



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 35 & 36 OF 2012 (CONSOLIDATED)

1. **BONIFACE KIOKO MATHUKU**
2. **JOSEPH KYALO MUA** **APPELLANTS**

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Principal Magistrate J. Karanja PM delivered on 8/3/2012 in Makueni Principal Magistrate Criminal Case No. 372 of 2010)

(Before B.T. Jaden and J.M Ngugi JJ)

J U D G M E N T

1. The 1st Appellant, **Boniface Kioko Mathuku** and the 2nd Appellant, **Joseph Kyalo Muia** were convicted and sentenced to death on two counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offences are that on the 28th day of July, 2010 at **Wote Township** in **Makueni District** within **Eastern Province**, jointly with others not before court while armed with dangerous weapons namely a homemade gun and pangas they robbed **Justus Mwanzia Kisio** of cash Kshs.600/= and at the time of such robbery, threatened to use actual violence on the said **Justus Mwanzia Kisio**.

Secondly, they are also charged with robbing **Emilio Kinyua Makau** of Kshs.200 and a mobile phone, make **Nokia 1110** all valued at Kshs.3,000 and at the time of such robbery threatened to use actual violence to the said **Emilio Kinyua Mugo**.

2. The 1st and 2nd Appellant were also convicted and sentenced to serve seven years imprisonment each for the offence of being in possession of an imitation firearm contrary to **section 34 (1) (3)** of the **Firearm Act**.

The particulars of the offence were that on the 29th day of July 2010 at **Nyunzu village** in **Makueni District** within **Eastern Province** was found in possession of an object resembling a firearm namely pistol.

3. The facts of the prosecution case were that PW1 **Justus Mwanzia** and PW2 **Emilio Kinyua Mugo** who are taxi drivers in **Wote Township** went to drop a fellow taxi driver to his house in

- Shimo** area. As they turned to leave, they were accosted by three men who were armed with pangas and an imitation firearm. The assailants smashed the motor vehicle windows with pangas. PW1 was robbed of cash Kshs.600/= and a mobile phone. PW2 was robbed of cash Kshs.200/= and a mobile phone. The attackers then fled. A report was made at **Makueni Police Station**.
4. Police officers rushed to the scene. Amongst the police officers who came to the scene was a dog handler with a sniffer dog. The dog picked up the scent from the scene and lead the police officers to a homestead in **Nyunzu** area, about ten (10) kilometers from the scene. The sniffer dog lead them to a house that was not locked. Four people were asleep on the floor of the house. The police officers shone their torches on them and saw that one of them had a panga under his head and another had a panga tucked inside in his trouser. Another one had an imitation firearm next to him and another had a toy pistol. One of the police officers fired in the air and the four people started running away. One of them was shot two times on the arm and the leg and arrested. The 1st Appellant was arrested by the dog handler and the dog. The 2nd Appellant was arrested the following day by members of public. After investigations the 1st and 2nd Appellant were charged with the offences herein.
 5. In his defence, the 1st Appellant gave unsworn evidence. No witnesses were called. He stated that he was at the bus stage at about 6.00 a.m. waiting for a motor vehicle to go to hospital to see his wife who had given birth. He was then arrested by police officers who had had a sniffer dog. He was bundled into a police motor vehicle where he found two other people who were handcuffed. He was escorted to the police station where he was locked up and later escorted to his house. A search was conducted but nothing recovered.
 6. The 2nd Appellant also gave unsworn evidence. No witnesses were called. He stated that he was going to look for oranges for his business when he was arrested, beaten and interrogated about a robbery said to have taken place. He was escorted to the police station and charged with the offences herein.
 7. The appeals by the 1st and 2nd Appellant were consolidated and heard as one. This judgment is therefore in respect of both appeals.

The grounds of appeal raised by the appellants can be summarized as follows:-

- That the evidence on identification was insufficient.
 - That crucial witnesses were not called.
 - That the defence evidence was disregarded.
 - That the prosecution case was not proved beyond reasonable doubt.
8. The 1st Appellant relied on his written submissions while **Mr Mutinda Kimeu** for the 2nd Appellant made oral submissions. The submissions essentially expounded on the grounds of appeal.
 9. **Ms. Abuga** the State Counsel opposed the appeal. She submitted that the evidence on record established that the robbery occurred and that the sniffer dog lead to the arrest of the Appellants and the recovery of the pangas and the imitation firearm.
 10. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
 11. From the evidence of the two complainants in the offences of robbery (PW1 and PW2), there is no doubt that they were robbed of their aforesaid properties. PW1 and PW2 were not however able to identify their attackers.
 12. PW3 **PC Jackson Kibet** was among the police officers who were lead by the sniffer dog to the house where the 1st Appellant, **Boniface Kioko** was arrested by the dog handler. PW3 identified the 2nd Appellant, **Joseph Kyalo** as one of the people they found in the house with a panga under his head and a toy pistol. PW3 was the only witness who gave evidence on how the Appellants were tracked to the house in question. PW3's evidence is scanty and fails to give details on how he identified the 2nd appellant after his arrest. PW3 did not describe the intensity of the torchlight nor state for how long he observed the 2nd Appellant before the 2nd Appellant escaped. The dog handler who arrested the 1st Appellant did not testify. It is only the dog handler who could have

shed light to the court on how the dog was able to identify the culprits without any possibility of error.

13. PW4 **Cpl. Paul Kipkorie** only participated in re-arresting the Appellants and escorting them to the police station. PW5 **Sgt. Francis Njuguna** the Investigating Officer produced the report of the ballistics expert confirming that one of the contraptions found in the house in question was an imitation firearm. However, there is no evidence that connects the Appellants with the imitation firearm. We arrive at the conclusion that the circumstantial evidence that led to the arrest of the Appellants is unreliable and cannot sustain a conviction.

14. The appeals by the 1st and 2nd Appellants are meritorious. The convictions are quashed and the sentences set aside. The Appellants are at liberty unless otherwise lawfully held.

.....

.....

B. THURANIRA JADEN

J.M. NGUGI

JUDGE

JUDGE

Dated and delivered at Machakos this 15th day of October 2013.

.....

B. THURANIRA JADEN

JUDGE