



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 72 OF 2016

MPAKA LEPAYETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Maralal PM

Criminal Case No 565 of 2014 – B S Khapoya, Ag SRM)

**J U D G M E N T**

1. The Appellant herein, **MPAKA LEPAYETE**, was convicted after trial of two counts of **attempted robbery with violence** (Counts I & II) contrary to **section 297(2)** of the **Penal Code**. It was alleged in the particulars of these two counts that on 04/08/2014 at **West Gate Community Conservancy** in Samburu East Sub-County within Samburu County, jointly with others not before court, and being armed with a dangerous weapon, namely a **Sterling** rifle, he attempted to rob, respectively, one **FELISTA LENASALIA** and one **BOSCO LEKIALE**, and that at or immediately before or immediately after the attempted robbery, he wounded the said complainants.

2. The Appellant was also convicted in Counts III and IV of, respectively, **possession of a firearm** and **ammunitions** contrary to **section 89(1)** of the Penal Code, the particulars being that on 06/08/2014 at **Lowai Village** in Laikipia County, without reasonable excuse, he had in his possession or under his control a **Sterling** rifle serial number [xxxx] & 001319, and also five (5) rounds of ammunition of caliber 5.56 mm, in circumstances which raised reasonable presumption that the said firearm and ammunition had recently been used in a manner prejudicial to public order.

3. On 17/04/2015 the Appellant was sentenced in Count I to death as by law then provided. Sentencing on the other counts was held in abeyance. He has appealed against both the convictions and the sentence.

4. The Appellant's grounds of appeal as set out in his petition (filed in person) and as argued by his learned counsel are –

- i. That the charge sheet was defective.
- ii. That the Appellant's trial was irregular.
- iii. That the motive of the attack upon the complainants was not disclosed.
- iv. That crucial witnesses were withheld from testifying.
- v. That the Appellant was not properly identified as no identification parades were conducted.
- vi. That the convictions were based upon uncorroborated circumstantial evidence.
- vii. That the evidence tendered by the prosecution was contradictory and uncorroborated.
- viii. That the Appellant's defense was not considered.
- ix. That the sentence was "*too harsh and excessive*".

5. Learned counsel for the Respondent supported the convictions. As for the sentence, he conceded this court's power to re-look at the punishment imposed following the change in the law regarding statutory mandatory death sentences.
6. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact. I have also considered the able written submissions of the learned counsels, including the cases cited.
7. The prosecution case was that in the early night of 04/08/2014 **PW4** (JOHN LOWA LOMUNYA) was driving a motor lorry registration number KBL 796M from **Ngutuk Engiron in Sasaab (Westgate)** area towards **Wamba**. It was about 7 pm and dark; he had the headlights on. In the driver's cabin were also **PW1** (ANTONELLA LESILELE), **PW3** (BOSCO LEKALE) and **PW7** (FELISTA LENASALIA). In the back of the lorry was **PW2** (JUMA LENOLNGIRO), a game warden who was armed. He was sitting on the rails of the bodywork.
8. As the lorry approached a dry river-bed somebody suddenly emerged from the bushes in front and started firing a gun at the lorry. The driver kept driving and crossed the dry river-bed. The attacker pursued the lorry up the river bank and kept firing at it. The driver did not stop, and he drove all the way to safety at **Westgate Conservancy**. There they realized that the rear wheels of the lorry had been deflated by the gunfire. Two of the passengers in the driver's cabin, **PW3** and **PW7**, had been injured by gunshot in the leg and arm respectively.
9. As the robber shot at the lorry, **PW2** had loaded his firearm and shot back, guided by the direction from which the hostile fire was coming.
10. The driver (**PW4**) stated that he saw the attacker "very well" by his vehicle's lights, and that he was the Appellant. **PW3** stated that the attacker had on a mask and was clothed in jungle attire. He said he identified him as the accused (Appellant) in the dock. However, **PW1** stated that the attacker's head was covered. The other person in the driver's cabin (**PW7**) in effect stated that she was not able to identify the person who attacked them.
11. **PW2** (the armed game warden who was sitting on the rails at the back of the lorry and fired back at the robber), stated that it was dark and that he had fired back guided by the flash from the hostile fire. He did not state that he was able to see the attacker at the scene well enough to be able to identify him.
12. **PW5** (STEPHEN LETOIYA) was in charge of the wildlife sanctuary at **Westgate Conservancy** where the victims of the attempted robberies took refuge. He was one of the people who received them. He and others offered first-aid to the two injured persons and made arrangements for them to be taken to hospital by ambulance.
13. **PW5** then organized a team and led them to the scene of the attack. They got there at about 06.00 am the following morning. They spotted foot-marks as well as blood spots on the ground. They also recovered six (6) spent cartridges at the scene. Sniffer dogs were brought in and sniffed their way to a river where the suspects appeared to split and go separate ways (two together and one alone). **PW5** and his team followed the trail of the two and they got to a place where it appeared they had boarded a motor cycle.
14. **PW5** and his team followed motor cycle tyre marks to a centre called **Kipsing**. There they reported the matter to the area chief and the head of a police **General Service Unit**. The chief then assembled the motor cyclists who operated in the area. Two of them were missing. It was also learnt that some two persons had been spotted the previous day going to **Oldonyo Ngiro**.
15. **PW5** and his team then headed towards Oldonyo Ngiro. On the way they met two motor cyclists who told them that the previous night one **NTAKUA LEMWAO** had asked for two motor cycles. The two cyclists had then been led to a person who had injuries. They gave his name as **MPAKA LEPAYETE**. The cyclists had then taken both those people to a place called **Leluai**.
16. On 06/08/2014 at about 3.00 am the cyclists led **PW5** and his team (which included the area chief) to a home in Leluai where they laid an ambush. At about 6.00 am they entered the manyatta which they had been told belonged to the injured Lepayete. There they found the Appellant in the company of two morans. He had injuries. He also had a firearm (rifle) and five (5) bullets. They arrested him and took him to **Wamba Police Station**.
17. **PW6** (PETER NGANGA) was a clinical officer. He produced in evidence the medical report (P3) of the Appellant (**Exhibit 1**) which had been prepared and signed by one Dr. Ondiek who could not be availed to testify. The medical report disclosed that the Appellant had a gunshot injury in the right upper arm that involved a compound fracture, with blood oozing.
18. **PW6** also produced in evidence the medical reports (P3s) of **PW2** (Felista Lenasalia) (**Exhibit 2**) and **PW3** (Bosco Lekale) (**Exhibit 3**). Both also had gunshot injuries.
19. **PW8** (CPL OPTAT MWAMBURI) was the investigating officer of the case. He and other officers visited **PW3** and **PW7** in hospital and interviewed them. He also proceeded to Westgate Conservancy where he saw the lorry that had been involved in the attempted robbery. On examining the lorry he noted that it had five (5) bullet holes in the driver's cabin and that its rear tyres were flat. Finally he visited the scene of the attack and noted spots of blood on the ground as well as footmarks of 3 people which led into the bush. He took samples of the bloody soil.
20. Subsequently, further testified **PW8**, **PW5** handed over to him a rifle and five live bullets recovered from the Appellant, and 6 spent cartridges (recovered at the scene of the attack), which he kept in his custody. The bullets and spent cartridges were all of 5.5 x 45 mm caliber. **PW8** also escorted the Appellant to Wamba District Hospital where his blood sample was drawn.
21. Later **PW8** forwarded the two blood samples to the **Government Chemist** for forensic analysis. Subsequently he received a DNA report

from the Government Chemist which he produced in evidence as **Exhibit 8**. The report stated that the DNA profiles of the sample of the Appellant's blood and the blood sample found in the soil at the scene of the attack matched.

22. PW8 also submitted the rifle and the live bullets, and also the 6 spent cartridges for expert ballistic examination. He later received the ballistic expert's report which he produced in evidence as **Exhibit 10**. The report said that the rifle was in good working order as 3 of the live bullets (picked at random) were successfully fired from the rifle; and that the spent cartridges had all been fired from that same rifle. PW8 also produced in evidence the rifle, the remaining live bullets and the spent cartridges.

23. In his own defense the Appellant gave an unsworn statement. He did not call any witness. He stated that he was a livestock keeper; that in August 2014 he was looking after his animals near **Musokutoti Lodge** which was fenced off; that he and a young boy had gone into the lodge grounds with his animals in search of pasture; and that seven **Kenya Wildlife Service (KWS)** officers appeared and assaulted him and the young boy.

24. The Appellant also stated that later people from his home came and picked him up and took him to his uncle's manyatta. Later he was taken to his home where a goat was slaughtered for him. Subsequently KWS officers came and arrested him. They took him to Wamba Police Station, and later to hospital. Subsequently he was taken back to the police station where his fingerprints were taken. Later he was taken to Maralal Police Station and charged.

25. That then was the totality of the evidence placed before the trial court.

26. Let me state at the outset that no argument was advanced in respect to the complaint that the charge sheet was defective. On this court's part, I do not find any of the four counts in the charge sheet to be defective in any way.

27. Similarly, no argument was preferred to advance the complaint that the Appellant's trial was irregular in any manner. Having read through the entire record of the trial court, I do not find any irregularity at all in the Appellant's trial.

28. The Appellant's third complaint is that the motive of the attack upon the lorry and its occupants was not disclosed. Whereas motive could be a good pointer towards solving a crime, it is never an ingredient of an offence unless specifically so provided by statute. See **section 9(3)** of the Penal Code.

29. The fourth complaint of the Appellant is that "*crucial witnesses*" were withheld from testifying. There were indeed a number of other persons who could have been called as witnesses by the prosecution – for instance other police officers involved in tracing and arresting the Appellant and the chief of the area who assisted PW5 and other police officers in that regard. However, at the end of the day what matters is not the **quantity** but the **quality** of the evidence presented. There is no requirement that a certain number of witnesses must be called to establish any particular fact in issue. One single witness can suffice.

30. The Appellant's fifth complaint is that he was not positively identified. As far as visual identification of the attacker at the scene of the attack is concerned, my own evaluation of the evidence is this. It was already dark when the attacker emerged from behind trees and started firing at the approaching lorry which had its headlights on. PW1 stated clearly that the attacker's head was covered. There is no reason at all to doubt her testimony in this regard. And if the attacker's head was covered, how then were PW3 (who said that the attacker was wearing a mask) and PW4 (the driver) able to clearly observe him to positively identify him as the Appellant? This was a very stressful situation, where an attack occurred suddenly at night. This attack involved gunfire which was aimed at and actually hit the lorry several times and injured two of the occupants of the driver's cabin. The driver, commendably, struggled and kept driving despite the rear tyres being blown out by the gunfire. In the meantime PW2 was firing back at the hostile fire from the back of the lorry.

31. I hold that the prevailing circumstances were simply too sudden and stressful and not conducive to a good and positive identification of the attacker by anyone in the driver's cabin. The purported identifications by PW3 and PW4 cannot be true and were most likely informed by the subsequent events leading to the Appellant's arrest, as will be seen shortly. There simply was not any good and positive visual identification of the Appellant at the scene of the attack.

32. The Appellant's sixth complaint is that the convictions were based upon "*uncorroborated circumstantial evidence*." The law relating to circumstantial evidence has been well settled for a long time. See for instance the case of **SAWE –vs- REPUBLIC (2003) KLR 364** where the **Court of Appeal** held –

**“In order to justify on circumstantial evidence an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”**

And in the case of **ABUNGA alias ONYANGO –vs- REPUBLIC, COURT OF APPEAL AT NAIROBI, CRIMINAL APPEAL NO 32 OF 1990 (UNREPORTED)** the court said -

**“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests –**

- i. the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established;**
- ii. those circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused; and**
- iii. the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”**

33. This court has already held that given the prevailing circumstances at the time of the attempted robbery there was no positive visual identification of the attacker by any of the witnesses PW1, PW2, PW3, PW4 or PW7. The Appellant was tied to the attempted robbery by circumstantial evidence. What was this circumstantial evidence?

34. PW2 fired back at the attacker(s), though he did not know if he had hit anyone. The following morning blood spots were found on the ground at the scene of the attack; samples of the bloody soil were collected by PW8 for forensic examination. Spent bullet cartridges were also found there and collected for ballistic examination.

35. Footmarks were seen at the scene. See the testimony of PW5 as to how those footmarks were followed with the help of sniffer dogs, and then with the help of cyclists and others, leading to the arrest of the Appellant. The Appellant was found with a serious bullet injury (compound fracture) to his upper right arm. He was taken to hospital and a blood sample was drawn from him for forensic examination. His DNA profile matched that of the blood spots collected at the scene of the attack.

36. The Appellant was also arrested with a rifle and some live bullets. The rifle was ballistically examined and test fired using some of those live bullets recovered from him. It was in good working order. Furthermore, a comparative analysis of the test-fired spent cartridges and the spent cartridges recovered at the scene indicated that the spent cartridges recovered at the scene had been fired from the same rifle.

37. The Appellant had not sought medical treatment at any hospital for his very serious gunshot injury; one must wonder why! He offered no explanation at all how he had received his gunshot injury.

38. The above circumstances from which the inference of guilt of the Appellant is to be drawn were cogently and properly established by the evidence placed before the trial court. I do not find any material contradictions in that evidence at all sufficient to raise a reasonable doubt.

39. Those circumstances definitely and unerringly point towards the Appellant's guilt; otherwise, how else could he have received his gunshot injury? How else could his blood have been found at the scene of the attack? How else could he have been found in possession of the very rifle that had been used in the attack? Why had he not sought medical treatment for his very serious gunshot injury?

40. All the above circumstances, taken cumulatively, formed a chain so complete, that there is no escape from the conclusion that, within all human probability, the crimes the Appellant was charged with, were committed by him and no one else.

41. The Appellant's convictions were thus based upon very sound circumstantial evidence and are entirely safe. There is no merit at all in his appeal against conviction, and the same is hereby dismissed.

42. As for his sentence, the same was lawful and mandatory when it was passed. The law has however since changed. See the judgment of the *Supreme Court of Kenya* in the case of **FRANCIS K MURUATETU & ANOTHER –vs- REPUBLIC, PETITION NO 15 OF 2015 (UNREPORTED)**. That decision held to be unconstitutional the mandatory nature of the death sentence for the offence of *murder* contrary to **sections 203 and 204** of the Penal Code, without interfering with the constitutionality of the penalty itself. By parity of reasoning that decision of the apex court must apply in equal measure to the mandatory nature of the death sentence for the offences of *robbery with violence* and *attempted robbery with violence* contrary to, respectively, **sections 296(2) and 297(2)** of the Penal Code. This court therefore can re-look at the sentence imposed upon the Appellant.

43. I have considered the circumstances of the commission of the crimes in this case. The actions of the Appellant could very easily have led to the deaths of several people. Luckily no one was killed; however, two of the victims suffered serious gunshot injuries. That notwithstanding, I hold that the death sentence is not appropriate for counts I and II. I will therefore set aside the sentence of death imposed upon the Appellant in respect to count I and substitute therefor imprisonment for twenty-five (25) years from the date of sentence by the trial court, which was 17/04/2015. I will also sentence the Appellant to a similar term of imprisonment (25 years) in count II, to run from the date of sentence by the trial court.

44. For counts III and IV, I hereby sentence the Appellant to seven (7) years imprisonment in each count, effective from the date of sentence by the trial court.

45. For the avoidance of doubt all the four sentences shall run concurrently.

46. To that limited extent only does the appeal against sentence succeed. The appeal against conviction has already been dismissed. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 10<sup>TH</sup> DAY OF MARCH 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 18<sup>TH</sup> DAY OF MARCH 2021**