IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: PLATT & APALOO, JJ.A. AND. MASIME Ag. J.A.)

CRIMINAL APPEAL NO.149 OF 1986

BETWEEN

GABRIEL KAMAU NJOROGE.........................APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Rauf, J.) dated 3rd July, 1986

in

Criminal Appeal No.21 of 1986)

JUDGMENT OF THE COURT

The appellant was convicted of robbery contrary to section 296(1) of Penal Code and sentenced to six and a half years' imprisonment with ten strokes of corporal punishment and he was ordered to be subject to police supervision after his release from jail as required by law.

There were two robberies involved in this case. The first occurred, according to the particulars of the charge, on August 11, 1985 at about 8 pm at the Sigona Golf Club. Dr Macharia had been successful in a golf competition arranged for doctors. He was returning to his car in the car park followed by another doctor whom Dr Macharia was to show a shorter route home. Dr Macharia placed his prize of golf balls on the seat of his car, put his gun, a Smith and Wesson, in the glove compartment of the car, and was about to close the door when somebody grabbed his hand, and pointed a small gun at his abdomen. Dr Macharia courageously struggled for the gun but another man hit him on the leg causing him to fall down. He was shot at, but was able to get up, and ran around the compound, when a second shot was fired at him. Unfortunately his keys and spectacles fell down, and while Dr Macharia reached the club house the robbers took away the car and all its contents. The car was later found abandoned, and when Dr Macharia saw it, the gun, a brown case of clothing, the radio cassette and the rear view mirror were all missing. It is clear therefore that the robbers had used force in order to steal the car and its contents.

Dr Macharia identified the appellant as the man who first pointed a gun at him. This identification was a

dock identification . No identification parade had been held.

The second robbery, which is not the subject of this case, occurred on August 20, 1985 at about 11.30 am in Limuru township. Police Constable Wilson Mutahi (PW 2) was on duty with Police Constable Mutuku; they were in police uniform, armed with rifles and were patrolling Limuru town. They received information that there had been a hold up at Limuru Barclays Bank Limited. The constables rushed to the bank and as they were about to reach the door of the bank, they saw somebody escaping from the bank with a paper bag. Then another came out holding a pistol. This man fired two rounds of ammunition towards the constables who returned the fire 13 rounds of ammunition in all. The man escaping from the bank ran away towards Limuru township. He chased the fugitive and caught up with him at the railway line. He called upon the man to drop his pistol; the man complied and Constable Wilson arrested him. That man was alleged to be the appellant, and when the pistol was picked up the appellant was taken to Chief Inspector Kiketi to whom he was handed together with the pistol and one round of ammunition.

The gun was a Smith and Wesson revolver .38 special serial number 218640. Dr Macharia had a certificate for it which confirms that this serial number was that of his gun. He had seen the gun in court and identified it as his. The appellant is quite right to point out that there was a discrepancy in the evidence between Dr Macharia and Police Constable Chibeka (PW 4) as to whether Dr Macharia brought the certificate to the police station, or whether Constable Chibeka found the firearm certificate in the stolen car on August 12, 1985, when the car was found abandoned. It is also true that neither constable Mutuku nor Chief Inspector Kiketi gave evidence

in support of constable Wilson Mutahi's account of what happened. Furthermore it is true that Constable Chibeka did not take the revolver and remaining bullet to the firearms examiner, Mr Lubanga (PW 5). It is clear from Mr Lubanga's evidence that it was Corporal Musavya. It is therefore likely that Constable Chibeka had forgotten what occurred; he probably did not find the firearm certificate in the abandoned car, nor did he take the revolver and ammunition to Mr Lubanga.

The questions raised on this appeal are whether the contradictions were such that the findings of facts were rendered unreliable. It was held by the trial court that Dr Macharia reliably identified the appellant as the man who took hold of the doctor. This was supported by the fact that the appellant had the doctor's revolver in his possession despite the appellant's defence that he had been a bystander and falsely arrested.

The High Court on first appeal made short findings. It was said that the identity of the appellant was somewhat doubtful, but the conviction would be upheld on the doctrine of recent possession of the gun which was stolen from the complainant. The appellant's explanation about the gun was properly rejected by the trial court. Indeed the evidence was overwhelming and the police officers' evidence was rightly accepted.

Naturally the appellant appealed to this court against that judgment. As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court

of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. (See *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570). If the High Court has not carried out its task, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law. On first appeal, the issues raised were that in

general there was not enough evidence in view of the contradictions and lack of witnesses to support the prosecution, the appellant had brought to the attention of the court that there was no description of the clothes worn by the appellant and no identification parade. On the issue of the appellant's possession of the gun he had attempted to dispute that.

As the learned judge found that the evidence of his identification was doubtful, we would have left the matter there, had not counsel for the republic remarked that the identification of the appellant by the doctor in court would have been sufficient. When we expressed surprise counsel invited the court to express its opinion. Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.

On many occasions this court has held that such identification is almost worthless without an earlier identification parade (see *Owen Kimotho Kiarie v Republic*, Criminal Appeal No 93 of 1983 relying on Rachhodas & Thakore, *The Law of Evidence*, (The Indian Evidence Act) 13th edn p 151.) The operation of this rule may be observed in *Gopa s/o Gidamebanya v Republic* (1953) 20 EACA 318 at 322 *et seq*.

Dr Macharia was a single identifying witness, whose evidence had to be tested with the greatest care, as the trial court fortunately remembered (*Roria v Republic*[1967]EA 583). That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is

then to be tested on an identification parade. (See *Republic v Mohamed bin Allui* (1942) 9 EACA 72, *Rex v Shabani Bin Donald* (1940) 7 EACA 60 and *Owen Kimotho Kiarie* (*supra*). If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in *Republic v Turnbull* [1976] 3 All ER 549 saw the examination. 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 the accused under observation " At what distance" In what light" Was the observation impeded in any way, e.g by passing traffic or a 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 him and the accused's actual appearance" As a result of public disquiet in England that there were mistakes of identification, the Attorney-General agreed that the Director of Public Prosecution would not invite a witness as to identity who has not previously identified the accused at an identification parade, to make a dock identification unless the witness' attendance at a parade was unnecessary or impractical or there were exceptional circumstances. (See *Archbold, Criminal Pleading Evidence and Practice* (40th edn) para 1348 et seq.) There is no evidence that there is any less disquiet in Kenya than in England, and as the authorities on this topic stretch back some 40 years, it is not asking too much that a witness is asked to give a description of the accused, and the prosecution to arrange for a fair identification parade.

Having these principles in mind, we would go a little further than the High Court and state that as a matter of law, the dock identification in this case was almost worthless. Certainly no conviction could be based upon it alone.

Turning then to the second part of the case, the High Court based its conviction of the appellant on the doctrine of recent possession, which was not a matter spelt out by the trial court. It is not surprising, therefore, that the appellant has tackled this aspect on this appeal. What he says in effect is that it is a misdirection of the trial court to have dealt with the evidence on a new aspect of the case without examining the contradictory evidence, and simply saying the police are to be believed and the appellant

is not. It may be that this cavalier type of treatment is the cause of many second appeals. The learned judge should have considered: (1) whether the appellant was the man actually arrested with the revolver; (2) whether it was the stolen revolver; (3) whether the appellant's defence raised any doubt on these matters; and (4) whether the inference of theft at the time of the robbery charged was properly drawn; whether it might be a case of stolen property at the bank, or receiving stolen property, if it were not a case of mistaken identity. On the first point, it is a case of the evidence of Constable Wilson Mutahi against that of the appellant. In this court, the test is whether there was any evidence, and not the sufficiency of it. There was evidence, even if Constable Mutuku could and should also have been called. It would also have been proper for an inquiry to be made whether the appellant had always remained in the view of Constable Wilson Mutahi, what clothing he had worn, which Constable Mutuku might have corroborated. It would have been proper for Chief Inspector Kiketi to be called, and for a proper chain of evidence to be established showing through whose hands the revolver passed. We notice that the prosecution had intended to call Inspector Kiketi; but did not.

It was due to the lack of a chain of evidence, and supporting evidence that the appellant queried his arrest with the revolver alleged to be the complainant's property. If the lack of a chain of evidence meant that there was no evidence to support the finding of possession then this court must interfere. But that is not the position. First, Dr Macharia identified the gun with the aid of his firearm's certificate. The serial number proved the gun to be his. Second, Constable Wilson Mutahi noticed that very serial number. It was the same number that was seen by the firearms examiner. Thus despite the lack of a chain of evidence, in this case it can be said with certainty that the revolver found on the man arrested was Dr Macharia's gun. The High Court should have answered that point.

Then the evidence of the appellant's arrest had to be weighed with the defence. This the trial court did and the High Court concurred. There was not overwhelming evidence, but there was evidence. Accordingly this court cannot interfere. The result is that the appellant was found in possession of the doctor's gun, and not that he was a mere bystander.

The inference to be drawn from the appellant's possession is a matter of law. The appellant suggested in cross-examination that he had acquired the gun in the bank, no doubt in an effort to separate the two robberies. If he did not acquire the gun at the Sigona Golf Club, then he was not guilty of that particular robbery. But this defence was not put forward in his unsworn statement. The appellant contented himself with saying that he had not possessed the gun – somebody else had dropped something— suggesting the gun, but this is not explicitly stated. In that case, it was a question whether or not the appellant had the gun which he was ordered to drop. The conclusion must be that there was evidence to prove that the appellant had the stolen gun in circumstances, which did not point to the fact that the appellant had acquired the gun on August 20, 1985. There was no evidence to suggest that the appellant was merely a receiver. In the case of a revolver which would have to be carefully guarded and for which the appellant found a use, nine days is a sufficiently recent period. The appellant queried that point. But we agree with the High Court, that the proper inference to draw was one of recent possession of the stolen revolver. The appellant also queried whether or not he had common intention. All the gang at Sigona Gold Club had the common intention to rob the doctor. It is fair to infer that the appellant was one of them and that he was guilty of robbery which includes the theft of the gun that had been left in the car which was taken with the other articles and while the car was abandoned the gun and other articles were stolen from it.

In the end, having considered what the appellant has put before the court in his various memoranda of appeal and written address, in the light of the scope of the duty of this court, we confirm that the appellant was rightly convicted.

We should end on a note of acknowledgement to the firearms examiner who produced photo-

micrographs for the trial court to understand his examination. That has been lacking in many cases recently, and we hope this a sign of a return to the proper standards in that respect. That was well done.

The appeal is dismissed in its entirety.

Dated and delivered at Nairobi this 7th day of December, 1987.

H.G. PLATT

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

J.R.O. MASIME

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.

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