REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 150 OF 2004

BETWEEN

BONIVENTURE MUKANGAI …...........................1ST APPELLANT

AND

REPUBLIC …………………………....…………RESPONDENT

AS CONSOLIDATED WITH

CRIMINAL APPEAL NO.148 OF 2014

ELIJAH ABDALLAH NGANANI..........................2ND APPELLANT

AND

REPUBLIC..RESPONDENT

(Being an appeal from original conviction and sentence in Kakamega CM.CR.Case NO.1633 of 2004 delivered by Hon. R.A. Mutoka on 9th December 2004)

JUDGMENT

Introduction

1. The two Appellants herein were charged in the Chief Magistrate's Court Kakamega Criminal case number 1633/04 with two counts of offences. The first charge was attempted robbery with violence contrary to section 297 (2) of the penal code particulars of which were that on the 19th June 2004 at Kakamega Township in Kakamega District within the Western Province jointly with others not before court while armed with a home made pistol they attempted to rob FRANCIS MASIYA and at or immediately before or immediately after the time of such attempted robbery threatened to injure the said FRANSIS MASIYA.

2. The second count was Possession of imitation firearm contrary to section 21 (1) as read with section 34 (1) of the Firearms Act Cap 114 Laws of Kenya particulars of the being that on the 19th of June 2004 at Mahanga Chemist within the Western Province they were jointly found in possession of an imitated firearm.

3. The trial court after hearing five prosecution witnesses and the appellants’ defences and their witnesses found that the prosecution had proved all the ingredients of attempted robbery with violence contrary to

section 297(2)of the penal code and that the two appellants were armed with an imitation firearm which they used to threaten PW1. They were found guilty as charged on both the counts and convicted of the same. In count 1 they were sentenced to death while in count 2 they were sentenced to 7 years imprisonment.

The Appeals

4. The appeals were aggrieved by both the conviction and sentence by the trial court and filed separate appeals being Kakamega High Court Criminal Appeal No. 148 of 2004 and Kakamega High Court Criminal Appeal No. 150 of 2014. The two appeals were consolidated under Kakamega High Court Criminal Appeal No. 150 of 2014 with BONIVENTURE MUKANGAI being the 1st Appellant and ELIJAH ABDALA NGANANI as the 2nd Appellant.

5. In his undated petition of appeal the 1st Appellant has raised the following grounds of appeal:

1. THAT he pleaded not guilty to the mentioned charge.

2. THAT the testimony given by the prosecution was contradictory in that they did not corroborate on the time the incident took place.

3. THAT the pistol in question was not dusted to know who possessed it and

4. THAT the learned trial Magistrate put in consideration the evidence of PW1 who was not even at the scene of crime.

He asked this court to allow the appeal quash the conviction set aside the sentence and set him free.

6. On the other hand the 2nd Appellant has set out the following grounds in his undated petition:

1. THAT he pleaded not guilty to the mentioned charge.

2. THAT the prosecution gave the evidence that was contrary with regard to the distance where the pistol was recovered.

3. THAT the learned trial Magistrate relied on the evidence of PW1 who was not even at the scene of crime.

4. THAT the learned trial Magistrate erred in Law by not considering his defence witness evidence.

The 2nd Appellant wants this court to allow the appeal, quash the conviction set aside the sentence and set him free.

The Submissions

7. The two Appellants filed undated written submissions. Briefly the 1st Appellant in his submissions challenged the conviction and sentence by the trial court. He submits that the trial court relied on circumstantial evidence on his identification by PW1, PW2, PW3 and PW4. He relies on the decision of KIPKERIN arap KOSKE and TEPER -VS- R [1952] E.A.C.A 447/486. He claims that in this instant case there are co-existing circumstances which weaken the inference of guilt on his part. He maintains that there is doubt about his identification and arrest and that there were no recoveries made to link him to the said crime. He claims that the only evidence linking him with the offence is the identification by PW2, the complainant whose evidence he claims was not corroborated by the evidence of PW3 and PW4. He also submits that the prosecutions case is marred by inconsistencies and contradictions which make the conviction unsafe.

8. He has also raised the issue of the time when the attack took place and says it is not clear whether it was at 6.00 a.m as insinuated by PW2 or 6.30 a.m as stated by PW4. He submits that the evidence on record as to witnesses and the judgment delivered had a lot of contradictions. He submits that the trial Magistrate did not also warn himself of the inherent danger of relying on the evidence of identification and arrest when the conditions were difficult. He submits on the need for corroboration of evidence when it comes to identification. He argues that the trial Magistrate shifted the burden of proof of the offence to him which is contrary to the principles of criminal law. He submits that the prosecution witnesses did not give the description of the attackers to the police and that the circumstances of identification were not satisfactory. On the recovery of the firearm he submits that the evidence led was not satisfactory; the firearm was not dusted nor was there any ballistic expert report nor an O.B entry produced as exhibit. He thus maintains that the trial Magistrate did not in his judgment resolve the glaring inconsistencies in the evidence laid before him.

9. On his part the 2nd Appellant submitted that the trial Magistrate should not have relied on the evidence given as it was contradictory. He also submits that there was contradiction as to where the firearm was recovered and that the trial court erred in law and fact by including the evidence of PW1 in its judgment yet he, PW1was not at the scene and had been stepped down. He has also raised the issue of the imitated firearm not being dusted to know the actual possessor. The 2nd appellant also submits that there is doubt as to when the incident complained of took place at 6.00 a.m or 6.30 a.m and maintains that he was not caught with anything. He also submits that the trial Magistrate erred by not considering his evidence in Defence.

10. The appeal was opposed by Mr. Ngetich for the State who in his oral submissions told this court that PW1 was stood down before he testified and therefore the trial court could not have relied on the said evidence. He maintains that it is possible that at the judgment stage, the trial court may have mistaken PW1 as PW2. He further submits that the evidence of DW3 did not in any way respond to the evidence of the prosecution witnesses. He wants the appeals dismissed.

11. In his reply the 1st Appellant urged the court to consider the provisions of Sections 388 and 389 of the Penal Code whereas the 2nd Appellant says that he was only a buyer and wants the court to consider the length of time he has been in prison and the authority Constitutional Petition No.3 of 2011 PROTUS BULIBA SHIKUKU -VS- ATTORNEY GENERAL, and to set him free.

Duty of this Court

12. This is a 1st Appellate Court and on this first appeal, it is the duty of this court to re-evaluate and re-consider the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to have in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanor of the witnesses.(See **Okeno –vs- Republic [1972].**

The Evidence

13. It is noted that PW1 was stepped down in the initial stages of the trial because the prosecutor noted he (PW1) was not the complainant.

PW2 FRANCIS MASHA NJAMIRI a Pharmacy Attendant in a Chemist near the Kakamega Provincial General Hospital testified that on the 19/06/2004 at 6.00 a.m while washing the shop two young men knocked the door and requested for a panadol tablet worth Kshs.10/=. As he was handing over the tablet to them one of them pointed a pistol at him and ordered him to give them money. He confronted the young man with the pistol and they struggled over it as he screamed. The man who was free ran away followed by the other but they were caught by neighbors who responded to PW2's distress call. He added that an Administration Police who was armed and on patrol came to the scene of crime and after recovering the pistol asked the two men to identify themselves. He explained to the trial court that the

pistol was recovered one meter from the chemist. He was the only one in the shop and had seen the two men that morning. He identified the two appellants in the dock by pointing at them 1st accused (1st Appellant) and the 2nd accused (2nd Appellant).

14. PW2 also stated that it was the 2nd Appellant who had asked him for panadol and who also had the pistol while the 1st Appellant was standing at the door of the chemist. He was able to identify the home made pistol “MFI-1” and he said that it was intact when it was pointed at him but in two pieces when recovered. On cross examination by the 1st Appellant PW2 told the court that he had not seen him that day and maintained that the doors to the chemist were closed and it was only when they knocked that he opened it. He further explained to the trial court that when he screamed people responded to the distress call and the appellants were caught just outside the Chemist as they tried to escape. The Police Officer who was on patrol arrested the two accused persons. He maintained that the 1st Appellant was with the 2nd Appellant and that he saw the fire arm which was recovered. He told the trial court that the appellants were arrested at the scene of crime.

15. On cross examination by the 2nd Appellant PW2 told the trial court that he had earlier seen him the day before and that he was the one who asked for the panadol and who pointed the pistol at him . He said that he was not injured during the incident.

16. PW3 JOSEPH KHAKABO a carpenter from Shikoye testified that on the 19/06/2004 at about 6.00 a.m he heard PW2 shouting “thieves” and struggling with the 1st appellant. He also saw the 2nd appellant trying to turn away. He claims to have chased the 2nd accused and he caught him and returned him to the shop of PW1 and just then an Administration Police Officer who was armed appeared. He claims to have seen something like a pistol which was picked from the ground near the chemist which he was able to identify in court as “MFI-1” which he said were in two pieces. He never knew any of the appellants and his workshop was about 10 meters from the chemist. On cross examination by the 1st appellant PW3 testified that he found that the 1st appellant had already been arrested and that PW1 had raised an alarm by shouting “thief, thief”. He also said that he saw the firearm being thrown away. On cross examination by the 2nd accused PW3 told the court that he never caught the 2nd accused with anything but that he was sure the 2nd accused was involved in the attack because he saw him running away.

17. FRANCIS SHIONDA (PW4) a carpenter at Fitina Road near Atanga Chemist testified that on the 19/06/2004 at about 6.30 a.m he was on his way to the workshop when he heard screams. He then saw PW2 holding a young man while another young man was standing besides. It was PW2 who was shouting that he had been attacked by robbers. He testified that he then ran towards them and the young man who was standing started running away, but he chased him and caught him. He said that he saw the 2nd appellant drop a pistol as he struggled with PW2 so as to escape and just then a Police Officer who was armed appeared and stopped the commotion and the two appellants were then taken to the Police Station. He told the court that he never knew the appellants before and that it was PW2 who helped him restrain the 1st appellant. He claimed that the pistol fell about three (3) meters from the Chemist. He identified the pistol in Court as “MFI-1”. On cross examination by the 1st appellant that as the 1st appellant was trying to escape PW2 managed to apprehend him. He maintained that he had not seen 1st appellant before and that the incident happened early in the morning. He also maintained that 2nd appellant was the one who had the pistol and that they went to the chemist claiming to buy medicine.

18. PW5 No. 81014286 A.P.C. HAROUN MUSOGA attached at Mwingavita Chiefs Camp and formerly of D.C's Office Kakamega testified that on the 19/06/2004 at about 6.30 a.m he was from duty at Kakamega Medical Store and he was armed. As he approached Mahaga Chemist he heard someone shouting “thief, thief” and hurried towards that direction. He claims that he saw the 2nd appellant struggling with PW2 and that the 2nd appellant was holding something like a pistol. He then ordered the 2nd appellant to surrender or he would shoot. The 2nd appellant threw the pistol down and it broke into two “MFI-1”. He also saw 1st appellant trying to run away but he ordered him to stop. He saw that the

pistol was home made. He arrested the two appellants who he was able to identify in the dock. On cross examination by the 1st appellant PW5 stated that the 2nd appellant sat down when he was told to surrender and that he saw 1st appellant with the 2nd appellant as he approached the scene of crime.

19. On cross examination by the 2nd appellant PW5 explained that the 2nd appellant was struggling with PW2 and members of the public were closing on them while carrying weapons. He maintained that it was the 2nd appellant who was carrying the pistol and who threw it down on being ordered to surrender. On conducting a search on them he found they had nothing.

20. PW6 No. 47332 Sgt. BENSON NAIBEI of Kakamega D.C.I.O Office recalled that on the 20/06/2004 he was told by the Deputy D.C.I.O C.I.P Ndiema to investigate this case. He received the 2nd appellant from the cells and also received a broken home made pistol. He told the trial court that as part of his investigations he visited the scene and questioned the complainant PW2 and recorded his statement. He told the court that members of the public helped PW2 restrain the 2nd appellant person who wanted to rob PW2 and that an Administration Police Officer arrested the appellants. He then charged them with the offence. He identified them in the dock by pointing at them and produced the broken home made pistol as PExhibit1. On cross examination by the 1st appellant PW6 told the trial court that the two appellants were together when they were arrested. On cross examination by the 2nd accused he told the court that the pistol was not dusted and that he relied on the statements by the witnesses.

The Defence Case

21. At the close of the Prosecution case, both appellants were found to have a case to answer. They were put on their defence.

In his Defence the 1st appellant who gave an unsworn statement told the court that on the material day he left his house at 6.00 a.m and went through Fitina road where he met a group of people and passed them. An A.P. Officer stopped him and searched him. He claimed that the officer claimed that he was drunk and after some argument he arrested him and took him to the Police Station and thereafter he was arraigned in court on the 24/06/2004.

22. The 2nd appellant also gave an unsworn statement. He told the trial court that on the 19/06/2004 he was from the hospital and had passed by the chemist to buy medicine and also that he had left some change there the day before. On reaching the chemist the 2nd appellant claimed that PW2 had raised an alarm that he (2nd appellant) was a thief. He told the court that he saw the A.P Officer with the fake Pistol who claimed that it was the weapon he (2nd appellant) had.

23. DW3 SAUM ABDALLA from Amalemba told the court in a sworn statement that the 2nd appellant was her husband and that on the 19/06/2004 he woke up at 6.00 a.m and left to go and visit his mother in hospital. Shortly after he left a woman came and told her that her husband had been arrested. On cross examination by the prosecution DW3 stated that her mother was at Kakamega Hospital and that she never heard her husband say he was going to get medicine. She claimed that her husband had Kshs. 500/= and that he was an artist and a casual worker in Midland Hotel. She did not know the 1st appellant. She added that her husband did not tell her that he was going to get change from the pharmacy.

24. DW4 BETTY MALESI a casual worker from Maraba claimed that the 2nd appellant was her husband and that on the 19/06/2004 he left the house at 6.00 a.m for work. Later she went to his place of work but did not find him. That it was a neighbor who told her that she saw Police taking him away.

Judgment of the Trial Court

25. After the defence closed its case the trial court delivered its judgment on the 3/12/2004. The trial court found that PW2, PW3,PW4 and PW5's evidence was not only corroborated but was watertight against

the 1st and 2nd appellants. The trial court also found the prosecution's case as straight forward and clear and that the prosecution had proved all the ingredients of the charge of attempted robbery c/s 297 (2) of the Penal Code and also on count found them guilty. They were convicted and sentenced hence the appeal herein.

Analysis and Findings

26. This Court has analyzed the evidence by both the Prosecution witnesses and the defence and their witnesses. From the evidence both the appellants together with the prosecution witnesses except PW1 and PW6 were at the scene of crime on the 19/06/2004. DW3 and DW4 were not at the alleged scene but they confirmed that the 1st and 2nd Appellants left their homes for work at 6.00 a.m on the material day. No one has told the trial court how long it took the 1st and 2nd appellants to reach their respective workstations and which was their normal route to work. We are of the considered opinion therefore that the incident herein must have occurred between 6.15 a.m and 6.30 a.m. This lays to rest the contensions by the appellants that there were contradictions as to the time the incident occurred. From the evidence also we find that indeed the appellants knocked at the chemist where PW2 was washing because they were seen by PW3,PW4 and PW5. We also find that PW2's testimony was corroborated by the said witnesses who were at the scene that morning and who responded to the distress call by PW2. The fake pistol was found at the scene of crime not anywhere else and PW2 had testified that the 2nd appellant had pointed it at him. We are of the humble opinion that PW2 was courageous enough to struggle with the 2nd appellant because he saw the gun was fake. If the gun was real, I we do not think that PW2 would have taken such a risk. We do not see any reason why a ballistic expert should have given a report on a fake pistol suffice it to say that ballistic experts are normally called where real guns have been fired or used. The appellants herein were caught immediately after they tried to attack PW2. It was therefore not difficult to identify them again because the incident occurred in the morning.

27. We hasten to add that the prosecution witnesses were candid in stating that they did not know the accused's before the incident meaning that they were not people who traded in that vicinity but strangers, and therefore had no reason to tell lies against the appellants who were lucky not to be lynched by the mob which was ready to pounce on them. The A.P. Officer who was uniformed and armed at the time and who brought the situation under control saved the appellants from mob justice. Having made the above analysis we wish to point out that in straight forward cases like this the courts of appeal would be reluctant to interfere with the decision of the trial court unless the same was founded on wrong principles.

28. Our minds are drawn only to the sentencing by the trial court. Having sentenced the appellants to death in count 1 it was not necessary to again sentence them to seven (7) years on count II. This was not necessary since a man cannot serve another sentence once he is in the grave. Coming to the decision submitted by the appellants being Constitutional Reference No. 3 of 2011 delivered at Kisumu we are persuaded that section 297 (2) of the penal code contradicts section 389 of the penal code as to the offence of attempted robbery and goes not only against the letter and spirit of the section providing a general penalty for attempted felonies among them attempted robbery which is a felony but also goes against the provisions of the Constitution as well as international norms and best practices accessed through Article 2 (5) of the constitution. We find in favor of the appellants that they have a right to benefit from the general sentence provided for under section 389 of the Penal Code as opposed to the penalty of death prescribed therein. This court in coming to its decision is guided by the principles in the GODFREY NGOTHO MUTISO -VS- REPUBLIC Criminal Appeal No.17 OF 2008. The general penalty of attempted felonies which is the case herein is a sentence of seven years considering that attempted robbery is a felony falling under sections 297 (2), 388 and 389 of the Penal Code. The appellants have to date served more than ten (10) years in prison. We find that the sentence served is satisfactory. Though the trial court did not specify how the sentences were to be served in its initial judgment we are of the opinion that if the trial court had considered to section 389 of the Penal Code it would have sentenced the appellants to seven (7) years in both counts which would have been served concurrently.

29. The appellant's appeals therefore succeeds. The sentence of death is hereby quashed, and since we

have concluded that the term already served is adequate, the appellants shall be released from prison custody forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 31st day of July 2015.

RUTH N. SITATI	**ANTONY C. MRIMA**
JUDGE	**JUDGE**

In the present of:

……………………………......…..for 1st Appellant

……………………..……………for 2nd Appellant

…………………..……......………for Respondent

………………...…………………Court Assistant