



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU**

Criminal Appeal 246 of 2006

DAVID EREGAI KERIO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.1343 of 2003 Principal Magistrate's Court Nyahururu – G.A.M'MASI – SRM)

JUDGMENT

The appellant David Eregai Kerio was charged with the offence of robbery with violence contrary to section **296(2)** of the Penal Code. The particulars of the charge stated that on the 7th day of February, 2003 at Siron farm in Laikipia District within the Rift Valley Province, jointly with another not before the court, and while being armed with dangerous weapon namely AK 47 rifle, robbed **John Mwaniki Gathitu** of Kshs.1,400/=, one Radio Cassette make Panasonic, one bag, one torch, four cassette compacts and one sheep all valued at kshs.9.250/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **John Mwaniki Gathitu**.

He is also faced with an alternative charge of unlawfully being in possession of Firearm contrary to Section 4(1) as read with Section 4(2) of the Firearms Act Cap 114 Laws of Kenya

particulars of the charge stated that on the 31st day of march, 2003 along Rumuruti Maralal Road, in Laikipia District within the Rift Valley Province, was found being in possession of a firearm namely AK 47 S/No.17062373 without a firearms certificate.

He is also faced with a third count of being in possession of ammunitions without firearms certificate contrary to section 4(1) as read with Section 4(2) of the Firearms Act Cap 114 Laws of Kenya. The particulars of the charge stated that on the 31st day of March, 2003 along Rumuruti Maralal Road in Laikipia District within the Rift Valley Province, was found in possession of seven (7) rounds of 7.62mm special caliber ammunitions without a firearms certificate.

The appellant pleaded not guilty to all the charges and after a full trial he was found guilty and convicted of a lesser charge of simple robbery in respect of 1st count and sentenced to 7 years imprisonment. He was also convicted of the 2nd and 3rd counts and sentenced to 2 years imprisonment for each and the sentences to run concurrently.

Being dissatisfied with the conviction and sentence of the trial court the appellant has appealed and challenged the conviction which was based on evidence of identification which had no basis as the complainant did not record the physical features of the assailants when they reported the incident to the

police. The judgment of the trial court was also faulted as there was no evidence by the investigating officer whose evidence was crucial in this case. Further the appellant also was dissatisfied with the quality of the evidence regarding the identification of the stolen items. During the hearing of this appeal the appellant was unrepresented applied and was given leave to file a supplementary memorandum of appeal and written submissions in addition to his oral submissions. The further supplementary grounds also challenged the trial court for relying on evidence of possession of firearm without adequate proof. The appellant also faulted the trial court for rejecting his defence which would have earned him an acquittal if put into consideration. This appeal was opposed by the State the learned state counsel Mr. Opati submitted that the appellant was conviction was supported by overwhelming evidence by the prosecution witnesses especially PW1 and PW who were victims of robbery. The robbery took a considerable amount of time and witnesses were able to identify the appellant by his unique features. The ammunition was also unique as it was tied with a blue tape and that is the same gun which was produced in evidence. In deed counsel submitted that there was sufficient evidence to support a conviction for robbery with violence but the appellant was lucky that the trial court reduce the charge to a lesser one.

This being a 1st appeal, this court is mandated to reconsider and re-evaluate the evidence that was before the trial court and arrive at its own independent determination of whether to uphold the conviction . This court has to bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge V Republic 1987 KLR page 19.**

I now wish to review the evidence that was before the trial court as well as the judgment of the court by setting out the summary here below:

The prosecution's evidence show that on the 7th day of February, 2003 at 7.00 p.m. John Mwaniki Gatitu **PW1** was at his home with his wife Anne Njoki PW2. Some people knocked at the door and when PW2 opened two men who were armed with guns entered the house and demanded for money. PW1 gave them kshs.400/= and his wife gave them kshs.1, 000/=. The assailants also demanded for food and when PW1 invited them to eat with the family, they declined and said they wanted meat. PW1 was forced by one of the assailants who he identified as a tall one with traditional marks of the nose, the appellant herein to go to the sheep boma. PW1 was guided by the appellant. He selected a sheep and was forced to slaughter it. Meanwhile PW2 was forced to lit two jikos and to cook the meat for the assailants. They ate the meat and carry some others. They also took away a Radio cassette, 4 compacts cassettes, a bag, a torch and a hat all valued at Kshs.9, 480/=. The matter was reported to the police and PC William Loiporikera attached to Naibor AP Camp in Rumuruti when he received a report of some robbers at Tinga Mara Centre. They arrested the appellant together with another one but the other one attempted to shoot at the police but they managed to shot him dead. They recovered from the appellant a riffle S/No.17062573 AK 47 with 7 rounds of ammunition which were produced in court. The riffle and the ammunition were taken for examination by a Ballistic Expert and **PC James Muiya PW5** produced the reports on the same examination. When the appellant was arrested on 31st March, 2003, PW1 and PW2 were called to Rumuruti Police Station where an identification was carried out by IP Abisai and both PW1 and PW2 were able to identify the appellant. PW5 was investigating officer in this matter. He visited the complainant's premises where they were robbed and recorded the statements. He told the court that he asked the complainant to give the description of the suspects and also the description of the riffle. They then carried on investigations until 31st March, 2003 when the appellant was arrested and a gun which was identified by the complainant was recovered from him.

Put on his defence the appellant denied having had anything to do with the robbery and gave an account of how on 31st March, 2003 he had boarded a matatu from Nakuru to Nyahururu and while on his way home he was arrested and taken to the police station and was charged with the offences which he says he knew nothing about.

The trial court analyzed the above evidence including the appellant's defence and found that the prosecution had proved the case of simple robbery and proceeded to convict the appellant and also for the 2nd and 3rd counts.

This appeal raises two issues: One the evidence of identification of the appellant by the complainant and the evidence of credibility by the prosecutions witnesses regarding the 2nd and 3rd counts that is being in unlawful firearm and ammunition.

On the issue of identification I find various discrepancies in the evidence of **PW1, PW2** and **PW3** who was the parade officer. As regards the evidence of PW1 he testified that they were attacked by two robbers whereas PW2, who was also a victim of the said robbery said they were attacked by a gang of 3 robbers. Further PW1 told the court that he was able to identify the attacker due to some unique facial features namely some traditional marks on the nose, **PW2** said she could not identify any unique features on the attacker. These contradictions are material because the robbery incident took a considerable amount of time which was estimated to be about 5 hours. This is further compounded by the evidence of PW3 the parade officer who said that he conducted the identification parade on the 7th March 2003 when indeed the appellant was arrested on the 31st march 2003.

The above discrepancies are of material significance and in my view if the trial court had addressed them the appellant would have been acquitted of the main count. As regards the 2nd and 3rd counts, the appellant was found in possession of a firearm by PW4 and PW5. This evidence was not all challenged and the trial court had a greater advantage to assess the credibility of the two witnesses. The trial court believed their evidence and there is no justification to interfere with that finding. In the case of **Republic Vs Oyier (1985) KLR page 353** it was held that:

“The first appellate court could not interfere with those findings by the lower court which were based on the credibility of witnesses unless to reasonable tribunal could make such findings or it was shown that there existed errors of Law”.

The aspects of the above analysis is that the appeal herein be allowed in respect of the 1st count. The appeal in respect of the 2nd and 3rd counts is hereby dismissed and the conviction and sentence by the trial court is confirmed. However, from the records all the sentences were to run concurrently and it is clear the appellant has served a period of more than 2 years which was the sentence for the 2nd and 3rd counts. In this regard therefore, the appellant may be released unless otherwise lawfully held.

Judgment read and signed on 10th May, 2007.

M. KOOME

JUDGE