



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO.142 OF 2018

VICTOR MUGENDI.....APPELLANT

VS

REPUBLIC.....PROSECUTION

JUDGMENT

Victor Mugendi was the 4th accused in Meru CMC CR. C. No. 2156 of 2014. Where he was jointly charged together with 4 others co-accused with the offence of robbery with violence contrary to section 296(2) of the penal code.

The particulars of the charged was that on the 15th day of November 2014 near Kinoru stadium in Imenti North District within Meru county the appellant jointly with others while armed with a dangerous weapon namely G3 rifle and a pistol robbed Apla Alpesh Karaniya of cash Ksh. 800,000/- and immediately before such robbery used actual violence to the said Alpa Alpesh Karaniya while using motor vehicle Registration KBS 437 X make Toyota Probox white in colour.

The appellant was convicted for the offence of being in possession of a pistol as per count 3 contrary to section 89(1) of the penal code. The evidence as regards cunt 3 was adduced by PW6 PC Silvester Muthoka who said that on 15th November 2014 at 10.30 am there was a robbery at Meru Slopes Hotel and in company of CPL Naibei and CP Kugeli proceeded to the scene and found motor vehicle registration KBQ 408 S Toyota Allion blue in colour in a ditch and A1 & A2 had been arrested and G3 rifle had been recovered.

On Interrogation of the 2 suspects who had been arrested A2 Dennis Karani who led them to a house in Gitimbine where A4 was arrested and upon conducting search a pistol was recovered but it didn't have any ammunition.

Appellant in his sworn statement in court said that he was not found with the pistol produced in court. He also testified that he lived in Kooje where 3 police officers went and arrested him on the material day due to a dispute with his wife over motor vehicle KBQ 318 V which certificate of insurance he produced together with receipts issued by Mustag Issac.

As the 1st appellate court, the duty of this court is to re-evaluate evidence on record and come up with an independent finding on the grounds of appeal and judgment of the trial magistrate.

The finding of the trial Magistrate in respect to the pistol allegedly found in possession of appellant was

“ I find there is no doubt that the 4th accused person was found in possession of a pistol on the date in question as PW6, one of the police officers who arrested the 4th accused person from his house stated that they conducted a search in the house of the 4th accused person after they had been led there by the 2nd accused person and they found the pistol before court and that evidence of PW6 was corroborated by evidence of the Firearms Examiner who confirmed what was recovered was a pistol”

The appellant and his co-accused were acquitted for the offence of robbery with Violence for reasons that the complainant didn't produce any document to prove the source of Kshs 800,000/= which claimed was robbed from her and therefore the court found that it was not established whether she was robbed violently.

The court also said that since the complainant failed to prove her source of money and therefore failed on that account to prove that she was robbed violently, the trial magistrate saw no need of dealing with issue as to whether the accused persons committed the robbery.

I have noted that Hon Abuya took up matter at the tail end of trial and that maybe reason she didn't consider evidence of PW5 PC James

Muthuri who testified that he was able to identify A1 who emerged from complainant's car and used probox motor vehicle that had been used to block the complainant to escape.

The judgment has not considered that complainants motor vehicle KBQ 408S entered into a ditch in the course of the robbery. Having failed to find that A1 who was 1st arrested together with A2 about one hour after the robbery was guilty of being in possession of the G3 Rifle after PW3 had identified him come out of complainants vehicle where G3 was recovered, it is surprising that trial magistrate found that a pistol allegedly recovered by PW6 belonged to A4 when there is no corroborative evidence.

PW6 went to arrest A4 in company of other officers and one Oscar Wafula led by A2 but it is only PW6 who came to testify. It is his word against A4's word. A4 says he lives in Kooje and not Gitimbine. The evidence is on a balance of probabilities. The evidence of PW3 – Ballistics expert was only to confirm whether the pistol allegedly recovered could be used to fire ammunition and not to corroborate PW6's evidence that the pistol was recovered from the appellant.

This court finds that evidence adduced by PW6 in support of the count that appellant was found in possession of firearm doesn't meet the threshold of beyond all reasonable doubt and the conviction can't be upheld.

The conviction is quashed and sentence set aside and appellant to be set free forthwith.

HON A. ONG'INJO

JUDGE

JUDGMENT DELIVERED, DATED AND SIGNED IN COURT ON 20TH DAY OF JUNE 2019.

In the presence of :

C/A: Kinoti

State : Ms Mbithe

Appellant:- Present

Ms Ojiambo holding brief for Ndubi for accused. Copies of judgment to be supplied at cost of parties.

HON A. ONG'INJO

JUDGE