



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 151 OF 2011

MICHAEL PERE.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

The appellant **Michael Pere** alias **Juma Pere** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at Narok Law Courts. The appellant and three co-accused persons (who are not parties to this appeal) were all arraigned in court on 15/4/2010. The appellant faced two (2) counts of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of those two (2) counts were as follows:-

Count NO.1

“On the 8th day of April 2010 at Narok University site in Narok North District of Rift valley Province jointly with others not before court while armed with dangerous weapons namely a pistol and simis robbed Vishram Karyan of a motor vehicle registration number KAT 833L Toyota Hilux pickup valued at Kshs.1.5 million, cash Kshs.163,800/-, a mobile phone make Samsung valued at Kshs.8,500/- and a wrist watch valued at Kshs.1,500/- and immediately before the time of such robbery used actual violence to the said Vishran Karyan.”

Count No.2

“On the 8th day of April 2010 at Narok University site in Narok North District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely a pistol and simis robbed Daniel Waweru Kamunya a mobile phone make Samsun valued at Kshs.8,500/-, cash Kshs.4,500/-, a wrist watch, Equity Bank ATM Card, a notebook and a comb and immediately before the time of such robbery used actual violence to the said Daniel Waweru Kamunya...”

The appellant faced a third charge of **ATTEMPTED ROBBERY WITH VIOLENCE CONTRARY TO SECTION 297(2) OF THE PENAL CODE**. The particulars of the third court were that:-

“On the 8th day of April 2010 at Nairasirasa Village Nkareta Loction Narok North District of the Rift Valley Province jointly with another not before court while armed with dangerous weapons namely a pistol and simis attempted to rob Sungura Muntet of a motor vehicle registration number KBJ 579B Toyota Saloon and at the time of such attempted robbery attempted to use actual violence to the said William Kesier.”

The appellant pleaded **'Not Guilty'** to all three counts. His trial commenced on 14/10/2012. The prosecution led by **Chief Inspector Kingi** called a total of seven (7) witnesses in support of their case.

The facts of this case involve a series of robberies which occurred on the night of 8/4/2010 in the Narok North area. **PW4, Vishram Karyan Manji Patel** (the complainant in Count No.1) told the court that he is a contractor with the firm of **Vilhiyani Co. Ltd.** During the material period his firm had been hired to carry out some construction work at Narok University. On the night of 8/4/2010 at about 8.00 p.m. **PW4** in the company of his foreman **PW6, Daniel Waweru Kamunya** (the complainant in Count No.2) were headed to inspect the site at Narok University. They were in a Toyota Hilux pickup vehicle registration KAT 533L. **PW4** was driving the vehicle whilst **PW6** sat in the passenger seat. Upon arrival at the gate as **PW4** made to stop the vehicle a group of about 6-8 men emerged. The men had flashlights (torches) which they shone towards the vehicle. One man was armed with a pistol. The robbers orders **PW4** and **PW6** to alight from their vehicle. The two men complied. They were ordered to surrender all their valuables. **PW4** was robbed of a Samsung mobile phone containing Kshs.5,000/- in Mpesa account, a watch make wadram, wallet and cash Kshs.150,000/- which was hidden inside a raincoat in the vehicle. **PW4** told the court that the robbers stole from him a Samsung mobile phone, watch and cash Kshs.4,500/-. The two men were then forced into the back of the pickup and the robbers drove off. They drove for about 1km and came to some bushes. They forced **PW4** and **PW6** out of the pickup, tied up their hands and legs and abandoned them there. Two of the thugs remained to guard the complainants but after a while the two left. Both **PW4** and **PW6** told the court that they heard some gunshots after they had been abandoned so they remained where they were out of fear. They remained hidden in the bushes the whole night. The next day the two untied themselves and walked to a nearby homestead to seek help. They were taken to Narok Police Station where they found the vehicle which had been stolen from them the previous night parked at the police station.

The complainant in Count No.3 of attempted robbery was **PW1, William Kaboro Kisier** also known as **'Sungura'**. He testified that on the same night, 8/4/2010 he was driving a motor vehicle registration KBJ 579B Toyota Runx headed to Narok Town. He was in the company of one **Pastor Pareiyo** and two police officers. One police officer was seated with **PW1** in the front of the pick up whilst the other officer **PW2, PC Jackson Narankaik** was seated in the back of the pick up. At about 10.00 p.m. a pickup Toyota Hilux registration KAT 833L overtook them and parked across the road blocking their path. Two men jumped out of the KAT 833L. Both had torches and one was armed with a gun. The man with the pistol went to the front and ordered **PW1** to get out of the driver's seat. The other man went to the rear of the vehicle and yanked open the door. **PW2** who was armed fired at him. The two thugs then took to their heels. The one who had been shot fell briefly but he later raised himself up and ran away. **PW1** and the 2 police officers then recovered the motor vehicle registration KAT 833L and took it to Narok Police Station where the owner **PW4** found it parked the following day. Also recovered inside the pick up KAT 833L was a wallet containing an Equity ATM Card hearing the names of Daniel Kimunya (**PW6**), two notebooks PExh.6 and a torch which the robbers dropped which bore a sticker with the name **'Juma Pere'** on it.

The same night **PW1** and his passengers went to Narok District Hospital to seek treatment for their passenger **"Pastor Pareiyo"** who suffered shock after the incident. Whilst at the hospital, they spotted a man the appellant who had been brought for treatment due to a gunshot wound. **PW1** and **PW2** identified the appellant as one of the men who had just attempted to rob them and whom **PW2** had shot. They alerted police. The appellant was then placed under arrest. The police later visited the scene for the first robbery in the area of Narok University. They recovered sim cards, one Safaricom and one Zain and two wrist watches. The police investigated the matter and eventually charged the appellant with the three counts.

At the close of the prosecution case the appellant was ruled to have a case to answer and was placed on his defence. The appellant opted to make an unsworn defence. He denied having been involved in any robberies on the night of 8-4-2010. He states that on 9/4/2010 as he left the Mosque in Ntulele he was called by a police officer **PW2** who shot him at point blank range. He was then rushed to hospital where he was admitted. To his surprise he was later slapped with these charges of robbery with violence.

On 8/6/2011 the learned trial magistrate delivered his judgment. He convicted the appellant of count Nos. 1 and 2 of robbery with violence and also convicted the appellant on the third count of attempted robbery with violence. The trial magistrate thereafter sentenced the appellant to death. Being aggrieved the appellant filed this appeal. The appellant opted to rely upon his written submissions which had been duly filed in court. **Ms Nyakira** learned State Counsel strenuously opposed the appeal. She submitted that the appellant was properly convicted and urged us to uphold both the conviction and sentence of the trial court.

This being a court of first appeal we have a duty to consider the evidence afresh and to draw our own conclusions thereupon. In the case of **Ajode vs Rep [2004]1 KLR 81**, the Court of Appeal held that:-

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that.”

The appellant faced charges in relation to two separate but intentioned incidences of robbery and attempted robbery. As such we will have to analyze the evidence with a view to determining whether the prosecution proved each of the three counts beyond a reasonable doubt.

The first incident occurred on the night of 8/4/2010 at about 8.00 pm. The complainants were **PW4** and **PW6** who were on their way to inspect their construction site at Narok University. Both witnesses state that at the gate to the site before **PW4** could stop the vehicle they were in, a group of 6-8 men accosted them. Both **PW4** and **PW6** confirm that they were riding in a Toyota Hilux Registration KAT 833L. They both confirm that the men who robbed them were armed with a pistol. They forced the two men out of the vehicle and robbed them both of their mobile phones and cash. Thereafter the robbers took **PW4** and **PW6** into a thicket, tied them up and left them there. The two witnesses corroborate each other's evidence in all material aspects. From their narration it is quite clear that this incident did amount to a robbery with violence as envisaged by Section 296(2) of the Penal Code. There was more than one attacker, the robbers were armed and **PW4** and **PW6** were both threatened and manhandled in pursuance of the theft.

Neither **PW4** nor **PW6** was able to identify any of the men who robbed them. More pertinently neither **PW4** nor **PW6** was able to identify the appellant as one of the men who robbed them. There is therefore no eye witness account placing the appellant at the scene of this first robbery.

The prosecution has sought to rely upon circumstantial evidence and evidence of recent possession to link the appellant to this robbery. It is claimed that the appellant was positively identified by **PW1** and **PW2** as one of the men who attempted to rob them later the same night using the motor vehicle registration KAT 833L which had been stolen from **PW4** barely two hours earlier. Once again this attempted robbery occurred at 10.00 p.m. and it was dark. **PW1** and **PW2** claim that they were able to see the appellant due to the flashing torch lights at the scene as well as the headlights from the two vehicles. Given the circumstances, it was dark, the incident did not take long and the two witnesses must have been panic stricken. We must carefully interrogate this evidence of identification. Both **PW1** and **PW2** state that the two robbers had torches which they flashed at them. The intensity of light emitted by the said torches is not disclosed. We find it difficult to see how a torch being flashed at the faces of the two witnesses would enable them to have a clear look at their attackers. On the contrary the light from the torches being flashed would blind the two and obscure their vision. Both **PW1** and **PW2** state that they were attacked by two (2) men. Under cross examination at page 10 line 10 **PW1** states

“The headlights of my car were on. the pickup had been packed across the road. I saw accused come out of the pickup as it blocked our car”

PW1 goes on to state:-

“The headlights of my car were on. I saw the man who had the gun. It is the first accused....”

PW1 claims to have relied on the light from his headlights to see and identify the appellant. The intensity of this light is not disclosed to the court. **PW1** also admits that he did **not** in his statement reveal that he had seen the appellant as he alighted from the vehicle. If indeed **PW1** was able to identify one of the robbers then this fact ought to have been included in his statements.

PW1 told the court that appellant was armed with a gun. However, **PW2** states that the appellant is the man who came and yanked open the rear door where he was seated, the appellant was the man he shot and **PW2** insists that he was armed with a sword. The witnesses gave contradictory evidence regarding what weapon the appellant had. A sword and a gun are two very different items. One cannot be easily mistaken for the other. The learned trial magistrate noted this inconsistency and in his judgment sought to explain it away thus at page 3 line 32:-

“PW1 testified that it was accused who was armed with a gun. As between PW1 and PW2 there is some difference as to what accused was armed with, with PW1 saying it was a gun while PW2 said it was a sword. I do hold the view that in view of the circumstances prevailing at the time and the possible panic that accompanied the robbery it is possible for a witness to confuse as to what a suspect was armed with....”

In realising and noting this contradiction the trial magistrate sought to explain it away by citing the **‘prevailing circumstances being that it was dark and the panic of the witnesses.’** We find that his reasoning was erroneous. This contradiction cannot just be wished away. The fact that the 2 witnesses were unable to clearly cite what weapon the appellant was carrying increases the likelihood that they had not seen him well enough. This places more doubt on their identification of the appellant as the man they saw on the night in question. On our part we find that the circumstances did not favour a clear and positive identification. **PW2** testified that during the incident he was armed with an AK 47 rifle which he used to shoot one of the robbers. It is contended that the appellant was later spotted by **PW1** at Narok District Hospital receiving treatment for a gunshot wound. In this regard **PW1 states at page 11 line 25 that:-**

“I was at the hospital while these two men came carrying one injured man. They told us they had been attacked by robbers at Sufapet area. The doctor came and asked the injured man the name. He said his name is Juma Pere. He had a red jacket. I suspected he was one of the men who attacked us.... I called the police officers and alerted them.” (Our emphasis)

Having earlier asserted that he had seen and identified the appellant, why is it that upon seeing the injured man at the hospital **PW1** merely **‘suspects’** that he was one of the robbers? If he was sure of the appellant’s identity then he ought to have clearly recognized and identified the appellant upon seeing him a few hours later at the hospital. By saying that he only **‘suspected’** that the injured man was one of the robbers **PW1** makes it clear that he is not sure of the identity of the men who robbed him. Clearly his suspicion was only fuelled by the fact that the appellant was brought to hospital with a gun shot wound. We therefore find that the evidence of identification by **PW1** and **PW2** is not sufficient. Their testimony was inconsistent and **PW1** did not appear certain that it was the appellant whom he had seen. We therefore find that the appellant was not properly identified as one of the robbers.

The question arises as to whether the fact of the appellant having sustained a gun shot wound links him to the attempted robbery. **PW3, Hilary Kiptoo** a Clinical Officer attached to Narok District Hospital confirms that he examined the appellant and found him to have a **‘penetrating injury caused by a bullet’**. He filled and signed the P3 form which he produces as an exhibit (PEXh.1). Undoubtedly the fact of the bullet would raise a suspicion that the appellant could have been one for the robbers. However, it is trite law that mere suspicion cannot constitute the basis for a conviction. For the prosecution to rely upon this as circumstantial evidence to link the appellant to the attempted robbery, all other possible explanations and/or hypothesis on how he may have sustained the bullet wound must be eliminated. The firearm allegedly used to shoot the robber was never examined by a ballistic expert. No search for cartridges was conducted at the scene of shooting. The court is not told whether this was the only shooting that occurred in Narok North area on the night of 8/4/2010. The prosecution did not cover all bases to prove that the gun-shot wound sustained by the appellant came from the AK47 rifle fired by

PW2.

It is alleged that at the scene of the attempted robbery a torch bearing a name tag '**Juma Pere**' was recovered at the scene. '**Juma Pere**' is the alias name of the appellant. Quite apart from the fact that it is very unlikely that a person out to commit a crime would carry items bearing his full name to the scene of crime, the mere fact that the torch was tagged with the appellant's name does not prove that it was he who had the torch at the time. The possibility that another person had this torch has not been excluded. In our view this link is far too tenuous to prove the appellant's complicity in the incident. It must be reiterated that in law the burden lies squarely upon the prosecution to prove each element/ingredient of an offence beyond reasonable doubt. At no time does this burden ever shift to an accused to explain himself or to prove his innocence. The evidence adduced in our view did raise the possibility of suspicion that the appellant was involved in the three robbery incidences. However, the evidence fell short of proving his involvement. The prosecution evidence was inconsistent and lacked cogency. The evidence on identification fell below par. For these reasons we are obliged to award to the appellant the benefit of doubt.

Based on the foregoing we find that the conviction of the appellant was not merited. In the absence of conclusive proof of his involvement in the attempted robbery any suggestion that the appellant was involved in the first robbery fails as his link to the stolen vehicle remains tenuous at best. We therefore allow this appeal. The conviction of the appellant of counts 1 & 2 of robbery with violence and count No.3 of Attempted robbery with violence are hereby quashed. The attendant death sentence is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 14th day of December, 2015.

MAUREEN A. ODERO

JANET N. MULWA

JUDGE

JUDGE