



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GICHERU, KWACH & SHAH, J.J.A.)**  
**CRIMINAL APPEAL NO. 21 OF 1988**

**BETWEEN**

**1. ABDI GATHANA KABINU ..... 1ST APPELLANT**

**2. JAMES MWANGI KARERU ..... 2ND APPELLANT**

**3. PAUL WAMITI MBAO..... 3RD APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at**

**Nairobi**

**(Owuor & Schofield JJ.) dated 16th October, 1985**

**in**

**H.C.CR. APPEALS NOS. 1139, 1140 & 1142 OF 1983)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT:**

Benson Gichuki Nduguga (P.W.6), a Firearms Examiner with the Criminal Investigation Department of the Kenya Police, in his report dated 23rd June, 1981 in respect of one spent .45 inch cartridge case recovered from Ontulili Forest Station at 6.00 a.m. on 9th June, 1981 found that the same was a fired cartridge which was formerly a component part of one .45 inch calibre ACP ammunition. Comparative microscopic examination of this cartridge case in conjunction with equivalent outstanding cases revealed that it was fired from one firearm that was also used in the shooting incidents at Nyeri Plantation in Nyeri District on 14th/15th March, 1981; Thimbiri Market in Meru District on 23rd/24th March, 1981; Thimangiri Trading Centre in Meru District on 29th/30th March, 1981; Tigania area in Meru District on 11th/12th April, 1981; and Kithaku Trading Centre in Meru District on 20th/21st April, 1981. His examination of one .45 inch calibre ACP serial number 288648C on 24th June, 1981 and two .45 inch calibre ACP empty magazines revealed that the .45 inch calibre ACP serial number 288648C was a self-loading pistol of U.S.A. manufacture which was in good working order and was complete in all its component parts and was capable of being fired. Comparative microscopic examination of the test cartridge cases and the bullets fired in the pistol serial number 288648C in conjunction with equivalent outstanding cases revealed that the said pistol was connected with the shooting incidents referred to above together with that that occurred at Ontulili Forest station in Meru District on the night of 8th/9th June,

1981. The two empty .45 inch calibre ACP magazines each of which had a capacity of seven rounds of ammunition were suitable for use in firearms such as the pistol serial number 288648C referred to above.

On the night of 8th/9th June, 1981 the shop belonging to James Murira (P.W.3) and situated at Ontulili Forest Station was broken into and ransacked. According to the appellants' statements under inquiry which they repudiated at their trial before the court of first instance and which after trials within a trial were admitted in evidence by that court and whose admissibility in that regard was upheld by the first appellate court, the appellants together with two others had planned to rob this shop during the night in question. They left the first appellant's house in Liiki village within the Municipality of Nanyuki on the evening of 8th June, 1981 heading to the said shop and on the way there, the third appellant climbed up a telephone post and cut off the telephone wires leading to Ontulili Forest Station so that after their intended robbery the residents of the surrounding area may not have immediate communication with the local Police Station. In the meantime, the first appellant had shown them a pistol which he was armed with and which he said was to be their security in the course of the robbery. Save for the first appellant who had a pistol, the other four of his companions were each armed with a "rungu" and one of them had in addition a small "panga".

Between 1.00 a.m. and 2.00 a.m. on the night in question, the appellants together with their two other companions broke into the shop of P.W.3 wherein they found Patrick Mwangi Muriuki (P.W.1) who was an employee of P.W.3 and was sleeping in one of the rooms in that shop. P.W.1 screamed but was told to keep quiet and cover himself otherwise he would be killed. He complied and as he did so, his K.Shs.500/- together with his wrist watch, make, Kienzel, were taken away by the robbers. The robbers then entered into the room where shop goods were displayed for sale and began looking for money and as they did so the third appellant went outside the shop building to ascertain that nobody came to the shop to interfere with their exercise. Shortly thereafter, the third appellant came back into the shop and told his co-robbers that there were some people coming towards the shop. The robbers came out of the shop and while outside, one of them flashed his torch in the direction of the people coming towards them. The Forester in-charge of Ontulili Forest Station, Charles Kamiri, now deceased, who was then carrying a 12 Bore shot gun serial number C440396 ordered that the spotlight be put off and as he so ordered he fired one bullet from the shot gun he had in his possession. Nobody was shot by that bullet but in returning the fire, the first appellant shot him on the forehead with the pistol he was armed with. The first appellant also shot one William Warutere, a night watchman at Ontulili Forest station, who was then accompanying the Forester towards P.W.3's shop that had been broken into by the robbers. This latter person died almost immediately following a bullet wound that had lacerated the middle and lower 1/4 of the upper right lobes of the right lung and had also perforated the right atrium with massive bleeding into the pericardial sac while the Forester died at Nanyuki District Hospital of the bullet wound through the head that led to subarachnoid haemorrhage and moderate sized laceration of the left vertical hemisphere of the brain.

After the first appellant shot the Forester and the night watchman, he now took the commanding position and instructed his co-robbers to get back into P.W.3's shop and collect money and cigarettes. This was done and in the meantime, he took possession of the 12 Bore shot gun serial number C440396 together with two 12 Bore shot gun bullets which the Forester had before being shot at as is set out above. The robbers then left Ontulili Forest Station for Liiki village in Nanyuki Township. On the way back to this village, the first appellant instructed the second appellant to take possession of the shot gun referred to above and the second appellant complied. Meanwhile, the appellants shared the money and the cigarettes they had robbed from P.W.3's shop. At Liiki river, the second appellant gave the shot gun in question to the third appellant who hid it in the bush near that river. On the morning of 9th June, 1981 at 6.00 a.m. I.P. Francis Ndungu (P.W.11) recovered one spent .45 inch cartridge case at the scene of the robbery. That cartridge case was the subject of examination by P.W.6 on 23rd June, 1981 as is indicated above.

The first appellant and the second appellant were arrested on 14th and 18th June, 1981 respectively while the third appellant was arrested on 23rd July, 1981. According to I.P. Bernard Njeru (P.W.7), on 16th June, 1981 the first appellant volunteered to show where he had hidden his pistol and rounds of ammunition. Accompanied by Police Corporal Silas Njoka (P.W.8) and Police Constable (Driver) Joseph Marimba (P.W.9), the first appellant led this witness to Liiki village within the Township of Nanyuki and about 50 yards from his house in a small bush he pointed to a sisal stem and said that that was where his

rounds of ammunition were. Beneath that sisal stem, P.W.7 recovered a large nylon bag and in it were 124 rounds of ammunition. The first appellant then pointed to another sisal stem in the same bush and underneath it was another nylon paper bag in which was a pistol serial number 288648C and two magazines one of which was inside the pistol and had 7 rounds of ammunition. That pistol together with the two magazines were the subject of examination by P.W.6 on 24th June, 1981 as is outlined above. Out of a total of 131 rounds of ammunition recovered as is indicated above, 96 of them were, according to P.W.6, pistol ammunition in .45 inch calibre while the other 35 were revolver ammunition in .44 inch calibre. These rounds of ammunition were live and capable of being fired in the firearm of the appropriate calibre.

On 30th July, 1981 after interrogation, the second and third appellants led I.P. Michael Mbogo Muriithi (P.W.4) and Police Sergeant Josephat Mananu (P.W.10) to Liiki forest and in a bush pointed out by the second appellant near Liiki river the third appellant pulled out the 12 Bore shot gun serial number C440396 which had been hidden in that bush by the third appellant as earlier mentioned in this judgment. That shot gun was the subject of examination by P.W.6 on 19th August, 1981.

The appellants were subsequently charged in the Senior Resident Magistrate's Court at Meru with two counts of robbery with violence contrary to section 296(2) of the Penal Code in relation to the stealing of the 12 Bore shot gun serial number C440396 and the theft of K.Shs.500/= and one wrist watch, make, Kienzel, belonging to P.W.1. The first appellant was separately charged with two counts one of which related to his being in possession of a firearm without a firearm certificate while the other related to his being in possession of ammunition without a firearm certificate both counts being contrary to section 4(2) (a) of the Firearms Act, Chapter 114 of the Laws of Kenya. The second and third appellants were jointly charged in a separate count of being in possession of a firearm - the 12 Bore shot gun serial number C440396 - without a firearm certificate contrary to section 4(2)(a) of the Firearms Act, Chapter 114 of the Laws of Kenya.

Relying heavily on the appellants' statements under inquiry in his judgment dated 9th August, 1983, the learned trial magistrate convicted the appellants of the lesser offence of stealing from the person contrary to section 279(a) of the Penal Code on the first count of robbery with violence contrary to section 296(2) of the Penal Code in relation to the stealing of the 12 Bore shot gun serial number C440396 but convicted them of the offence of robbery with violence contrary to the same section in the second count that related to the theft of K.Shs.500/- and one wrist watch, make, Kienzel, belonging to P.W.1. The first appellant was separately convicted on the third and fourth counts of the offence of respectively being in possession of a firearm and ammunition without respective firearms certificates contrary to section 4(2)(a) of the Firearms Act, Chapter 114 of the Laws of Kenya while the second and the third appellants were each convicted on the fifth count of being in possession of a firearm - the 12 Bore shot gun serial number C440396 - without a firearm certificate contrary to the same section. On 10th August, 1983 the appellants were each sentenced to 18 months imprisonment together with one stroke of corporal punishment on the first count and on the second count, they were each sentenced to suffer death in the manner authorized by law. On counts three and four, the first appellant was sentenced to 4 years imprisonment on each of those counts and on count five, the second and third appellants were each sentenced to 4 years imprisonment. The prison sentences were ordered to run concurrently.

The appellants' first appeals to the High Court of Kenya at Nairobi against their conviction and sentence of death for the offence of robbery with violence contrary to section 296(2) of the Penal Code were dismissed on 16th October, 1985. While dismissing the appellants' consolidated appeals, the first appellate judges observed that the trial magistrate after holding trials within a trial concluded that the appellants' confessions in their respective statements under inquiry were admissible as he was satisfied that those statements were voluntary. The first appellate judges were in agreement with this conclusion as, according to them, on their own assessment of the evidence on the record they were of the view that the appellants' respective statements under inquiry were voluntary. Being of that view, it was inescapable that the appellants' first appeals were doomed to fail. It was on account of this that the appellants have appealed to this Court contending that their respective statements under inquiry were not voluntary and in holding that the same were made voluntarily notwithstanding the circumstances under which they were allegedly given both the trial court and the first appellate court erred in law.

When this appeal came up for hearing on 12th July, 1996, counsel for the first and second appellants, Mr. Mogikoyo, submitted that the two appellants' alleged confessions were involuntary as they were given after the two appellants had been subjected to physical violence while incarcerated for unreasonably long period. According to counsel, after the first appellant was arrested on 14th June, 1981, his statement under inquiry was not recorded until 10 days later on 24th June, 1981 while that of the second appellant was recorded on 25th June, 1981 after his having been arrested on 18th June, 1981 - 7 days later. The two courts below did not address themselves to the fact of the two appellants' long period of incarceration before making their alleged respective statements under inquiry. Indeed, the first appellate court did not address itself as to whether or not the two appellants were under threat when they made their alleged confessions. If these alleged confessions were excluded, there was no other evidence to support the conviction of the two appellants as the discovery of the firearms and ammunition may have been fabricated, counsel concluded.

Counsel for the third appellant, Mr. Mwita, emphasised that his client's alleged confession was involuntary as there was impropriety in obtaining his statement under inquiry.

The Deputy Public Prosecutor, Mr. Chunga, who appeared for the respondent while admitting that the appellants' conviction turned on their respective extra-judicial statements submitted that the voluntariness of those statements had been resolved by the two courts below. In resolving the issue of voluntariness of such statements, Mr. Chunga contended that consideration of all the circumstances attendant to a particular case must be taken into account and the duty of presenting the relevant material for such consideration is on the prosecution. In the present appeal, according to him, such material was laid before the trial court which resolved that the appellants' respective extrajudicial statements were voluntary and the evidence of discovery of the firearms and ammunition referred to earlier in this judgment corroborated those statements.

Section 31 of the Evidence Act, Chapter 80 of the Laws of Kenya (hereinafter referred to as the Act) stipulates that:

"31. Notwithstanding the provisions of sections 26, 28 and 29, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The provisions of sections 26, 28 and 29 of the Act respectively relate to inadmissibility of confessions and admissions caused by inducements, threat or promise; a confession of an accused person while in the custody of a police officer unless such confession is made in the immediate presence of a magistrate or a police officer of or above the rank of, or a rank equivalent to, inspector; and confessions to police officers below the rank of, or a rank equivalent to, inspector or an administrative officer not holding first or second class magisterial powers and acting in the capacity of a police officer. Section 31 of the Act as is set out above therefore derestricts the operation of the provisions of the aforementioned sections only as relates distinctly to the fact discovered in consequence of information received from an accused person which may amount to a confession obtained in breach of the provisions of the said sections. This derestriction does not, however, remove from the trial court the discretion to disallow evidence of discovery if the strict rules of admissibility would operate unfairly against an accused person and thereby occasion him loss of a reasonable chance of acquittal. See the case of *Kenyarithi s/o Mwangi v. Reginam*, (1956) 23 E.A.C.A. 422 at page 426.

In the instant appeal, after the first appellant was arrested on 14th June, 1981 he on 16th June, 1981 - 2 days later - led P.W.7, P.W.8 and P.W.9 to where a pistol serial number 288648C, its two magazines and 131 rounds of ammunition were recovered as is outlined in this judgment. That pistol was found by P.W.6 to have been used at the scene of robbery on the night of 8th/9th June, 1981 as is set out at the beginning of this judgment besides being connected with other shooting incidents also set out at the beginning of this judgment. Of the 131 rounds of ammunition referred to above, 96 of them were of the same calibre as the one spent cartridge case recovered at the scene of the robbery on the morning of 9th June, 1981 at 6.00 a.m., that is to say, .45 inch calibre.

Again, according to P.W.6 the 96 rounds of ammunition in .45 inch calibre were live and capable of being fired in pistol serial number 288648C whose calibre was also .45 inch. Indeed, the one spent cartridge case recovered at the scene of the robbery as is mentioned above had been fired from this pistol. The first appellant's statement under inquiry was recorded by I.P. James Maina (P.W.14) of the Criminal Investigation Department, Meru at 12.55 p.m. on 24th June, 1981 - 8 days after the discovery of the fact of the pistol, its two magazines and the 131 rounds of ammunition referred to above - at Nanyuki Police Station.

The second appellant was arrested on 18th June, 1981 while the third appellant was arrested on 23rd July, 1981. Subsequent to their arrest, on 30th July, 1981 the two appellants led P.W. 4 and P.W.10 to where a 12 Bore shot gun serial number C440396 was recovered as is outlined above. This was the gun that had been stolen from the Forester after he had been shot on the forehead at the scene of the robbery on the night of 8th/9th June, 1981. The second appellant's statement under inquiry was recorded by I.P. David Wanjohi Kahando (P.W.18) of the Criminal Investigations Department at Meru on 25th June, 1981 at 3.05 p.m. at Nanyuki Police Station while that of the third appellant was recorded by the same police officer on 3rd August, 1981 at 9.45 a.m. at the Divisional C.I.D. Office at Meru, the latter's statement under inquiry being recorded 4 days after the discovery of the fact of the short gun referred to above.

The appellants' statement under inquiry, the basic details of which are set out in this judgment, were to a large measure the basis of the prosecution case against the appellants in the court of first instance. These statements as we indicated earlier in this judgment were repudiated by the appellants but the two courts below held them to have been made voluntarily and therefore admissible in evidence against the appellants. Indeed, according to the first appellate court, the appellants' statements under inquiry were so rich in details of the plans, movements, execution of the robbery and subsequent evacuation from the scene of the robbery that they had the characteristics of voluntary confessions for only participants in the robbery for which the appellants were charged could have given such clear and detailed narrations of the events as were contained in those statements. The truth of this observation by the first appellate court is indisputable and we have no reason to disagree with the holding of the two courts below in regard to the voluntariness and admissibility of the appellants' respective statements under inquiry. These statements were corroborated by the independent evidence of the discovery of the pistol serial number 288648C used in the robbery at Ontulili Forest Station; 96 live rounds of ammunition of the same calibre as that of the one spent cartridge case recovered at the scene of the said robbery and which 96 live rounds of ammunition were capable of being fired in pistol serial number 288648C; and the 12 Bore shot gun serial number C440396 which had been stolen from the same scene of the robbery as is narrated above. It follows that the appellants' conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code by the court of first instance and the upholding of the same by the first appellate court cannot be faulted. In the result, the appellants' appeal to this Court must fail and the same is dismissed.

Dated and delivered at Nairobi this 14th day of November, 1996.

**J.E. GICHERU**

.....

**JUDGE OF APPEAL**

**R.O. KWACH**

.....

**JUDGE OF APPEAL**

**A.B. SHAH**

.....

**JUDGE OF APPEAL**