



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NOS. 90 AND 91 OF 2010
(CONSOLIDATED)

BETWEEN

KEVIN KIEYA MOGERE.....1ST APPELLANT
DUKE MOMANYI MOKAMBA..... 2ND APPELLANT
AND
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Keroka SRM's Criminal Case Number 1537 of 2009 by Hon. J. Were dated 24th May, 2010)

JUDGMENT

1. This appeal arises from the original conviction and sentence in Keroka SRM's Criminal Case Number 1537 of 2009 dated 24th May, 2010 by Hon. J. Were, SRM.

2. The two appellants *Kevin Kieya Mogere* and *Duke Momanyi Mokamba* were arraigned before the Keroka Senior Resident Magistrate's court in Court charged in count 1 with the offence of attempted robbery with violence contrary to **Section 297 (2)** of the **Penal Code**. In count II, the 1st appellant was charged with consorting with a person in possession of a firearm contrary to **section 89(2)** of the **Penal Code**. The 2nd appellant was charged in Counts III and IV with being in possession of a firearm without a firearm certificate and being in possession of ammunition contrary to **section 4 (2) (a)** of the **Penal Code**.

3. The particulars of the offence in Count 1 were that on the 28th day of November, 2009 at Nyakacho village Mogusii sub-location of Borabu District within Nyanza province, jointly with others not before court while armed with dangerous weapons namely firearm (Browning pistol serial Number 245PZ05627), pangas, runigus and torches. The two appellants attempted to rob Geoffrey Nyamweya Anchinga.

4. In count II, it was alleged that Kevin Kieya Mogere the 1st appellant herein did on the 28th day of November, 2009 at Nyakacho Village in Mogusii Sub location on Borabu District within Nyanza Province consorted with Duke Momanyi Mokamba a person who without reasonable excuse had in his possession a Browning pistol serial number 245PZ0527 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

5. In Counts III and IV, the 2nd appellant Duke Momanyi Mokamba was charged that on the 29th November 2009 at Chepilat Trading Centre in Borabu District within Nyanza Province he was found in possession of

a firearm and ammunitions respectively without a firearm certificate.

6. Both appellants pleaded not guilty to the charges and the case went to full hearing.

7. Briefly the facts of the case were that on the 28th November, 2009 at about 9.45 pm the complainant in Count 1 **Geoffrey Nyamweya Anchinga (PW1)** was just arriving home along the Sotik-Kisii road when he heard voices in the moonlight night asking his wife **Stella (PW2)** to open the door for them and alleging that they were police officers. PW2 did not open the door and after a brief moment of suspense, PW1 who had a rechargeable torch switched on the torch and directed it towards the direction of the voices. He saw 4 people who were not dressed in police uniform. PW1 identified one of the people by face namely the 2nd appellant herein. The 2nd appellant was armed with a gun. On seeing the light flashed at them, the 4 people scattered in 4 different directions.

8. PW1 screamed. Neighbours who answered to PW1's screams gave chase and managed to arrest the 1st appellant upon whom they administered mob justice. The area assistant chief, **Joshua Momanyi (PW5)** was notified of the incident. The 1st appellant was escorted to the Chief's camp and later taken to Manga Police Station. Pw4 number 35763 sergeant Herbert Midibo of Manga Police Station received the report of the incident and went to the scene of crime where he found the 1st appellant under arrest by members of the public. After some enquiries at the scene PW4 rearrested the 1st appellant and took him to Manga Police Station. The 1st appellant directed the police to Chipilat at a funeral of a criminal gang member who had been shot and killed in Nairobi. Meantime, the 1st appellant was taken to Masaba District Hospital for treatment.

9. At Chepilat, PW4 together with the Assistant Chief, Pw5 found the 2nd appellant already arrested by members of the public. He was found in possession of a gun- a Browning serial no 245PZ05627. It had a magazine with 3 bullets. The 2nd appellant was then escorted to Manga Police Station from where he was taken to court at Keroka and charged together with the 1st appellant with the various offences whose details we have already set out above.

10. The prosecution called 5 witnesses. Apart from Pw1, Pw2, Stella Owange Nyamweya testified that at about 9.00 pm, on 28th November, 2009 while she was in her house, some people knocked on her door and demanded that she opens the door. The people alleged that they were police officers, but did not say which police station they came from. She did not open the door and soon thereafter she heard her husband, PW1 shouting, 'thieves, thieves'. Later, PW2 learnt that one of the persons who had knocked on her door had been arrested but she could not say who they were. She never recorded any statement with the police.

11. PW3 was Evans Miruka, a neighbour of both PW1 and PW2. At about 9.00 pm on 28th November, 2009, he heard shouts of "thief, thief" from the house of PW1. He ran to the scene and saw the 1st appellant running. He was caught and when asked for his name he said he was Erick. They took the 1st appellant to the chief's camp and later the police from manga Police Station came and took the 1st appellant to Masaba District hospital.

12. On the following day at about 7.00 am PW3 accompanied PW4 and PW5 to Chepilat from where the 2nd appellant was arrested. PW3 said he knew the 2nd appellant who stays at Chepilat. The 2nd appellant's common name was Musani.

13. PW4 was Number 35763 Sergeant Herbert Midibo of Manga Police Station. On 29th November 2009 at about 2.20 am, while on duty at the station, he received a report of the attempted robbery at PW1's home at Nyagacho village. He went to the scene where he found the 1st appellant under the arrest of members of the public. The 1st appellant gave the names of his accomplice's as Musani, Blacky and Sammy. With the help of the assistant chief, PW5 and members of the public PW4 stormed a funeral at Chepilat and managed to have the 2nd appellant arrested. The 2nd appellant was found in possession of a gun and 3 live ammunitions.

14. PW5 was Joshua Momanyi assistant chief of Mogusii sub-location, Mekenene Location of Borabu District. After he received the report of the attempted robbery at the home of Pw1 he ordered for

the suspect to be taken to his house. He then contacted OCS Manga Police Station. After taking the suspect to PW5 proceeded to Chepilat in the presence of PW4 and members of the public. The 2nd appellant was arrested in possession of a gun but had no I.D. The gun was produced in evidence.

15. At the close of the prosecution case, the appellants were put on their defence. Each one of them elected to give unsworn evidence and called no witnesses.

16. The 1st appellant stated that on 28th November, 2009 he woke up early and went to his uncle's place at Kipkebe (to collect maize). He did not find his uncle at home and waited until 6.00pm then decided to go back home. He used a short cut to go home. At about 8.30 pm just before he crossed the river, he heard people screaming. Some people came to him and demanded to know where he was going. They beat him so badly that he lost consciousness and only came to while at Masaba Hospital. He was later charged together with the 2nd appellant with offences he knew nothing about. He denied mentioning the names of the 2nd appellant to anybody. The 1st appellant told the court he was aged 18 years.

17. The 2nd appellant who said he was 23 years old stated that on the 29th November, 2009 he went to attend the funeral of a cousin of his at Chepilat. At about 4.00 am, he was sent to buy fuel at the nearby petrol station. He was with another of his cousins by the name Geoffrey Ondieki Nyiego. As the pair returned from the petrol station, they were arrested by policemen who handcuffed them and ordered them to sit still until 7.00 am when they were bundled into a police vehicle and taken to Manga Police Station until 1st December, 2009 when they were taken to Keroka Police Station and subsequently charged in court. He denied that he ever committed any of the offences. He denied knowing anyone by the name msanii.

18. After carefully considering all the evidence that was laid before him, the trial court reached the conclusion that the prosecution had proved its case against the 2nd appellant on all the 4 counts; against the 1st appellant on Counts I and II and against the 2nd appellant on counts I,III and IV. The two appellants were sentenced to death on count 1. The sentences on counts II, III and IV were rightly held in abeyance pending execution of the sentence in count I. The trial court acted correctly in this regard.

19. Being aggrieved by both the conviction and the sentence each of the appellants appealed. The two appeals were consolidated by an order of this court made on 20th January, 2011. The appellant's complaints against the judgment of the trial court are that:-

- 1. The learned trial Magistrate erred in law and fact in concluding that the prosecution had proved its case beyond any reasonable doubt.**
- 2. The Learned trial magistrate erred in law and in fact in applying the doctrine of recent possession in convicting the appellants.**
- 3. The Learned Trial Magistrate erred in both law and fact in failing to appreciate that the circumstances for the identification of the appellants were difficult for positive identification.**
- 4. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the material contradictions in the prosecution case.**
- 5. The Learned Trial Magistrate erred in both law and fact in rejecting the appellant's defence.**
- 6. The sentence imposed upon the appellants was excessive in the circumstances.**

20. When this appeal came up for hearing before us on the 20th January, 2011 the appellants chose to prosecute their appeal by way of written submissions. They filed their respective submissions. We have

carefully read and considered the same.

21. On his part the Learned Senior Principal State Counsel, Mr. Mutuku conceded the appeal in respect of Count 1 on the ground that though the 2 appellants were among a group of 4 people who were in PW1's compound on the material day, it was not correct for the appellants to be charged with the offence of attempted robbery; that the actions of the appellants did not manifest the crime intended. Mr. Mutuku submitted that the appellants should have been charged and convicted of a different offence. Mr. Mutuku urged us to allow the appeal on count 1 of the charge and to proceed to convict the 2 appellants with the offence of preparing to commit an offence. In addition, Mr. Mutuku urged us to impose the sentences hitherto held in abeyance as against the 1st appellant and the 2nd appellant in respect of Counts II, III and IV respectively.

22. Our duty as the first appellate court is to reconsider and evaluate the evidence on record with a view to reaching our own conclusions in this matter. This duty has been imposed upon us by a number of decided cases among them **Okeno –vs- Republic (1972) EA 32 and Patrick & Another –vs- republic (2005) 2 KLR 162**. In effect the first appellate court is expected to carry out a retrial of the case, the only difference being that the appellate court has no advantage of seeing and observing witnesses. We must do that now with a view to confirming whether the trial court was right in reaching the conclusion that it did or whether we should agree with the learned Senior Principal state Counsel.

23. We have carefully reconsidered and evaluated the evidence. The prosecution case rests squarely on the evidence of visual identification of the appellants herein. For this reason, we are expected to subject such evidence of visual identification to very careful examination. In this case, the only evidence on the identification of the appellants herein is that of PW1. we appreciate that the offence of attempted robbery is alleged to have taken place in the night at about 9.45 pm. Pw1 stated that there was moonlight and that he had a torch, that one of the 4 robbers had a small gun while the others were armed with rungun, pangas and torches and that it was the 2nd appellant who carried the gun. Then he said,

“I was able to identify one person by the face, the 2nd accused. I was on my fence near my house. They saw me when I flashed the spot light. The 2nd accused was the one with a gun. They ran away in different directions.”

24. From the above piece of evidence, a number of questions arise: how far was Pw1's fence from the house; Which direction were the appellants and their cohorts facing, were they facing the door of the house or away from the door; which part of the appellant's bodies were in direct eye contact with PW1; how bright was the moonlight and how strong was the light from pw1's torch though he said it has 12 bulbs; for how long were the appellants under pW1's observation before he decided to flash the torch at them?

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25. These questions lead us to a number of court of appeal decisions on this matter of identification of suspects under difficult circumstances. In **Karanja & Another –vs- republic (2004) 2 KLR 140**, the court of appeal referred to its earlier decision in the case of **Cleophas otieno Wamunga –vs- Republic (1989) LKR 424** in which the court had stated thus at page 147

“We now turn to the more troublesome part of this appeal, namely the appellant's conviction on Counts I and II charging him with robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that

such evidence is examined carefully to minimize this danger whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken; the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery, J. in the well known case of *Republic -vs- Turnbull* [1976] 3 All ER 549 at Page 552 where he said –

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows the Jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

26. We have also visited the Court of Appeal decision in the case of *HCCRA NOS. 90 AND 91 OF 2010 (CONSOLIDATED)*

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Paul Etole & Another –vs- Republic, Criminal Appeal no 24 of 2000 where the court stated the following in part of its judgment:-

“... evidence of visual identification, such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of an accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows. The court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger.”

27. In the instant case, we are of the opinion that the circumstances under which Pw1 purported to have identified the 2 appellants were very difficult indeed. We are therefore in agreement with the learned Senior Principal State Counsel that though the 2 appellants may have been in the compound of PW1 when he returned home at around 9.45 p.m., it was not easy to identify either one or both.

28. If that was all the evidence that we had to consider, we would

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have dismissed this appeal out right and made no other orders. But there is the evidence of PW3 a neighbour of PW1 and PW2 and who answered to PW2's screams for help. PW3 stated that when he entered PW1's compound, he saw one of the robbers running. With the help of other neighbours, they caught the 1st appellant and beat him up before taking him to the AP camp for onward transmission to Manga Police Station. PW3's evidence corroborates the evidence of PW1 who said that when he shone his torch upon the gang of 4 robbers who were trying to get PW2 to open the door on the pretext that they were police officers, the 4 scattered in different directions. While admitting that he had been beaten unconscious on the material day the 1st appellant denied any wrong doing.

29. In the circumstances, we are satisfied that the 1st appellant was caught running away from the home of PW1 after PW1 and PW2 raised an alarm. We are satisfied that they were in the group of 4 that were trying to get PW2 to open the door. As rightly submitted by the Learned Senior Principal state Counsel, all that the appellants did was to knock on the door with a view to having it opened for them. It has not escaped our attention that if the door had been opened, or if PW1 had

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not shone his torch on the thieves; they would have committed or attempted to commit a robbery. All that the appellants did however was preparation to commit a felony ad we so find. Applying the provision of **Section 179 (2)** of the **Criminal Procedure Code** we reduce the charge of attempted robbery in Count I to one of preparation to commit a felony and do convict the 1st appellant of the said offence.

31. As regards counts II, III and IV of the charge we are satisfied with the evidence that was placed before the trial court and see no reason for interfering with the findings of the trial court, on all these three counts.

32. In the premises, this appeal succeeds to an extent that the conviction on count I is quashed and the sentence of death is set aside. The 1st appellant is however found guilty of the offence of preparing to commit a felony contrary to **Section 308 (1)** of the **Penal Code**. We sentence him to imprisonment for seven (7) years with effect from 24th May, 2010.

33. The 1st appellant is also sentenced to five (5) years imprisonment on count II. These shall run concurrently.

34. As for the 2nd appellant he is sentenced to a term of 10 (ten) years imprisonment each on Counts III and IV. The sentence shall run concurrently.

35. Except to the extent as above stated, the appeal is found to lack merit and the same is hereby dismissed.

36. It is so ordered.

Dated and delivered at Kisii, this 07th day of April, 2011.

ASIKE MAKHANDIA
JUDGE.

RUTH NEKOYE SITATI
JUDGE.

In the presence of:-

Present in person for the 1st appellant

Present in person for the 2nd appellant
Mr. Mutai (present) for respondent
Mr. Bibu - Court clerk also interpreting