



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 108 OF 2011

ERUPE LOKUTAN APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. T. Nzyoki, SRM in Lodwar Senior Magistrate's Court in Criminal Case No. 196 of 2010)

J U D G M E N T

The appellant Erupe Lokutan was charged with robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars are that on the 4th day of April 2010 at Lopur village in Katilu Location in Turkana South District within Rift Valley Province, jointly with another not before Court being armed with a dangerous weapon namely AK 47 rifle Serial No. B04928 robbed David Ekweel one sheep valued at Kshs. 1,500 and at the time of such robbery threatened to use actual violence on the said David Ekweel.

In count two, the appellant Erupe Lokutan was charged with being in possession of firearm contrary to Section 4 (2) (a) as read with Section 4 (3) (a) of the Firearms Act Cap 114 Laws of Kenya. Particulars are that on the 4th day of April 2010 at Lopur Village in Katilu Division of Turkana South District within Rift Valley Province was found being in possession of one AK 47 rifle Serial No. B04928 without a Firearm Certificate.

The appellant was convicted and sentenced to death. Being dissatisfied with the decision of the Trial Magistrate, he preferred an appeal to this Court in which he contends that the Prosecution did not prove the case to the required standard. That the complainant and his son may have strangled their goat to ensure that the appellant suffers.

The facts of the case are that on the 4th day of April 2010 at around 2.00am, Pw 1 Augustine Ekamais son of Pw 1 David Ekweel was asleep near their goat pen. He heard some movement in the goat pen. He turned to check on the door to the goats pen. He noticed that there were people in the pen. When those in the pen realized that their presence had been noticed, they started running away. Pw 2 ran after one of the men who ran towards his father's house. He shouted alerting his father (Pw 2) about thieves in their compound. It is at this time that one of the people shot in the air.

Pw 1 David Ekweel who had woken up took cover behind a tree in his compound. He saw one man approaching. He summoned his courage and held the muzzle of the gun which the man had. He started

struggling with the man in a bid to wrest the gun from him. As he was struggling with the man who is now the appellant, some Administration Police Officers who were on patrol among them Pw 3 Cpl. James Kemei who had heard gunshots arrived and found the appellant and Pw1 struggling over a gun. He ordered the two to surrender. The appellant put down the gun. The two were then arrested and escorted to Katilu Police Patrol Base where they were handed over to the in-charge of the Patrol Base CIP Mbutia.

The appellant was later taken to Kainuk Police Station where he was received by PC Nyamwea Leonard. The AK 47 was also received. The AK47 was later taken for examination. The ballistic report was produced by Pw 4 SP. Lawrence Nthiwa on behalf of Alex Mwandawiro. The appellant was then charged for the offences.

When the appellant was put on his defence, he stated that on 05/04/2010 his mother accidentally cut herself on the leg. He administered first aid on her by tying her injured leg with a piece of cloth. He then left for Katilu market for assistance. When he was nearing Katilu market, he found a group of people receiving food rations. He was arrested and subjected to beatings by the mob who said that he was a thief. He was escorted to the Chief's Office where the Chief told him to wait for witnesses. People from his village came among them one Ekai whom he had a dispute of over land. He was later taken to Kainuk police station and finally to Court where these charges were read to him. He denied the charges.

We have gone through the evidence adduced before the trial Court. Our duty as the first appeal Court is to examine the entire evidence afresh and reach our own findings. We have to weigh conflicting evidence and reach our own findings and conclusions. We are however expected to give allowance for the fact that we neither heard nor saw the witnesses testify. Our duty was clearly set out in the case of **Okeno Vs. Republic [1972] EA 32.**

In the present case, there is evidence on how Pw 2 heard about strange movements in the goats pen. When he turned to see what was happening, he noticed that there were people in the goat pen. The people started running away as he shouted. There was one shot fired in the air. Pw 1 who had been attracted by his son's screams woke up and took cover behind a tree. He confronted one of the persons who happened to be the appellant. In the course of struggling with the appellant, Pw 3 an Administration Police Officer who had heard gunshots came to the scene and found the appellant and Pw 1 struggling. He arrested the two that is the appellant and Pw 1 but Pw 1 was later released.

It was discovered that those who had been in the goat pen had strangled one goat. The carcass of the goat was taken to Kainuk police station but due to the heat in Turkana the carcass could not be brought to Court. The AK 47 rifle was taken to a ballistic expert who examined it and found that it was in sound mechanical condition. The report of the ballistic expert was produced as *exhibit 2*. Three spent cartridges which were used to test the AK 47 rifle were produced as *exhibit 4 (a), (b) and (c)*. The AK 47 itself was produced as *exhibit 1*. The exhibit memo used to forward the AK 47 to the ballistic expert was produced as *exhibit 3*.

The appellant was arrested at the scene of the robbery. He was armed with an AK 47 rifle which was recovered. There is evidence from Pw 3 Cpl. James Kemei that when they arrived, there was one other person who ran away. He managed to arrest the appellant whom he found struggling with Pw 1. The evidence of Pw 3 is corroborated by that of Pw 2 who testified that there was more than one person at the goat pen.

The appellant's defence that he was arrested as he went to seek assistance for his mother who had cut herself is not true. The appellant stated in his defence that one of the witnesses who came forward at the Chief's office had a grudge with him arising from a land dispute. He stated that that witness was one Ekai. There is no witness called Ekai who testified against the appellant. The appellant was not framed. The manner in which Pw 3 arrested both the appellant and Pw 1 shows that there was no plan to fix the appellant. Pw 1 himself stated that he was arrested together with the appellant but was released in the morning. Pw 3 had arrested the two for interrogation as to what was happening. After it emerged that the appellant is one who had gone to Pw 1's home to steal, Pw 1 was released. It was found that the robbers

had strangled one goat. Pw 5 confirmed that a carcass of a goat was taken to Kainuk Police Station.

We find that the evidence against the appellant was overwhelming. His conviction and sentence was proper. We dismiss his appeal in its entirety.

Dated, signed and delivered at Kitale on this ...5th.. day of December, 2013.

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent:

Court Clerk: