REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCCRA CASE NO. 106 OF 2016

HADISON AMANDI JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction in Criminal Case No. 3266 of 2013 Delivered on 19th September 2016 in the Principal Magistrate's Court at Kapsabet by Hon. D. A. Alego (Principal Magistrate)

JUDGMENT

1. The Appellant herein was charged as the 2nd accused in the Principal Magistrate's Court at Kapsabet with two (2) counts of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code.** It was alleged:

a. In the first count, that on 4th November, 2013 at Chemartin Tea Estate within Nandi County, jointly with another before court while armed with dangerous weapons namely, rifles, they robbed Eunita Ambonga Ihonga, the secretary of Chemartin Tea Estate of cash Kshs. 140,000/- and at, or immediately before, or immediately after the time of the robbery used actual violence on the victim.

b. In the second count, that on 4th of November 2013 at Chemartin Tea Estate within Nandi County, jointly with another before court while armed with dangerous weapons namely, rifles, they robbed Rose Wanjiru Osore of Kshs. 4650/- and at, or immediately before, or immediately after the time of the robbery used actual violence on the victim.

2. The Appellant faced a third count, of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code**. The particulars of the charge were that on 4th November, 2013 at Chemartin Tea estate within Nandi County, jointly with another before court while armed with dangerous weapons namely, rifles, attempted to rob Thomas Ngeno, the director of Chemartin Tea Estate of cash Kshs. 2,600,000/- and at, or immediately before, or immediately after the time of the robbery used actual violence on the said Thomas Ngeno.

3. The Appellant was found guilty in count 1 and 2 following a full trial and was accordingly convicted. He was sentenced to death in both counts on 19th September, 2016. Being disgruntled, he preferred the present appeal against both conviction and sentence on grounds that:

a. The mandatory death sentence has been declared unconstitutional vide a ruling in Nairobi Petition No. 15 of 2015 in Francis Karioko Muruatetu & Another v Republic (2017) eKLR.'

b. The trial of this case in criminal case file no. 3266 of 2013, emanated from the PM's Court Kapsabet case no. 1060 of 2014, in which he was tried for the offence of possession of the same firearm without licence and was acquitted.

c. The Appellant's conviction was based on mere suspicion.

d. The Appellant was not properly identified at the scene of crime.

e. The prosecution did not prove their case beyond reasonable doubt.

f. There were rampant material contradictions in the identification of the alleged gun used in the offence.

g. Vital witnesses were not summoned to testify.

h. The Appellant's strong alibi defence was not evaluated as the prosecution failed to comply with section 212 of the Criminal Procedure Code.

4. The Appellant filed written submissions in which he asserted that the evidence tendered by the prosecution was weak, flimsy, far-fetched and distorted, and could not sustain a conviction on such a capital charge as robbery with violence contrary to **section 296(2)** of the **Penal Code**. Further that no direct or circumstantial evidence which points to his guilt was tendered or adduced, in support of the particulars of the charge in counts 1 and 2.

5. The Appellant contended that the evidence of identification of the assailants was distorted and weak and it showed that the attack was sudden and occurred at night when visibility was too poor for there to be any accurate identification. He urged that PW1, PW2, PW3, PW4 and PW5 testified that the attackers were strangers to the witnesses, while PW1, PW2, PW3, PW4, PW5 and PW6 testified that the attackers had concealed their faces and PW7 and PW8 were candid that they did not recognize the attackers.

6. The Appellant submitted that the identification of the main exhibit was poor, there being no special marks on the rifle and no exhibit memo form from the ballistics expert. To buttress his point on the unreliability of the prosecution's evidence concerning the gun, the Appellant pointed to the evidence of PW9 in which he stated as follows:

> *'I saw the gun well. The gun was an AK 47. It is no. A456-/18081851. One ammunition was already in the chamber. (one rifle make AK 47 serial number A56-/18081851 marked Pmfi. 7). I am sorry 4 is not among the numbers. It is A56-/18081851.'*

That on cross examination the witness continued as follows:

> *"It is 56-/18081851. It is A-56-18081851. Yes I have not said stroke. The rifle was found on 31/03/2014".*

7. The Appellant argued that there was a rifle submitted by the CID Nandi Central vide CR No. 771/217/2014 on 4th April, 2014 and this rifle was make Archot AK-47, referred to as type 56-1. That the serial number of the rifle was 18081851 and it was marked as exhibit A. He urged the court to take judicial notice of the difference between AK-47 "Chinese" type rifle and the "Archot" AK-47 rifle.

8. The Appellant submitted that the rifle PMFI 7 was not specifically submitted as an exhibit and that the exhibit memo form does not capture it. He contended that in his testimony, PW13 stated that two rifles used in the incident were not recovered and confirmed on re-examination, that the report did not mention the specific rifle in the memo. The Appellant urged the court to find that the contradiction concerning the exhibit rifle, was fatal to the prosecution case herein.

9. The Appellant also submitted that the house in which the said rifle was recovered was not established from the evidence of PW11, PW13 and PW14. He averred that it was in evidence that the house belonged to one Gilbert Kipkemboi who was found in occupation and that one witness stated that they broke the door to an adjacent house. He urged the court to find that the contradictions in the evidence pertaining to the alleged recovered guns and where they were recovered, occasions reasonable doubt. He cited the case of **Mwangi vs. Republic (1974) EA 104**, to assert that where an exhibit is not found in the possession of the accused person, then he is not liable for it.

10. According to the Appellant, he was charged, tried and acquitted in Cr. Case No. 1060 of 2013 on the charge of being in possession of an unlicensed gun. The Appellant contended that the evidence upon which he was acquitted of the original charge, is the same evidence that was used to later convict and sentence him to death in this case.

11. The Appellant averred that the trial court failed to state the points for determination in the case as required under **section 169(1)** of the **Criminal Procedure Code** and instead shifted the burden onto the Appellant. This he said, the court did by stating that he should have informed the police that Gilbert Kipkemboi had a gun, and that he had an obligation to call defence witnesses in court. He cited the case of **Vitalis Obonyo Onyango vs. Republic [2008] eKLR,** in support of this submission. He contended that the prosecution's failure to summon the people alluded to in the testimony of various witnesses such as the OCS, OCPD and DCI who visited the scene of the crime was fatal to their case. He relied on the case of **Olivia vs. Republic (1965) E.A 10** in support of this submission.

12. The Appellant complained that he gave a cogent alibi defence which was not evaluated, or considered. He asserted that the prosecution failed to challenge the alibi defence as required under **section 212** of the **Criminal Procedure Code** by calling witnesses to rebut the defence evidence.

13. Learned state counsel Mr Rop opposed the appeal on behalf of the state and asserted that the prosecution had proved their case against the Appellant to the required standard, through the evidence of the fourteen witnesses they called. He urged that although none of the witnesses identified the Appellant at the scene of the robbery, they had proved that they were indeed robbed, by robbers who were many in number and that an offensive weapon was used during the robbery.

14. Counsel contended that the offensive weapon used in the robbery was recovered from the Appellant when he was arrested on 31st March, 2014. He submitted that the Appellant produced nothing to show that he was the landlord of the place where he was arrested as he asserted. He urged that the prosecution's case was proved to the required standard.

15. Counsel however, submitted that he too was of the view that the death sentence imposed upon the Appellant was harsh. He urged the court to reduce it as it deemed fit.

16. The Appellant raised several grounds in his appeal as set out above and these were opposed by the prosecution. An evaluation of the evidence on record shows that the case for the prosecution rested entirely on the evidence of the recovery of the gun adduced in evidence, while the case for the defence rested entirely on the evidence of the Appellant.

17. This being the first appeal, I have perused the lower court record and re-evaluated the evidence tendered at the trial to make my own

findings and draw my own conclusion as to whether the evidence was sufficient to form a basis for the Appellant's conviction. In my re-evaluation I took care of the fact that I did not have the advantage that the trial court had of seeing and hearing the witnesses as they testified and gave due allowance therefor.

18. Indeed, a copy of the exhibit memo was not availed before the trial court. However, failure to avail the exhibit memo was, in my view, not fatal to the prosecution case, since the officer who recovered the rifle testified in court as PW11 concerning the recovery. He testified that he personally recovered the AK-47 firearm wrapped in a fertilizer bag plus three (3) live ammunitions, in the house in which two suspects were found. The Appellant was one of those found in the house when the firearm was recovered. PW11 testified that the rifle had two numbers, one on its body being No. 56-18081851 and one on the bolt assembly being No. 81851. It was identified as PMFI 7 by the witness.

19. In **Stephen Kimani Robe and Others vs. Republic [2013] Eklr,** the two judge bench of Muchemi and Odunga JJ, grappled with the question of lack of an inventory where exhibits had been recovered and held that:

> **"The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."**

20. PW10 testified that during the month of March 2013 he drove to Milimani estate in Kamobo area with reinforcements and surrounded the Appellant's home. They found two (2) suspects inside the house and when they conducted a search they found three (3) bullets and three (3) ammunitions. They retrieved a rifle wrapped in a fertilizer bag. It was an AK-47 serial no. A56-180851 which was marked as PMFI 7.

21. PW13, the firearms examiner, testified that he did a comparison of exhibit A1 to A16 in conjunction with the last cartridge in the rifle which was received by the laboratory. There was a rifle submitted by the CID Nandi Central vide CR No. 771/217/2014, which was a Archot AK-47 rifle referred to as type 56-1. Its serial number was 18081851 and was marked as Exhibit A. He examined the bullets that were marked as exhibits and found that exhibits A3, A7, A9, and A12, to A16 were fired from the rifle submitted by CID Nandi Central. The same rifle was marked as Exhibit 3 and bears the serial number 18081851.

22. PW13 testified that though the specific rifle had not been mentioned in the exhibit memo, his duty was to determine the firearm that had been used to discharge the exhibit cartridges and from the comparison, he was able to determine that the rifle was used to fire some of the cartridges that were submitted in this case.

23. The testimony of PW14 was that the Appellant was arrested at Kamobo within Kapsabet, in possession of an AK-47 rifle serial number 18081851. The rifle was taken to the ballistics expert in Nairobi. Upon analysis, it was established that some of the 8 spent cartridges which were recovered at Chemartin Tea Estate were fired from that rifle.

24. From the foregoing evidence, it is my view that the inconsistencies in the manner in which the gun was recovered and in the sequencing of the serial number, were mistakes that would not have, per se, dealt a fatal blow to the prosecution case.

25. In their submissions, the prosecution contended that the case against the Appellant was proven to the required standard. That although none of the witnesses identified the Appellant during the robbery, it is clear that they were robbed and that an offensive weapon was used. Further that the offensive weapon used in the robbery was recovered in the possession of the Appellant when he was arrested on 31st May 2014.

26. The Appellant contended that none of the witnesses identified him at the scene of crime. That notwithstanding, it is apparent that the firearm found in the house he and another were arrested in, is the same firearm that was used in the robbery as demonstrated by the evidence that was produced in court.

27. From my perusal of the court record, the trial court relied on circumstantial evidence to convict the Appellant. The principles in sustaining a conviction based on circumstantial evidence, were stated in the case of **Sawe vs. Republic [2003] Eklr,** where the Court of Appeal had this to say:

> **"In order to justify on circumstantial evidence, the 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. <u>There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution.</u> It is a burden which never shift to the party accused."**

28. The ingredients of the offence of robbery with violence were elaborated in the Court of Appeal case of **Oluoch vs. Republic [1985]**. For one to be convicted of the offence of robbery with violence, there must exist at least one of three (3) ingredients:

a. The offender is armed with any dangerous or offensive weapon or instrument; or

b. The offender is in company with one or more other person or persons; or

c. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

29. In the instant case, all of these ingredients were present. All the Prosecution witnesses testified that they were robbed, that an offensive

weapon was used against them and the robbers were many in number. None of the witnesses however, placed the appellant at the scene at the time of the offence, or identified him as one of the attackers. The only inculpatory fact that links the Appellant to the offence is that four months after the crime was committed, he was found in the house where the firearm used in committing the crime was recovered.

30. In his defence, the Appellant contended that he was found in the house where the rifle was found because he was the landlord. The trial court however found that he was unable to prove that he was the landlord and that he was not living in the same house where the rifle was recovered.

31. Of great import however, is the fact that the Appellant had been tried and acquitted on charges of possession of the firearm, which he is said to have been found in possession of when he was arrested on 31st March, 2014, four (4) months after the robbery. He was tried and acquitted for possession of the said firearm in Kapsabet Criminal Case No. 1060 of 2010. The record shows that he brought this to the attention of the trial court, but the Kapsabet Cr Case file number 1060 of 2010 was not called for by the prosecution to rebut his evidence, nor did the trial court address this issue in its judgment. Notably the Prosecution was silent on this issue both at the trial and on appeal before this court.

32. In this case the trial court convicted the Appellant owing solely to the evidence that he was found in possession of the firearm that had been used in the robbery. From the record, it is evident that the Appellant had been charged together with another in Criminal Case No. 1060 of 2014 at Kapsabet Law Courts. The Appellant stated that he had in that matter been charged with the illegal possession of the firearm in question.

33. The Prosecution failed to controvert the Appellant's testimony that he had already been tried and acquitted of the charges of illegal possession of the same firearm. The charges of robbery with violence brought against the Appellant were predicated on his having been found in possession of the said firearm, following the recovery alluded to in the evidence herein. The conviction of the appellant in this case was therefore based, on circumstantial evidence whose inculpatory facts of possession of the firearm, he had been acquitted of in a prior case.

34. Be that as it may, upon conviction the Appellant was sentenced to death in each of the two counts. In this regard I can do no better than to repeat what the Court of Appeal held in the case of **Abdul Debano Boye and Anor vs. Republic Criminal Appeal No. 19 of 2001 (unreported)** as follows:

> **"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the other in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who is minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term".**

Once therefore, a sentence of death is imposed the other counts shall be left in abeyance. If there is a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the other counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed.

35. In the end, I find that without the evidence of possession of the firearm there are no other inculpatory facts or nexus to connect the Appellant and the offences for which he was convicted, to sustain the prosecution's case. The upshot is that this appeal must succeed and is therefore allowed. I quash the conviction and set aside the sentence imposed on the Appellant on each count and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

PREPARED, DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER, 2020.

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OLGA SEWE

HIGH COURT JUDGE