



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEALS 451, 452, 453 & 454 OF 2003

JOSEPH BARIU IMIEMBA.....1ST APPELLANT

JOSEPH KABERIA KAINGA.....2ND APPELLANT

MICHAEL MUNYAITI MUSILI.....3RD APPELLANT

FRANCIS MACHARIA KARIUKI.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.2121 of 2002 of the Chief Magistrate's Court at NAKURU - J. S. KABURU, SPM)

JUDGMENT OF THE COURT

Appeals numbers 451, 452 and 454 of 2003 were consolidated and heard together. Appeal number 453 of 2003, was marked as having abated because the third appellant, Michael Munyaiti Musili, died before the appeal was heard and determined. The appellants were jointly charged with the offence of attempted robbery contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on the 4th day of November, 2002, at 1.00 a.m., in Nakuru District within Rift Valley Province, jointly with others not before court being armed with dangerous weapons namely, guns, attempted to rob Leonard Muliro Wanyonyi of Taifa Filling Station of unknown amount of money and immediately before the time of such attempt, threatened to use actual violence to the said Leonard Muliro Wanyonyi.

After a full trial each of the appellants was convicted and sentenced to death as by law prescribed. The appellants were aggrieved by the said conviction and sentence and each preferred an appeal to this court. The first appellant was represented by Mr. Kiplenge and Mr. Kurgat Advocates while the other two appellants were unrepresented.

The first appellant raised the following grounds of appeal:-

- “1. The learned magistrate erred in law and fact in finding the appellant guilty as charged and convicting him accordingly.***
- 2. The learned magistrate erred in law and fact in failing to give reasons for his findings and judgment.***
- 3. The learned magistrate erred in law and fact in failing to take into account submissions***

led on behalf of the appellant during his trial.

4. *The learned magistrate erred in law and fact in finding that the appellant was arrested at the petrol station while guarding the watchmen.*

5. *The learned magistrate erred in law and fact in finding that the appellant was not arrested at the taxi stands.*

6. *The learned magistrate erred in law and fact in finding that all the ingredients of attempted robbery had been satisfied.*

7. *The learned trial magistrate erred in law and fact in finding that there was attempted robbery.*

8. *The learned trial magistrate erred in law and fact in finding that the appellant was involved in the attempted robbery.*

9. *The learned trial magistrate shifted the burden of proof to the appellant.*

10. *The evidence on record in the circumstances did not support the charge against the appellant.”*

The grounds of appeal that were raised by the second and fourth appellants are more or less the same as those stated hereinabove by the first appellant.

This being the first appellate court, it is mandated to look at the evidence that was adduced before the trial court afresh, re-evaluate and re-examine the same and reach its own conclusion whether or not to uphold the conviction of the appellants, see *OKENO VS REPUBLIC [1972] EA 32*. We will begin by setting out, albeit briefly, the evidence that was adduced before the trial court.

On 4th November, 2002, **Leonard Muliro Wanyonyi, PW1**, and **John Egesi, PW2**, were on duty as watchmen at Taifa Filling Station within Nakuru Town near the Railway station. At about 1.30 a.m., a motor vehicle registration number KAL 625L, Toyota Corolla by make, went to the station. PW2 approached the vehicle to see if the occupants wanted any assistance. However, four people alighted from the vehicle and held PW2 and tied him up. The station was well lit by electric light and so PW1 and PW2 were able to see the four people clearly. PW1 was confronted by two of the people and one of them was holding a pistol. He was ordered to sit down and remain silent. He was also tied up and was forced to lie next to PW2. Two of the people guarded PW1 and PW2 while the other two went and removed gas cylinders from the vehicle. The people proceeded to open an office at the petrol station using a key that they had. PW1 saw the third appellant opening the door. Two people entered the office with the gas cylinders. They were intending to open a safe in which money and other official documents were kept.

Meanwhile, **Sergeant Robert Owino, PW9**, who was a police officer attached to Criminal Investigation Department at the Kenya Railways, had been given a tip off by a police informer that there was an intended robbery which was to be staged at the said filling station on the material night. He had organised two sets of police officers to lay ambush at the filling station. When some police officers noted unusual movements at the station, they moved in. PW9 saw somebody standing between parked vehicles. PW9 asked the person to identify himself but did not answer. The person was ordered to surrender and he did so by raising up his hands. This was the first appellant and the police arrested him. The first accused was guarding PW1 and PW2. After the arrest of the first appellant, PW1 and PW2 told the police that there were robbers in the office. The robbers had been dropped at the station by the said motor vehicle. PW9 ordered the people who were in the office to come out and surrender. One of the robbers, the second appellant, attempted to run away and the police officers fired at him. When the police confronted the other two who were inside the office, they surrendered and pleaded with the police not to shoot them.

PW1 testified that the two people who were guarding them were the first appellant and Michael Munyaiti Musili, the deceased appellant while those who entered the office were the second and fourth appellants. PW1 knew the first and the second appellants as they used to operate a coca cola kiosk near the filling station. He had known them for over a year prior to the aforesaid date.

The police were told by the people whom they had arrested that they had been dropped there by a vehicle and it was to come back for them. The police waited and when the vehicle arrived and the driver noticed that there were policemen at the station, he chose to drive on and tried shoot at the police. The police officers circulated the registration number of the vehicle and the driver of that vehicle was later shot dead by police officers after he defied instructions to stop and shot at the police. The four people who were arrested were charged with the offence of attempted robbery which gave rise to the present appeal.

The evidence of PW1 was corroborated in all material aspects by PW2 and by **Christopher Omasa, PW4**, a pump attendant at the filling station. PW4 was sleeping in a car which was parked at the filling station but he woke up after the robbers struck.

Corporal Emmanuel Morogo, PW7, corroborated the evidence of PW9 as to how the appellants were arrested. He confirmed that all the appellants were arrested at the petrol station on the material night. PW7 also knew the first and the second appellants. He said that the first and the second appellants used to sell soda at a kiosk which was next to the filling station.

In his defence, the first appellant stated that he used to sell miraa at Nakuru bus station and that on 3rd November, 2002, at about 11.00 p.m., he left the kiosk from which he used to operate. The second appellant was also in the kiosk. While he was walking away he met police officers who arrested him and took him to Railway Police Station. He said that PW1 was his neighbour and he had testified against him because of some differences that existed between them. However, he did not tell the court the nature of those differences, if any.

The second appellant gave more or less the same defence as the first appellant. He also alleged that PW1 was his neighbour and that he had differed with him.

The fourth appellant said that he used to roast maize at the bus station. On the material night, a customer bought maize from him and gave him a note of Kshs.500/- and he went to look for change. On the way he met police officers who arrested him saying that he was a robber.

The learned trial magistrate was satisfied that the appellants attempted to commit a robbery on the material night and had attacked PW1 and PW2 while armed with a pistol and tied them. Some of the robbers proceeded to open the padlock to the station office and attempted to force open the safe by use of welding fire using the two gas cylinders which were shown to the court.

Regarding the arrest of the appellants, the trial court found that they were arrested at the petrol station and the first and the second appellants were well known to PW1 and PW2. The second appellant was the one who attempted to run away and was shot by the police while the fourth appellant was caught red handed inside the office. The first appellant was guarding PW1 and PW2.

Mr. Kiplenge argued all the grounds of appeal together. He submitted that PW1 and PW2 gave contradictory evidence in that PW1 said that he saw the pistol which was held by one of the robbers while PW2 said that he never saw the pistol that was produced as an exhibit.

However, that was not correct as both PW1 and PW2 said that they saw the pistol which was held by one of the robbers. Mr. Kiplenge further stated that the first appellant was arrested elsewhere and taken to the scene on the material night. Mr. Kurgat submitted that it had not been established by the prosecution that the first appellant had a weapon that was capable of causing harm. Regarding his arrest, he submitted that the first appellant was not arrested at the filling station and there was therefore nothing therefore to show that he was at the scene at the material time.

The second and the fourth appellants relied on written submissions which they had handed over to the court and the said submissions were carefully considered.

On the other hand, Miss Opati, learned State Counsel, supported the convictions and the sentences that were handed down by the trial court. She submitted that there was sufficient evidence that the appellants were all arrested at the filling station as they attempted to commit a robbery. She urged the court to dismiss the appeals.

Having carefully considered all the submissions that were made before us, we are satisfied that the appellants were arrested at Taifa filling station as they attempted to commit a robbery thereat. The evidence of PW1, PW2 and PW9 regarding the way in which the appellants were arrested was very clear. The people who arrived at the said station in motor vehicle registration number KAL 625L were armed with a pistol. They also had gas cylinders and a bunch of keys. The first and the second appellants were well known to PW1 and PW2. That was not denied by the first and the second appellants who confirmed that the two witnesses were their neighbours. The station was well lit by electric lights and so PW1 and PW2 were able to see the first and the second appellants clearly. This was a case of recognition as opposed to identification. In **ANJONONI AND OTHERS VS REPUBLIC [1980] KLR 59**, the Court of Appeal held that:-

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

Although the first and the second appellants admitted that PW1 and PW2 knew them prior to the said incident, they did not deny that they used to operate a kiosk next to the petrol station. All they did to challenge the evidence of the two witnesses was to allege that there was a grudge that existed between them and the two witnesses. However, they did not deem it necessary to tell the court the nature of the said grudge, if any. We therefore hold that the learned trial magistrate was right in rejecting their defences and proceeding to hold that the two appellants were properly recognised by PW1 and PW2.

As regards the arrest of the second appellant, he was shot by the police when he attempted to run away on the material night. However, his contention was that he was shot because he refused to produce his identify card when he was ordered to do so by the police. The evidence of PW1, PW2 and PW9 contradicts the defence that was advanced by this appellant. According to him, they closed their kiosk with the first appellant at about 11.00 p.m. and were presumably going home when they were confronted by the police. However, the attempted robbery was committed at about 1.30 a.m. This goes to show that the defence of the second appellant was unbelievable.

The fourth appellant was arrested inside the office of the station and his defence to the effect that he was arrested by the police when he was going to look for change, was rightly rejected by the trial court.

We find no merit in any of the appeals herein and we dismiss each and every one of them. The convictions and the

sentences that were handed down by the trial court are hereby confirmed.

DATED at Nakuru this 10th day of May, 2007.

M. KOOME

JUDGE

D. MUSINGA

JUDGE

Judgment is written and signed by the two Judges. Read and signed on 10/5/2007 in open court in the presence of Mr. Mugambi for the state and Mr. Muriuki holding brief for Mr. Mugambi for the appellants.

M. KOOME

JUDGE

D. MUSINGA

JUDGE