



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 446 OF 2008

ALFAN RASHID MUTSWEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 2278 of 2006 of the Chief Magistrate's Court at Nairobi by E.C. Cheron - Senior Resident Magistrate)

JUDGMENT

1. **Alfan Rashid Mutswe**, was tried in nine counts as follows:

Count I: Robbery with violence contrary to Section 296(2) of the Penal Code.

Count II: Attempted robbery with violence contrary to Section 297(1) of the Penal Code.

Count III and V: Being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with Section 4(3) of the Firearms Act Cap 114 laws of Kenya.

Count IV and VI: Being in possession of ammunitions without a firearm certificate contrary to section 4(1) as read with Section 4(3) of the Firearms Act Cap 114 laws of Kenya.

Count VII: Malicious damage to property contrary to Section 339(1) of the Penal Code.

Count VIII and IX: Causing grievous harm contrary to Section 234 of the Penal Code.

2. The brief particulars were as follows:

i. **Count I:** On 27th day of November, 2006 along Machakos-Athi River road near Kaseve market within Machakos District in Eastern Province, jointly with others not before court, they robbed **David Mutiso Mutune** of a motor vehicle registration number KAV 518X Nissan Pick-up loaded with 18 cans of milk all valued at Kshs.1,507,200/=, and at or immediately after the time of such attempted robbery threatened to use actual violence to the said Rashile Ole Museve.

ii. **Count II:** that on the 27th day of November 2006 at Wamiti Beer distributor depot in Machakos Town within the Eastern Province jointly with others not before court, while armed with dangerous weapons namely AK 47 rifles and G3 rifles attempted to rob Rashile Ole Museve a

watchman at the above depot and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence against the said Rashile Ole Museve.

- iii. That on the 27th day of November 2006 along Mwala-Kangundo road in Machakos District within the Eastern province was in possession of one AK 47 rifle serial number AH6228-1989, in **count III** a G3 rifle serial number 6739325, in **count V**. Ten (10) rounds of 7.62 special calibre ammunicions in **count IV** and six (6) rounds of 7.62 mm calibre ammunition in **count VI** respectively without firearm certificates.
- iv. **Count VII:** That on the 27th day of November 2006 along Mwala-Kangundo road in Machakos District within the Eastern province, wilfully and unlawfully damaged a G3 rifle serial number G3-A 36699529 the property of Government of Kenya.
- v. **Count VIII and IX:** That on the 27th day of November 2006 along Mwala-Kangundo road in Machakos District within the Eastern province, did grievous harm to Corporal Peter Musyimi Mutavi in **count VIII** and Corporal Urbanus Kivilu in **count IX** respectively.
3. The trial court convicted the appellant in all nine counts and sentenced him to suffer death in **count no. 1**, to serve prison terms of 5 years in **count II**, 7 years in each of **counts no. III, IV, V** and **VI** respectively, 3 years in **count no. VII** and 10 years in each of counts no. **VIII** and **IX** respectively. The sentences were ordered to run concurrently. We take this early opportunity to state that, where an accused person has been sentenced to death any other sentences should be held in abeyance.
4. The appellant quickly filed an appeal in which he contended that he was framed by **PW4** a Chief Inspector of police, that Section 200 of the Criminal Procedure Code was not complied with and that the appellant's alibi defence was ignored.
5. Mr. Kadebe, learned counsel for the respondent, conceded the appeal admitting that there was non-compliance with Section 200 of the Criminal Procedure Code by a succeeding magistrate. He however urged the court to order that the case be heard afresh as there was sufficient evidence on record, and the witnesses were still available to testify afresh.
6. The evidence adduced before the court was that on 27th November 2006 at about 3.30 a.m., **PW1** was driving motor vehicle registration number KAV 518X Nissan Pick-up to Machakos and Kitengela to sell milk when he was accosted by seven gun wielding robbers. Four of them blocked his path at Kaseve market using their motor vehicle and ordered **PW1** and his two sales ladies **PW2** and **PW3** respectively, into the back of the pick-up, where they were joined by three other robbers.
7. They turned the motor vehicle towards the direction it had come from and drove for about 1½ hours. They drove towards Mwala and on to Kangundo and Tala towns. Near Ruai towards Nairobi, the motor vehicle slowed down as it came to a police road block and this allowed one of the sales girls to jump off the back of the pick-up and alert the police manning the road block. Further ahead the robbers overtook and carjacked another motorist and fled in his motor vehicle. Police found and rescued **PW1** and the remaining sales girl some 30 minutes later.
8. Different police officer received the report of the robbery and pursued the robbers. They came upon the robbers in a second pick-up and saloon car and managed to arrest the appellant after an exchange of gunfire. They recovered one gun make AK 47 rifle with seven rounds of ammunition together with pick-up registration number KAV 591 D Toyota. He was brought to Nairobi and charged.
9. We have perused the lower court record and it is clear that the trial commenced on 20th September 2007 before Mr. Bidali, Senior Resident Magistrate. He conducted the proceedings upto the close

of the prosecution case. On 11th July 2008 he ruled that a prima facie case had been established against the appellant to warrant his being placed on his defence.

10. On 14th August 2008 for reasons that are not evident on record, Mrs. Githua Senior Principal Magistrate ordered the hearing to proceed under **Section 200 Criminal Procedure Code** before court no. 5. On 16th September 2008 when the case came up for hearing in court no. 5 before Mr. Cherono Senior Resident Magistrate, the record shows that he complied with **Section 211 Criminal Procedure Code**, but there is no mention of **Section 200 Criminal Procedure Code**.
11. For the foregoing reasons the appeal has been conceded by the state and the court also finds that the proceedings were fundamentally flawed for non-compliance with **Section 200(3) Criminal Procedure Code**.
12. Mr. Kadebe however, submitted that it would be in the interest of justice for this court to order a re-trial for several reasons. First, that there was sufficient evidence on record to convict the appellant, second that the appellant does not stand to suffer any prejudice since he has been sentenced to suffer death, and third, that the witnesses in this case were primarily police officers and they are still available to testify afresh.
13. Mr. Mochere, learned counsel for the appellant in opposition to the submissions for retrial, urged that the prosecution should not be afforded a chance to rectify the many mistakes they made during the trial. He contended that the evidence against the appellant was so weak that it ought not have sustained a conviction against him.
14. The question therefore, is whether or not to order a re-trial. The principles upon which a court should order a re-trial were restated in the case of **Fatehali Manji v Rep [1966] EA pg. 343**. The Judges of Appeal Sir Clement de Lestang, Ag. P., spry, Ag V-P and Law, J.A. had this to say:

“in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;”

15. These principles were reiterated in the more recent case of **Muiruri v Republic [2003] KLR, pg 552**, where Kwach, Githinji & Waki JJA said:

“It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or the court’s.

We therefore examined the evidence before us to determine whether the interests of justice required us to order a retrial.

16. In the case before us, the only evidence that connected the appellant to the offence is that of his arrest. **PW4**, testified that he received information about the robbery on 27th November 2006 at 4.15 a.m. He constituted a squad of officers who included **PW5** and **PW6** and set off in pursuit of the robbers in the area District Officer’s motor vehicle.

17. At Tala the police came upon and engaged the occupants of a pick-up and a saloon car in gun

- fire. The pick-up sped off as the occupants of the saloon car got out and fled on foot. It was the testimony of **PW4**, **PW5** and **PW6** that the appellant emerged from the saloon car shooting at the police and that the appellant himself sustained a grazing gun wound on his scalp, on his head and had blood running down his forehead.
- 18.The three officers also testified that the appellant was holding an AK 47 rifle when he emerged from the saloon car and that he surrendered and dropped the gun when he came out. Further that at this point both **PW5** and **PW6** had already been shot in the legs and **PW6**'s gun had been shot at and damaged.
- 19.The appellant's testimony was that he was arrested by irate members of the public who suspected that since he was a stranger in Tala, he must be one of the robbers that were being sought by the police. The appellant explained that he was in Tala to sell second hand clothes in which he deals. He denied any involvement in the robbery or that he was arrested by the police or even that he was found in possession of a gun at the time of arrest.
- 20.From the record **PW1**, **PW2** and **PW3** who were robbed of motor vehicle registration number KAV 518 X in **count I** were not able to identify any of the seven robbers who attacked them and could not state whether or not the appellant was one of them. The complainant in **count II** was not called to testify. In the remaining seven counts the record indicates that the police arrested the appellant in a serious shoot out in which he surrendered and emerged from a saloon car holding an AK 47 rifle.
- 21.**PW12** the Firearm Examiner testified that none of the two rifles discharged any of the 10 spent cartridges found at the scene of the arrest. Fingerprints lifted from the AK 47 rifle were not found to match those of the appellant, neither were his fingerprints found in the car which he was said to have been driving when he was arrested. It is not evident how the third rifle examined by **PW11** is connected to this offence.
- 22.The court was also told that the appellant sustained a wound on the head just above his forehead. No medical evidence was adduced in this respect, nor was there a scar which was shown to the trial court. The foregoing being the circumstances in which the appellant was arrested, we are unable to find that there was evidence to connect him with the offences in the seven remaining counts. The possibility of mistaken identity is real.
- 23.In light of the above we find that the evidence tendered before the trial court was too weak to sustain a conviction against the appellant in any of the nine counts for which he was tried. The doubt created in the prosecution case was real and reasonable and benefit thereof should have been accorded the appellant. We are therefore, of the view that the interests of justice would not be served by an order for retrial in this case.
- 24.For the foregoing reasons the appeal succeeds. The convictions in all nine counts are quashed and the sentences therein set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 17th day of **March 2014**.

A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE