



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HC.CRA NO. 41 OF 2004

LESIT & KASANGO, J.J.

(From: Original Criminal Case No. 217 of 2004 CHUKA; P. Ngare SRM)

ISAACK MUTEGI NTHIGA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

The accused was charged with one count of attempted robbery with violence contrary to section 297(2) of the Penal Code. The appellant also faced one count of being in possession of a firearm and a third count of being in possession of ammunition without a firearm certificate contrary to section 4(2)(a) of the Firearms Act.

The appellant was convicted for the first offence and sentenced to death. He was convicted in counts 2 & 4 and sentences. Being unhappy with the conviction the appellant filed this appeal.

The appellant has raised lengthy grounds of appeal in his petition. We have perused these grounds and find that they can be summarized into three main grounds. The appellants challenges the decision of the learned trial magistrate for relying on the evidence of identification by PW5 which ought to be disregarded since the first said witness did not give a description of the robbers, she alleged she saw that day and secondly she did not give the distance at which she allegedly saw the robbers. The appellant challenges the evidence of the arresting officer contending that it lacked corroboration by other evidence. Finally the appellant challenges this rejection of his defence on grounds no reasons were advanced for same.

The appeal is opposed, Mr. Kimathi who represented the State urged that the prosecution had adduced sufficient evidence to sustain a conviction. Counsel urged that the evidence of identification by PW5 a bar attendant, was sufficient to establish that the same people she attended to at her place of work for 2 hours

earlier in the day, were the same ones who attempted to rob the complainant. Counsel submitted that PW5 was able to identify the appellant in an identification parade.

We have subjected the evidence adduced before the lower court to a fresh analysis and evaluation as expected of a first appellate court. We are guided by the Court of Appeal decision of **Okeno vs Republic [1972] EA 32** where it was observed:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

The facts of the prosecution case are that the complainant PW1 sold cigarettes and a matchbox to three men who delayed to pay her. They stood around outside her shop smoking. Suddenly one ordered her to give them money she was hit and fell down. She screamed and told them she had no money. PW5 responded to her screams but by the time she went the robbers had walked away. PW5 saw them as they ran into a maize plantation. The complainant and PW5 were called to an identification parade conducted by PW2, CIP Nzioka on 20th January 2004 8 days after the incident. PW5 was able to identify the appellant.

The appellant was arrested at 3 am on 18th January, 2004 by PW6, APC Kimaiyo. The appellant was removed from police cells at Chuka Police Station by PW3 on 21st January, 2004. The appellant led police to his home. PW3 testified that they found an AK 47 rifle with no serial No and 3 rounds of ammunition outside his house. The firearm and ammunition were examined by a ballistic officer PW4 who certified them as firearm and ammunition under the Firearms Act. The report was P.Exh.14.

The appellant denied the charges and put forward an alibi as his defence. He stated that he was arrested at a bus stage on his way to work. He denied the charges.

The most important issue in this case is that of identification in relation to the main count. The only evidence against the appellant is that of PW5. This was evidence of a single witness. On the question of identification by a single witness it is trite law that the court should test such evidence with the greatest care. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

The learned trial magistrate had this to say regarding the testimony of PW5.

“PW5 on her part stated that she hosted two men in the bar where she was employed to work for about two hours and when they left she heard screams. She responded. She saw two people run into a maize plantation and were not arrested. The same persons he saw at the bar is the same

person who was pointed out by PW1 as they ran towards the maize plantation. She later identified accused when the identification parade was conducted. I hold that the events and the time followed one another in guide succession and PW5 had sufficient time to see the two men in the bar”.

The incident took place at 3 pm. It was in broad day light. PW5 was not present at the shop of PW1 at the time the attempted robbery took place. She came after PW1 screamed for help. She found the robbers running away. There is no evidence that PW5 saw the faces as they ran. PW5 did not disclose at what in relation to her self the men were running. PW5 did not disclose which of the three men she saw running away. Was the appellant before court?

We are not satisfied that there was sufficient evidence before court on which to conclude that the appellant was one of the men PW5 had attended to at the bar earlier that day. We are particularly convinced that even in her evidence PW5 did not establish fully that she saw the faces of the three men who allegedly attempted to rob the complainant. We find that the learned trial magistrate misdirected himself when he found that PW5 had sufficient time to see the two men in the bar.

The evidence of identification by PW5 was not cogent. This witness did not see the face of the men she saw running away from the scene of PW1's shop. We are not satisfied that she was in any position to recognize any of the men as one of the two she had entertained at her place of work earlier that day.

In regard to the two charges of possession of firearm and ammunition, according to PW3 the appellant took him to his home. He said that near the accused person's home he recovered a rifle with two rounds of ammunition.

We have perused the evidence of PW3. The exact place he says he recovered the rifle is outside the home of the accused. PW3 also described the home as a place he found the appellant's brother and mother.

Regarding what constitutes possession the learned trial magistrate relied on a Court of Appeal decision **CRIMINAL APPEAL NO. 261, OF 2003 GACHURU VS REPUBLIC** where the Court defined possession in the following terms:

“(a) “Be in possession of or “have in possession” includes not only

Having in one's own personal possession but also knowingly

Having anything in the actual possession or custody of any other person, or having anything in any place whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.....

The evidence before court was that PW3 took the appellant to his home twice. The first time nothing was recovered. The second time PW3 got a rifle. PW3 did not say that the appellant led him to where he recovered the rifle. There is no other evidence linking the appellant to the rifle except the fact it was found “near” his house. Given the fact the home was occupied by many other people and in absence of any evidence to show that the appellant knew that the rifle was hidden there or that he knew it was hidden there for his benefit or benefit of any other person the evidence was insufficient to establish the charge. With due respect to the learned trial magistrate possession was not proved.

Having carefully considered this appeal we have come to the conclusion that there was insufficient evidence to found convictions in all 3 counts. The conviction entered in this case was unsafe and

therefore ought not to be allowed to stand.

We find merit in the appellants appeal. Consequently we allow his appeal, quash the conviction and set aside the sentence. The appellant should be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 19TH MAY 2011

Lesiit J

Judge

Kasango M

Judge