



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Criminal Appeal 157 , 158 & 159 of 2008

JEREMIAH GICHOBI NDEGE.....APPELLANT

VERSUS

JEREMIAH GICHOBI NDEGERESPONDENT

AND
CRIMINAL APPEAL NO. 158 OF 2008

THOMAS GITAU WANGARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND
CRIMINAL APPEAL NO. 159 OF 2008

JOHN NJERU SAMMY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(CONSOLIDATED)

The 3 Appellants were arrested in Kagio area outside Starehe bar on the early morning of 11/6/2007. They were later taken to Kerugoya Police Station where they were charged with several counts under the Penal Code. John Njeru who is the 3rd Appellant herein and the 1st accused before the Kerugoya court was charged with 4 counts. He was charged on Count 1 jointly with the other Appellants with the offence of preparation to commit a felony under to section 308(3) of the penal code. On count 2 he was charged with the offence of being found in possession of forged Bank notes contrary to section 359 of the penal code. He was nonetheless acquitted contrary to section 210 of C.P.C on that count. On counts 3 and 4, he was charged with being in possession of a Firearm and ammunition in circumstances which raised reasonable presumption that the said firearm and ammunition was intended to be used in a manner prejudicial to public order contrary to section 89(1) and 89(2) of the penal code respectively. They all denied the charges and the prosecution called a total of 6 witnesses in support of its case.

On their part the appellants testified on oath and called no witnesses in their defence. This being a first Appeal, it is incumbent on me to reanalyze the evidence adduced before the trial court, re-evaluate the same and arrive at my own independent finding as to whether the convictions against the appellants were safe or. **(see OKENO-V-R 1972 EA 32)**

In a nutshell, the prosecution case was that the 1st Appellant herein (Jeremiah Gichobi) who was the 2nd Accused person before the trial court was introduced to PW1 by one Waweru on 10/6/2007. They had hired a motor vehicle Registration No. KAS 860S from PW1 who said he knew the said Waweru very well before. According to PW1, Waweru had introduced the 1st Appellant as his cousin and said that they wanted to use the said motor vehicle to travel to Embu to take Waweru's sick mother to hospital. They paid 3,000/= and took away the motor vehicle. They were to learn later that the motor vehicle had been used in a robbery and it was being held at Kerugoya police station.

At about 4.00 a.m on 11/6/2007, IP Job Njiru who was the Deputy OCS Sagana Police Station was on night patrol duties with other officers. He told the court that while patrolling towards Kagio police post, they saw a motor vehicle which was being driven at a very low speed. He said that this raised their suspicions. They followed the motor vehicle which was parked outside Starehe bar at Kagio market. PW4 radioed Pw5 IP Alfred Mugo at Kagio Police Post and reported to him about the suspicious car they had seen. PW5 mobilised his people and they proceeded to Starehe bar. Meanwhile, when the car was stopped outside Starehe bar, one of the occupants alighted and proceeded to the bar while the 3 others were left inside. Before they could alight, PW4 and his people surrounded the car and ordered them out of the car and to lie down outside next to the car which they did. The one who had alighted earlier escaped. PW4 and his officers searched those who were left. According to PW4, on searching the motor vehicle, under the driver's seat, he recovered the revolver which was loaded with the 2 ammunition that are the subject of counts 3 and 4. The 3rd appellant was found with 2 driving licences both in his name. PW4 took possession of the same. By the time PW3 and PW5 got to the scene, they found that the suspects had been searched and the revolver recovered. They arrested them since that was their jurisdiction and took them to the police station. The motor vehicle in question was later released to the owner. The revolver and ammunition were sent to the ballistic expert by PW6. The report came out positive and they were confirmed to be a revolver and ammunition in good working condition. The examiner's report to that effect was produced as exhibit by PW6.

In their defence, the Appellants denied having committed the offences they are charged with.

The 1st Appellant (A2) told the court that he had gone for a disco at Starehe Bar and he was

there at 4.00a.m. When he was found there by police officers who searched him and later took him to Kerugoya Police Station where he was charged with an offence he knew nothing about.

2nd Appellant said that he had rented a room at Starehe bar for the night. He was supposed to transport tomatoes to Nairobi the following morning. He said that at 4.00 a.m, the pick up he was to transport the tomatoes in came and hooted and he therefore went outside. Instead of finding the pick up he met the police officers who searched him and put him in the land rover and drove him to Kerugoya Police Station where he was charged.

The 3rd appellant gave a similar story. He was at Starehe bar on the date and time in question. As he was leaving he was ordered to stop. A search was carried out on him and he was taken to the police station and charged with offences he knew nothing about. He nonetheless told the court that he was first taken to Siakago Court where they were charged with robbery with violence. After hearing this evidence, the learned trial magistrate found them guilty on count 1 and the 3rd Appellant was also found guilty on counts 3 and 4 and convicted. They were each sentenced to 5 years imprisonment in their respective counts.

Being aggrieved by the said conviction and sentences, they each filed an appeal faulting the conviction and sentence and urged the court to allow their appeal. The 3 appeals were consolidated and heard together. They filed home made submissions in support of their grounds of Appeal. I have read the said submissions and considered the relevant issues raised therein. I have also considered the submission by the learned counsel for the state who supports both conviction and sentence herein.

Among the grounds raised was that the Appellants were brought to court after 24 hours and their constitutional rights under Section 72 (3) b were therefore violated. I have looked at the charge sheet. The original charge sheet before the substitution on 28/11/2007 indicated that the Appellants were arrested on 11/6/2007 and that they were remendees when brought to court for plea. The original trial court file shows that when the matter was first mentioned in that court on 3/7/2007, the accused persons were absent. They were said to have been remanded in custody in respect of a capital robbery. It is not known when they were taken to the other court for the robbery charge and when that plea was taken. In the absence of that file, this court cannot tell when the appellants were taken to court. If they were in lawful custody in respect of the capital robbery, then they cannot say that they were brought to Kerugoya Court for plea after the 24 hours stipulated under the constitution. Had this matter been raised before the trial court, the trial magistrate could have called for that file and confirmed the said dates. In the absence of that file, I am unable to find that the appellants were taken to court outside the stipulated time. I nonetheless agree with the

appellants that the charge sheet dated 28/11/2007 was defective on its face because it indicates that they were arrested on 1/6/2007 and taken to court on 3/6/2007. Surely, they could not have been taken to court before the offence was even committed. As stated earlier however, the earlier charge sheet indicated the correct date of their arrest. The dates on the substituted charge sheet are therefore erroneous. These errors have not nonetheless caused any prejudice to the appellants and the same is correctable under Section 382 of the Criminal Procedure Code which provides:-

“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on Appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge,..... or any other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.”

Again as stated in the proviso to that section, the point should have been raised earlier on when the fresh charge sheet was introduced. That ground must therefore fail.

On the rest of the submissions taken together with the evidence adduced as re-analysed above, I am satisfied that all 3 appellants were indeed at Kagio trading center and specifically outside Starehe bar as stated by the witnesses. One of them was lucky to escape but the others were surrounded by the police officers and could not get away. The evidence of PW1 particularly proved beyond any doubt that the 1st Appellant and another were the ones he released the motor vehicle in question to. It is not therefore a coincidence that the 1st Appellant was found inside that motor vehicle several hours later. They had hired the motor vehicle at 4.00 p.m. and it was recovered early the following morning of 4.00a.m. This witness had no reason whatsoever to lie against the 3rd Appellant. I am also of the firm view that PW2, PW4, PW5 and the other police officers were just patrolling the area. They did not know any of the appellants before that date and had no reason whatsoever to fabricate the case against them. I am satisfied that they told the court the truth. The 3rd Appellant John Njeru Sammy was the one who was driving the said motor vehicle. He was found behind the wheel at the driver's seat and it was under that seat that the ammunition and revolver were found. He was rightly convicted for being in possession of the same.

I also find that they were not found at Starehe bar drinking or socializing at 4.00 a.m. They had just stopped the car, they were armed with a dangerous weapon and they did not have any noble intentions at all. Like the learned trial magistrate, I did not believe their evidence at all. I note that Pw3 and Pw5 differed as to whether they found the appellants inside the motor vehicle or outside. This in my view was not a material discrepancy. What was material is that they were found outside the bar at 4.00 a.m. in the morning after being trailed by the police officers. They had a

lethal weapon and they were just waiting to strike at the opportune moment. My finding is that the charges against them were properly proved and the convictions were lawful and safe.

I have no reason to interfere with either conviction or sentence. All in all therefore, I find that this appeal lacks merit. I dismiss the same and confirm both conviction and sentence of the trial court.

Delivered, dated and signed at Embu this 19th day of May 2010
W. KARANJA
JUDGE

In presence of:-

The 3 Appellants

Mr. Wohoro for the state.