



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL APPEAL NO. 322 OF 2006**

JOHN MUGUTHI KANG'ETHE ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From original conviction and sentencing in Criminal Case No. 9001 OF 2004 at the Chief Magistrate's Court at Thika by L.W. Gicheha - Senior Resident Magistrate on 23<sup>rd</sup> June 2006)*

**J U D G M E N T**

The appellant was charged with three offences. In count 1 he was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

In count 2 he was charged with the offence of being in possession of a firearm without a certificate contrary to Section 4 (2) of the Firearms Act Cap 114 Laws of Kenya. In count 3 he was charged with the offence of being in possession of ammunition without a firearm certificate contrary to Section 4(2) of the Firearms Act aforesaid.

He denied all the offences but after a full trial, he was convicted of all the three offences and sentenced to death in count 1 and in count 2 and 3 he was sentenced to 8 years imprisonment on both counts respectively, which sentences were ordered to run concurrently. Being aggrieved by the said conviction and sentence he filed the present appeal.

In his amended memorandum of appeal, he challenged the judgment of the learned trial magistrate on the basis that she relied on a defective charge to convict her yet the said charge could not sustain a safe conviction. Further, he faulted the learned trial magistrate for relying on contradictory and inconsistent evidence to arrive at the conviction. It is also his case that the learned trial magistrate accepted in evidence exhibits produced in breach of Section 33 of the Evidence Act and Section 77 of the Criminal Procedure Code and that she failed to comply with Sections 150 of the Criminal Procedure Code. Finally, he complained that his defence was rejected yet it was formidable and plausible.

As the first appellate court, it is our duty to re-evaluate the evidence on record and come to independent conclusions.

The evidence adduced before the learned trial magistrate was that the complainant PW1 was closing the window of his shop at about 9 pm when the appellant came and asked to be sold some cigarettes. He was advised by the complainant to go to a different shop but he did not comply. He then showed the complainant a gun and demanded some money.

Both entered the shop and the complainant opened the cash box. The appellant is said to have removed

all the notes and in the process took the complainant's cell phone and put it into his pocket. He then demanded to be given even the coins which the complainant placed on the table. At that time, he held a paper bag for the complainant to empty the said coins and while he was staring outside the complainant held him and started screaming. Some neighbours who included PW2 came. The appellant was subdued and disarmed. Members of the public started beating him but he was saved by PW4 from further beating. The gun recovered from him had three rounds of ammunition. These were taken to a ballistic expert who filed his report in evidence before the learned trial magistrate.

In his defence the appellant denied the offence and stated that he had gone to buy some avocados when he was attacked by people because he was a stranger and not known in the neighbourhood. It is not true that he had in his possession the alleged gun which he only saw at the police station.

In convicting the appellant the learned trial magistrate said as follows:

***“There is no doubt that he is the one who attacked the PW1. There was electricity on and the PW1 was able to see his face. Further when they entered the shop and accused demanded for money after showing PW1 the gun, it was the accused that PW1 gave the money to as well as his mobile phone which was recovered from the accused person by PW1 after they subdued him. PW2 witnessed the weapon being recovered from accused jacket. There is no issue of mistaken identity as the PW1 managed to hold the accused when he realized when was not looking at him. And while holding him called for help and people came and helped him tie the accused while they sought help from PW4.***

***The accused in his defence denies having robbed PW1 and alleges he was beaten by unknown people and framed with the gun. The court notes that PW1 and accused did not know each other before this incident or it would have come out during the hearing nor did the accused allege that there was any grudge between him and the accused or the officers he alleged showed him the gun. His defence does not raise any reasonable doubt and the court finds it is an afterthought. The court studied the demeanour of the witnesses and PW1 and 2 appeared as honest people who helped arrest the accused person.”***

Going by the provisions and ingredients of Section 296 (2) of the Penal Code, the offence of robbery was complete when the appellant showed the complainant the gun and demanded money from him. We have seen no defect in the charge as framed and the allegation by the appellant that it was defective cannot be sustained.

After the complainant held the appellant he did not let him go until PW2 and some neighbours came onto the scene. There is evidence that PW4 is the one who saved the appellant from the wrath of the neighbours who were beating him. The evidence of PW1, PW2 and PW4 placed the appellant at the scene of the robbery.

It is not necessary that violence be proved. It is enough that the appellant was armed with a dangerous weapon, in this case the pistol.

We note that the said pistol had been taken for ballistic examination and a report filed in court as evidence.

The appellant has questioned the evidence as relating to the make of the said pistol but in our view, the make or description is irrelevant. It is enough that the pistol was recovered from his possession and that it was subjected to examination which confirmed that it was a firearm under the Firearms Act Cap 114 Laws of Kenya.

It was not necessary for the court to order any witnesses to be called by the prosecution because it is not the number of witnesses that proves an offence but the quality of the evidence received. We find that the learned trial magistrate was not in breach of Section 150 of the Criminal Procedure Code.

The learned trial magistrate had the advantage to see and hear the prosecution witnesses. That is a benefit

and an advantage we do not have. After so doing she was satisfied that having observed their demeanour, they appeared honest and we have no reason to doubt that assessment.

In our view we are satisfied that a robbery took place and that the person who committed that offence was armed. That person the evidence shows, was the appellant herein. The offence of robbery was proved beyond any reasonable doubt.

Further, counts 2 and 3 were proved by the examination of the firearm and ammunition found in the possession of the appellant and the report thereof produced. The conviction was safe in the circumstances.

On sentencing, this court has said over and over again that once an accused person has been convicted and sentenced to death under Section 296 (2) of the Penal Code, any other sentences have to be held in abeyance. Therefore, while upholding the sentences imposed by the learned trial magistrate in respect of the three counts, the sentences of imprisonment relating to counts 2 and 3 shall be held in abeyance. Otherwise this appeal is hereby dismissed.

**SIGNED, DATED and DELIVERED in open Court this 29<sup>th</sup> day of October, 2013.**

**A. MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**

a