



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 795 OF 2007

EVAN KALO CALLOS.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in criminal case No.113 of 2007 of the Chief Magistrate's Court at Nairobi)

JUDGMENT

The appellant was charged with 6 counts. In count No.1 – 4, he was charged with robbery with violence contrary to Section 296 (2) of the Penal Code. In count 5 he was charged being in possession of firearm without a firearm certificate and in count 6 being in possession of ammunitions without a firearm certificate. After trial he was convicted on all counts except count III of which he was acquitted for lack of evidence. He filed this appeal against both conviction and sentence.

The grounds of appeal are given namely

- 1) The conviction was based on advanced photographic evidence of CCTV video which was weakened circumstantial since the clearness of the images were not accurate hence blurred the evidence on strategic camera positioning never forth came as was equally the technician who fixed them. No testing of video backs was conducted to establish origin of the same.
- 2) Trial magistrate fell in error by failing to note the evidence on high factor which was discredited hence unreliable.
- 3) Trial magistrate erred to convict on the firearms and ammunitions counts which were (i) not recovered in hi exclusive control (ii) build on recovery evidence of variance dates hence defective charge sheet as is shown to court herein.
- 4) Trial magistrate erred by not making essential witness could not testify for Section 150 Criminal Procedure Code.
- 5) Charges of prosecution were unproved peradventure.
- 6) That defence remained unchallenged hence rejection, misdirection in law and facts.

The prosecution called PW1 Cornelia Achieng Owuor who was working with the bank of India Westlands branch. On 7.11.05 he reported at 9.10 a.m. Two men held him and demanded to open the safe and give them money which he did. Two people had covered themselves one with bui bui the other a checked scarf. One had pointed the bag with a rifle. The money was 4,239,258.10.

The theft had been captured by CCT – TV. The faces of robbers was shown. He saw 3 people one with Nigerian dress. PW2 was Beatrice Odide a tea girl. She was told to get in where there was no light by a person wearing Nigerian dress. He showed a pistol another person wore a bui bui. Then PW2 was hit in the head. Another man had a gun AK47 and them were locked in the toilet. She saw 6 people 4 with Nigerian style and wore bui bui and one Arafat style. PW3 was John Karanja Ngugi. He saw a man in the bank with a gun who had a white gown and one had a black gown. The men told the manager to open strong room they took PW3's mobile. This witness could not recognize the people. He saw one gun. He was aware that there was CCTV. The people who attacked were disguised.

PW4 was police officer he was with other officers travelled to Vihiga District to chase suspect of robbery featured in a CCTV camera. This was 24/12/2006. The robbery had taken place in November 2005 in Bank of India Westlands. They searched his room and recovered a firearm which did not have a serial number with 2 rounds of ammunitions with two bullets. Later they recovered 24 rounds of ammunition hidden in a pouch. Later on 9/1/07 OCPD Kilimani called and informed him the suspect had surrendered there. The accused was later charged.

The amount stolen from the bank was Kshs.4,239,258.10. He got recorded CD, CCTV captured during the robbery. The exhibits were produced in court. The installer of CCTV retrieved it and gave to witness.

PW5 also a police officer Jackson Ngure gave evidence he had travelled to Vihiga Cheptiru Market. PW6 was a police officer a firearm examiner, he identified, examined fire arm, ammunition, and components. He gave evidence on behalf of Kipkemoi who had dealt with the case and he produced report on the firearms and ammunition offences.

PW7 was a photographer he received an exhibit memo form forwarding a compact recovered from scene of crime flying squad officer. He produced copies of material recorded at Westlands. He produced 13 images which he certified and produced in court. The photos are not high quality. Images were recorded by CCT amera.

The Trial Magistrate put the appellant to his defence who chose to give sworn statement. In his sworn evidence the accused stated of a Peterson Amimo who was threatening to kill him. He was charged in Criminal Case No.1057/03 but he was acquitted because no witness came. He did disclose he was at home Kaimosi on 7.11.06 but not in Westlands robbing. Then he said he had not hidden from police. He said evidence was hearsay and he cited **Kagecha –vs- Republic** where informer had testified.

In the Trial Magistrate's judgment he found that the appellant robbed Cornella Owuor money and other items valued at Kshs.4,286,758.10 and he robbed John Kariuki Ngigi Mobile phone valued at 5000/= and robbed Baraza Tordi Kshs.2000 and mobile valued at Kshs. 4000/=.

Appellant also robbed Beatrice Oside 3000/= and a mobile 8000/= and he was found in possession of Totaleu pistol and ammunition as well set out in the charge sheet.

On 7.11.2005 robbers entered the bank of India Westlands branch where they took Kshs.4,329,258.10. They were armed with pistol and AK Rifle. The robbery was captured by a CCTV camera. When images were printed the witness PW1, PW 4 and PW 3 were able to identify photos of those who robbed them by the clothes they wore.

On 24.12.2006 PW4 with others proceeded to western Kenya to arrest the appellant who had featured in the CCTV camera in the robbery. They did not find him. They broke into his room where they recovered a pistol Totaleu with 2 rounds of ammunition and recovered 24 rounds of ammunition of different calibre. They wrote an inventory which was signed by the appellant's son. The son came to Nairobi with

PW4. The Trial Magistrate found that the appellant surrendered himself to police.

In his sworn statement he told the court that PW4 had promised to give him some documents from another case where he was acquitted but at a fee. When the fee was not paid he threatened him and therefore he surrendered to KNHR who took him to police where he surrendered. The evidence was that the robbers were disguised and they threatened them with gun. The prosecution witness identified the photos taken and CCTV as those who robbed them. They identified the clothes and bank corridors. 13 images were processes.

The Trial Magistrate examined the images produced in court and was satisfied that the appellant was one of the robbers.

We have examined the sworn statement of defence. It does disclose that the appellant was involved in another Criminal Case in which he was acquitted. Futhermore what he said that the PW4 threatened him because he did not pay him money does not appear credible. It is difficult to believe what he says even on oath.

We find that the prosecution evidence is truthful. Prosecution were not searching the robbers from 7.11.2005 to 18/1/2007 to prosecute the case of the robbery on the ground that PW 4 had a grudge against the appellant. This is unbelievable. We find that the prosecution has proved its case beyond any reasonable doubt. We confirm the conviction in counts 1, II and IV, save that we set aside the sentence in counts II and IV since a person cannot suffer death twice. The appellant shall suffer death in count I only. The sentence in counts II, IV, V and VI shall remain in abeyance.

We do dismiss this appeal, in its entirety.

Dated and Delivered at Nairobi this 28th day of May, 2012

**J.N. KHAMINWA
JUDGE**

**M. WARSAME
JUDGE**