IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, LAKHA & BOSIRE JJ.A)

CRIMINAL APPEAL NO.73 OF 1992

BETWEEN

JOSEPH MAINA MWANGI .....APPLICANT

AND

REPUBLIC .....RESPONDENT

JUDGMENT OF THE COURT

Joseph Maina Mwangi, the appellant, has come to this Court on second appeal, challenging his conviction and sentences by the Senior Principal Magistrate, Nairobi on two counts of capital robbery contrary to section 296(2) of the Penal Code, and one count of simple robbery contrary to section 296(1) of the same Code. The convictions in all the three counts were, as concurrently found by both the courts below, based on circumstantial evidence. It is trite law that where, as here, the conviction is exclusively based on such evidence it can only be properly upheld if, as was authoritatively stated by the Court of Appeal for Eastern Africa, in the case of *Simon Musoke v R* [1958] EA, 715, the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant but also that there exists no co- existing circumstances which would weaken or destroy such inference. In the appeal it is contended that there are discrepancies and gaps in the evidence, which if both the courts below had considered they would have found that the appellant did not commit the offences aforementioned.

The appellant along with two other people was arrested on 27th May, 1986, by Moses Wachira Kimondo (PW 1), a Chief Inspector of Police in the company of other police officers acting on information he received from a police informer that the appellant and his two companions were preparing to commit a robbery. This was at Ol Kalau, at about 6.20 pm at a playground near a petrol service station. PW l and his party searched the three men and inside a paper bag (exhibit 8) which was allegedly in the possession of the appellant, they recovered an AK47 rifle (exhibit 1) without a magazine which magazine the appellant is said to have produced shortly later, from inside his trouser. It was tucked between the trouser waistline and his lower abdomen. There was a dispute as to how many rounds of ammunition it had because PW l testified that they were 5 in all, while one of his companions said they were 8. Mr Kiage, for the appellant, considered this discrepancy crucial as in his view it severely dented the credibility of the two witnesses regarding whether indeed the appellant was arrested with anything. Besides the rifle and its magazine, a torch and small *simi* were also recovered from the bag. One of the appellant's companions, Jonathan Ngare, was allegedly found with a pen knife (exhibit 5), a small plastic bottle; and sunglasses (exhibit 6 and 8 respectively). Ngare was thereafter taken with the others to Ol Kalau Police Station where he was booked in with remarks in the occurrence book that he had been arrested for being in possession of a military assault rifle complete with a magazine carrying 8 rounds of 7.62mm calibre ammunition. Only Ngare was booked there. The appellant with the third man were taken to Nyahururu

Police Station where they were booked in with similar remarks in the occurrence book of that station.

The said rifle, magazine and ammunition were, according to the evidence handed over to the ballistics expert, William Lubanga (PW 12) by Mr Kikwai of CID Headquarters on 29th May 1986. Here, too, there is a discrepancy. PW 1 testified that on 30th May 1986, he had the "exhibits," which he then handed over to Superintendent Kiama, the then District Criminal Investigations Officer (DCIO), Kiambu. Mr Kiage submitted that if the firearm was indeed handed over to the ballistics examiner on 29th May, 1986, it could not have been the same one PW 1 had on 30th May 1986. In his view, therefore, the gun PW 12 examined and which was produced in Court was different from the gun, if any, that was said to have been recovered from the appellant. Such a conclusion, he said, could have been negatived had Mr Kikwai who handed over the weapon to the ballistics examiner testified to supply the missing link.

The ballistic expert's evidence regarding the rifle supplied the linkage of the appellant as the person or one of the persons who violently robbed Josphat Muchai Gatimu (deceased) with his wife Tabitha Njeri Muchai; and also Joseph Kamau Kiburu, respectively, on 11th May 1986, along Naivasha-Nairobi Road and Kigumo village, both in Kiambu district. As we stated earlier the appellant's conviction was based on circumstantial evidence. No one identified him as having committed the offences. We have already outlined how the appellant was arrested and we consider it now essential to also give a resume of the robberies.

On 11th May 1986, at Ngarariga village along the Naivasha-Nairobi highway Josephat Muchai Gatimu and his wife Tabitha Njeri Muchai (PW3) were travelling from Nakuru to Nairobi in their motor vehicle registration No KWP 417, when at about 5.30 pm they stopped at Ngarariga, to buy some fruits. Before they could set off to continue their journey two African men approached her husband, who was the driver, and ordered him to get out, which he did. Thereafter they demanded to be given all valuables including the car keys. PW 3's husband refused to surrender the said keys and was thereupon shot in the stomach and shoulder area with a firearm. He collapsed and died later while undergoing treatment. The two men also shot PW 3 on her right wrist. She fell down unconscious. In the meantime the two men took the car keys and after shooting dead the fruit vendor drove away leaving the three victims of their attack lying by the roadside. When the motor vehicle was eventually recovered at Pangani area in Nairobi, several personal items of Muchai and his wife (PW 3), were missing. Besides that car there was another car Reg No KXJ 141, a Peugeot 504 pick up, then owned by one Joseph Kamau Kaburu (PW10), which was also recovered at the same place.

Motor vehicle No KXJ 141, was taken from its owner at gun point on the evening of 11th May 1986, by two men who together with at least three others were travelling in motor vehicle KWP 417. According to Kaburu, the said motor vehicle trailed him right into his homestead where in addition to the said motor vehicle its occupants robbed him and his wife of cash, household and personal items before escaping in both motor vehicles. This incident was the subject matter of the third count.

The fact that motor vehicle KWP 417 was used by those who robbed PW 10 of his motor vehicle and other items links that robbery with those of Muchai and his wife. That was the more so because the robberies were committed within a short interval of each other. However, like in the case of the robberies along the Naivasha- Nairobi highway neither PW 10 nor his wife identified their attackers.

From those facts a rebuttable presumption arises that the same people were involved in all the three robberies. Apart from the evidence of the ballistics expert there is no other evidence to show that the appellant was or could have been one of the robbers.

We earlier stated that the rifle the appellant was allegedly arrested with was examined along with cartridge cases which were recovered at the scene of the first set of robberies, and those which were test fired from the aforesaid rifle. There was also a fired bullet which was recovered from inside Muchai's clothes while he was undergoing treatment. A comparative microscopic examination was carried out on those cartridge cases. The expert formed the opinion that they were fired from the same gun. The serial number of the gun was given as either P67956 or B67956. Mr Kiage also raised issue on that discrepancy, but we do not think it affects the case against the appellant in anyway as the trial magistrate must have

recorded what he made out from the pronunciation of the prefix letter by the various witnesses. We take judicial notice of the fact that some people from certain communities in this country pronounce “P” as “B” and *vice versa*.

We note that Mr Kiage does not challenge the correctness of the ballistic expert’s opinion. We too have no basis for doubting the accuracy of his findings. PW 12 was shown to have long experience in his field. However Mr Kiage, as we stated earlier, complained that assuming the firearm the expert examined was taken from the appellant, the evidence is unclear how it was handled between the time of its recovery up to the time it reached the ballistics examiner. We agree that there is a discrepancy as to the date when the firearm in question reached the ballistics examiner in view of the evidence of PW l in which he stated that he handed over the exhibits to a certain officer on 30th May 1986, a day after they had allegedly been received by PW 12. The discrepancy is not, in our view, fundamental considering the fact that a firearm unlike several other items has a serial number. The weapon which was recovered from the appellant had a serial number which was noted as B67956. Japheth Munyoki Ziwaihi (PW 14), a Chief Inspector of Police, testified that he received the firearm along with other related exhibits on 28th May 1986, and thereafter he submitted them or rather transmitted them to the ballistics examiner. The serial number was the one which was noted in the OB at O1 Kalau Police Station on 27th May, 1986. In view of the foregoing evidence it is quite clear that PW 1 must have been mistaken regarding the date when he received the rifle. Besides, there is evidence on record that the appellant was convicted of being in possession of the said rifle and ammunition without being in possession of a firearm certificate, an offence for which he was serving sentence at the time of his trial in connection with the robbery charges.

In the result the failure by the prosecution to call Mr Kikwai who personally delivered the firearm to the ballistic examiner is of no consequence. In *Bukenya v R* [1972] EA 549, it was held that where the prosecution fails to call a witness and it transpires that the evidence in support of the charge against the accused concerned is barely adequate, the Court trying the case is perfectly entitled to draw an adverse inference that had the witness testified his evidence would have tended to be adverse to the prosecution case. We cannot possibly hold that the evidence regarding the appellant’s possession of the rifle is barely adequate. The appellant admitted he was arrested on 27th May 1986, together with two others. He admitted he was then taken to Nyahururu Police Station with another person. The entries of the particulars of the firearm in the OBs at both Ol Kalau and Nyahururu Police Stations carry those particulars. Besides, the appellant in his inquiry statement admits he was found in possession of the firearm. We do not lose sight of the fact that the appellant retracted his statement. His evidence was that he signed the statement at gunpoint. The trial magistrate nonetheless admitted it in evidence because he was satisfied not only that it had been given by the appellant, but also that he gave it voluntarily.

In view of the facts and circumstances of this case we hold that the trial magistrate was perfectly entitled to come to that conclusion. The superior court on first appeal declined to rely on it holding that because the record of the trial court did not specifically show compliance with the provisions of sections 210 and 211 of the Criminal Procedure Code (CPC) then the trial within a trial regarding the admissibility of that statement was a nullity. That cannot possibly be so. We concede that the said record does not specifically state that sections 210 and 211 CPC were complied with, but it is clear that the appellant was called upon to and did give sworn evidence regarding the statement. He could not have done so unless the Court explained to him that he was at liberty to do so. The position would have been different had the record been silent on whether or not the appellant testified in the trial within a trial. Besides, the omission to specifically state that sections 210 and 211 CPC had been complied with is curable under the provisions of section 382 CPC. The appellant having testified cannot be said to have been prejudiced.

We also note that the first appellate court declined to use the statement because the trial magistrate declined to allow the prosecution the opportunity of calling rebuttal evidence to the allegation by the appellant that the inquiry statement had been extorted from him. The record is not explicit that the prosecutor specifically requested that he be allowed to call rebuttal evidence. All he said was “I have about 2 other witnesses.” This was at the end of the defence hearing during the trial within a trial. It is unusual for a Court to reopen the prosecution case at the end of the defence hearing to enable it to call further evidence. That is the more so when the prosecution closes their case after being given a hint that the defence would challenge the admissibility of the statement sought to be produced on account of it

having been extorted from him. The trial magistrate was quite right in declining to allow the prosecution to reopen their case after defence hearing.

But Mr Kiage submitted that we lack the jurisdiction to deal with the issue on a second appeal, more so, he said, because it was not raised by either side. Ordinarily, that is so, but whereas here, the appellant seeks to challenge a finding which is supportable by evidence which, in the opinion of the Court was improperly excluded by the first appellate court, there is no impediment in law to considering the propriety of such exclusion. It is clearly a point of law which the Court can properly raise *suo motu*, for the ends of justice. True, as Mr Kiage submitted, the issue was resolved in the superior court in favour of the appellant. However, if such a finding should be left to stand merely on the ground that a court below had, even though improperly, resolved it in favour of the appellant, clearly the ends of justice would be defeated. We say no more on the issue.

In the result we find that there is ample evidence upon which the concurrent findings of fact by both the courts below were based, that the appellant had possession of the firearm in issue on 27th May 1986, which firearm according to PW12 was the one which was used against PW3, her husband, and the fruit vendor, on 11th May, 1986.

Before we deal with the last issue namely, whether the possession was so recent as to justify the inference that the appellant in conjunction with other people robbed PW 3 and her husband, and later PW 10, we consider it imperative to deal with two other discrepancies which Mr Kiage pointed out. The witnesses were not *ad idem* on who recovered the expended cartridges from the scene of the first set of robberies and, likewise, on the number of bullets which were in the magazine which was allegedly recovered from the appellant. In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, *viz* whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. The offences against the appellant arose in May 1986. However the trial before Mr JA Osiemo SRM (as he then was) did not commence until a year later. Upon Mr Osiemo's elevation to the High Court the trial started *de novo* before a different magistrate, Mr Mabele SRM, (as he then was), over two years later. In view of the long passage of time it would not be expected that witnesses would testify without discrepancies. Besides, the discrepancies are only matters of minute detail and do not affect the tenor and substance of the prosecution case. In our view, therefore, they are inconsequential.

We earlier stated that PW 3, her late husband and the fruit vendor were attacked at about 5.20 pm on 11th May 1986. The appellant was found in possession of the firearm used in the attack on 27th May 1986, which was about 16 days thereafter. The trial magistrate found the circumstantial evidence against the appellant weighty and that it irresistibly pointed to the appellant as having robbed PW 3 with her husband; and also PW 10. The superior court on first appeal confirmed that holding and itself held that the appellant having been found with the firearm which, in that Court's view, does not easily change hands, the inevitable inference to be drawn from the circumstances is that he must have been involved in the robberies charged. In coming to that conclusion the Court did not advert to the appellant's explanation as to his possession of the firearm contained in his inquiry statement. Nor did that Court consider what the appellant said therein in answer to the charges against him. The appellant states in his inquiry statement that he stole the gun from one Kariuki long after the robberies complained of. However, considering that in the statement he confesses to having been party to the plan to rob, it did not matter that only his accomplices participated in the intended robbery. They had a common purpose and together went out to execute it.

Both the courts below were perfectly entitled to come to the conclusion they did regarding the appellant's participation. The appellant had the duty to rebut the presumption of participation which he failed to do. We find no co-existing circumstances to weaken or destroy the inference of the appellant's involvement and accordingly find no basis for interfering with his convictions and sentences in all the three counts and accordingly dismiss his appeal in its entirety.

Dated and delivered at Nairobi this 19th day of October 2000.

P.K. TUNOI
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JUDGE OF APPEAL

A.A. LAKHA
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JUDGE OF APPEAL

S.E.O. BOSIRE
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR