and as he turned his car his way was blocked by a red car a Peugeot 505 saloon registration number KAD 667T. From the red car a person armed with a gun emerged and entered PW1's car pushing him (PW1) to the passenger seat. Monicah Wanjiru Theuri (PW2) who was near the scene was also pushed into PW1's car. The two victims (PW1 and PW2) were ordered at the back of the car and driven to Jamhuri Show Ground where they were abandoned while the vehicle was driven off. PW1 was able to identify the appellant as the person who emerged from the red car armed with a pistol. PW1 reported the matter to the police immediately after he had been abandoned at the Jamhuri show ground. The police circulated the information and as a result Cpl. Paul Mbinda (PW4) and PC Jumapili Hamisi (PW3) laid an ambush at Agip Petrol Station along Langata Road when they saw a vehicle number KAE 915E approaching. The vehicle had two occupants and when the police officers flashed them to stop, they defied the order and instead opened fire on the policemen. The police officers returned fire and the appellant who was one of the occupants in the vehicle tried to escape when he was arrested. He was searched and found with a pistol in his trouser pocket. The appellant was then arrested, charged, tried and eventually convicted on all the three counts. The appellant's defence was simply that he was an innocent person who happened to be at the scene where police were shooting suspected robbers and he went to check what was happening only to be arrested and charged with the offences he knew nothing about.

From the evidence on record and the findings by both trial court and the first appellate court the appellant was identified by PW1 during the robbery at Kangemi at about 8 p.m. on 13th February 1995. PW1 was robbed of a vehicle registration number KAE 915E and this incident was reported to the police who circulated the information. About an hour after the robbery the appellant was found in the same vehicle stolen during the robbery. The appellant was in possession of a pistol which was loaded and hence his arrest.

It is against that background that we are being urged to find that identification of the appellant was not proper and hence his conviction ought to be quashed. We were referred to two very familiar authorities on the issue of identification.

These are **Roria v. Republic** [1967] E.A 583 and **Kamau v. Republic** [1974] EA 139

On the issue of identification we would start with the well known case of **Abdalla bin Wendo & Another V. R.** [1953] 20 EACA 166 at P.168 in which the predecessor of this Court made the following observation

***"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error".***

The above was cited with approval in the later case of **Roria V. Republic** [1967] E.A 583 in which the issue of identification was taken a step further when the same court stated that:

***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts. There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity".***

In **Joseph Ngumbao Nzaro V. Republic** [1988-92] 2 KAR 212 this Court held that the guidelines laid down in the English decision of **R.V. Turnbull** [1976] 2 All ER 549 were appropriate to the circumstances and inhabitants of Kenya. The guidelines given in Turnbull's case (supra) were as follows:-

***"First whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identifications. In addition he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.***

***Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have this accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"***

The evidence against the appellant is to be examined bearing in mind what the courts have stated earlier as regards evidence of identification as we have endeavoured to illustrate by the few cases that we have cited above.

The appellant's complaint here is that he was not properly identified. But there are concurrent findings by both trial and first appellate courts that the appellant was properly identified. It is true that this was identification by a single witness. But that was not the only evidence connecting the appellant with the robbery with violence that was staged at Kangemi on the material day. Only an hour or so later the appellant was found in the same vehicle that had been stolen during the robbery. The appellant was also armed with a pistol which he put into use as he and his companion engaged the police in a shoot out just before the appellant was overpowered and arrested. The appellant was certainly in possession of a fire-arm and ammunition. He had no certificate authorizing him to possess these items. Hence, his conviction in the second and third counts cannot be faulted. As regards his conviction on the more serious charge of robbery with violence contrary to section 296(2) of the Penal Code, there was evidence of identification by PW1 which was corroborated by the fact that an hour or so after the robbery, the appellant was found in the stolen vehicle. So, the evidence against the appellant was overwhelming.

In our view, the appellant's conviction on all the three counts was inevitable. In view of the foregoing, we find no merit in this appeal and we order that it be dismissed.

**Dated and delivered at Nairobi this 16th day of March, 2001.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**