



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.494 OF 2010

(An Appeal arising out of the conviction and sentence of Hon. L.M. Njora, P.M. delivered on 2nd September 2010 in Kikuyu PM. CR. Case No.594 of 2008)

DENNIS NJENGA KARUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Dennis Njenga Karumo was charged with the offence of **attempted robbery** contrary to **Section 297(1)** of the **Penal Code**. The particulars of the offence were that on the night of 15th/16th July 2008 at Thogoto Village in Kiambu County, the Appellant, jointly with others not before court attempted to rob Samuel Kibunja Kamau (the complainant) of his household goods. The Appellant was further charged with **being in possession of a firearm without a certificate** contrary to **Section 4(2)(b)** as read with **Section 4(3)(a)** of the **Firearms Act**. The particulars of the offence were that on the same night and in the same place, the Appellant was found in possession of a pistol without a firearm certificate. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged on the two (2) counts. He was sentenced to serve seven (7) years imprisonment on each count. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds challenging his conviction and sentence by the trial court. He was aggrieved that he had been convicted yet the evidence adduced by the prosecution witnesses had not established his guilt to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the trial court had failed to take into consideration the fact that the prosecution had failed to call essential witnesses who, in essence, would have adduced evidence which could have exonerated him. He faulted the trial magistrate for convicting him on the basis of the recovery of exhibits which were produced in court yet no evidence was adduced to connect him with the said exhibits. He faulted the trial magistrate for failing to take into consideration the fact that he had been detailed by the police beyond the requisite statutory period. He took issue with the fact that he had been convicted on the basis of evidence of identification which was made in circumstances that was not favourable to positive identification. The Appellant was aggrieved that the trial court had failed to take into account the fact that there was no nexus between his arrest and the crime that was committed. He faulted the trial magistrate for failing to take into account his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission denying committing the offences. He urged the court to allow his appeal. Mr. Mureithi for the State opposed the appeal. He submitted that the prosecution had established its case on the two (2) counts to the required standard of proof. He urged the court to dismiss the appeal and confirm the conviction and sentence of the Appellant.

Before giving reasons for our decision, it is important that we set out the facts of this appeal. The complainant in this case (he testified as PW1) is a resident of Thogoto Village. On the material night of 15th July 2008, he was asleep in his house together with his son PW2 S K K and his wife Catherine Njeri Kibunja (PW3). PW2 testified that while asleep in his bedroom, he was woken up by his mobile phone. A friend had sent him a text message. It was about 1.00 a.m. As he was reading the text, he heard noises emanating from the gate. He peeped out of the window of his bedroom and saw a person jump over the gate. He immediately went and informed his parents.

The complainant called the administration Police Officers based at Thogoto Administration Police Post. Two administration police officers responded to his call of distress. Among the police officers who responded was PW5 APC Samuel Kurgat. He testified that upon receiving information of the attack at the complainant's house, they went to the house and found the gate partially opened. They looked inside and saw a group of people near the window. When they got inside the compound, the group dispersed and run away. However, they were able to subdue and arrest one of the members of the gang. That person is the Appellant. On searching him, they found him with a toy pistol. On further searching the compound, they found huge secateurs, a broken chain, a red cap and a crude explosive device. All these items were produced into evidence. The other accomplices of the Appellant made good their escape.

Upon his arrest, the Appellant was taken to Kikuyu Police Station where he was detained. PW4 PC Odera Okapesi was assigned to investigate the case. He testified that his investigation revealed that the Appellant and his accomplices made an attempt to rob the complainant. The robbery was thwarted when the Administration Police Officers responded to the call made by the complainant. The items recovered in the compound, in particular, the imitation firearm and the homemade explosive device were taken to CID headquarters to be examined by a ballistic expert. PW6 Lindsay Kipkemboi, a Ballistic Expert testified that upon examination of the imitation pistol, he formed the opinion that it was incapable of being fired. However, it was an imitation firearm within the meaning ascribed to it by the **Firearm Act**. The explosive device was another story. He formed the opinion that if the device hit on the ground, it would explode and the nails embedded inside it would be released like bullets. He was of the view that the device was a dangerous crude weapon.

When put on his defence, the Appellant denied both charges. He testified that he was a victim of mistaken identity. It was his testimony that he had been arrested when he was walking home after having a drink. He had nothing to do with the crime. He was arrested by the police and taken to the compound where the attempted robbery had been made. He pleaded his innocence.

This being a first appeal, it the duty of this court to re-look afresh the evidence adduced before the trial court and reach its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard (see **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of attempted robbery and being found in possession of firearm to the required standard of proof beyond any reasonable doubt.

We have re-evaluated the evidence adduced before the trial court. We have also considered the grounds of appeal and the submission made before us during the hearing of this appeal. The prosecution essentially relied on the evidence of the circumstances of the arrest of the Appellant to secure the conviction of the Appellant. The complainant and members of his family did not identify any of the persons who jumped into their compound and made an attempt to rob them. This is in essence circumstantial evidence. As was held in the case of **Sawe –vs- Republic [2003] KLR 364** at page 372:

“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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. 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 is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

In the present appeal, the prosecution witnesses adduced evidence to the effect that the Appellant was arrested inside the compound of the complainant. This was after PW2 had seen a group of people jump into their compound. The complainant called the police to come to his aid. When the police arrived, they found the gate, which had been locked by the complainant before he went to bed, partially open. PW5 testified that when he entered the compound, he saw some people near one of the windows of the complainant’s house. An attempt had been made to cut off the metal grills. In fact, one of the metal bars had nearly been severed. The Appellant was arrested in the complainant’s compound. He was found with an imitation pistol. Within the compound, the police recovered huge secateurs and a homemade explosive device. It was clear that these items were obviously going to be used either to threaten or to harm the complainant and members of his family. The secateurs had one use: they were used to cut through the security grills that secured the windows and entrances to the house.

In fact, it had been used to cut through the chain at the gate and cut one of the grills securing a window in the house. The Appellant was arrested at 1.00 a.m. Although no one identified him during the course of the attempted robbery, upon evaluation of the evidence adduced, it was clear to this court that the Appellant was a member of the gang that attempted to rob the complainant and members of his family. If the police had not intervened, most probably, the gang would have succeeded in its evil mission. The inculpatory evidence adduced by the prosecution witnesses is incompatible with the innocence of the Appellant. The Appellant gave explanation that he was a victim of mistaken identity. His testimony in his defence, however, does not displace the strong, credible, consistent and corroborated evidence adduced against him by the prosecution witnesses. The fact that the Appellant was arrested within the complainant’s compound leads this court to no other conclusion other than the fact that the Appellant was a member of the gang that attempted to rob the complainant. This court therefore holds that the prosecution, established to the required standard of proof, that the Appellant was a member of the gang that attempted to rob the complainant on the material night. His appeal against conviction in regard to the charge of **attempted robbery** contrary to **Section 297(1)** of the **Penal Code** lacks merit and is hereby dismissed. His appeal against conviction of being found with an imitation firearm is similarly dismissed.

As regard sentence, the custodial sentences that the Appellant was ordered to serve was legal. This court cannot interfere with the said sentences save to state that the said sentences ought to run concurrently. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MAY 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE