

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

AT MOMBASA

Criminal Appeal 338 of 2003

SIMON MAINA KAMAUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case No. 593 of 2003 of the Chief Magistrate's Court at Mombasa)

J U D G M E N T

Simon Maina Kamau the appellant herein, faced a charge of three counts. The first count was in respect of the offence of robbery with violence contrary to Section 296(2) of the Penal code. In Counts II and III he was accused of being in possession of a firearm and ammunitions without a firearm certificate contrary to Section 4(1) of the Firearms Act Cap. 14 Laws of Kenya

er undergoing a trial, the learned Principal Magistrate convicted the appellant in all counts. He was sentenced to suffer death in count I and to serve 4 years each in counts II and III. Being dissatisfied the appellant has come to this court to upset the aforesaid decision.

The facts leading to this appeal appear to be short and straightforward. On the 7th day of February 2003 at around 10.00 a.m., the complainant was in his office in premises situated at Baringo road in Majengo when two men holding guns entered into the aforesaid premises. The complainant and his cashier were ordered by the intruders to lie down while the robbers emptied the morning's proceeds estimated at Kshs.1.4 M from the counters and drawers. The gangsters escaped and fled but members of the public gave a chase and managed to arrest and injure one of them. Administration policemen attached to the Majengo D.O.'s office rescued the appellant from the irate mob and handed him over to urban police station where he was subsequently charged with the offences earlier stated. The appellant when charged, he denied committing the offences. He claimed that he had gone to collect his debts but things went sour and the debtors turned against him calling him a thief and that is when members of the public joined them with the aim of lynching him but only survived when he was saved by the Administration Police.

On appeal, the appellant put forward five grounds. These grounds can be summarized to two main grounds namely: First that he was not positively identified and secondly that the evidence tendered did not establish the offences beyond reasonable doubt. We have considered these two main grounds vis-à-vis the evidence tendered before the trial court. On the issue of identification the key witnesses are Cosmos Mrombo Moka (P.W.2) and Samuel Mau Otenga (P.W.3). It is the evidence of P.W.2 that he was seated in his office which is adjacent to that of his Cashier (P.W.3) When at 10.00 a.m. he heard a commotion with shouts 'thief', 'thief' and suddenly two men emerged while armed with pistols. They pointed their pistols at P.W.2 while ordering him and P.W.3 to open the cashier's door. P.W.2 said he was forced to lie down while facing sideways. It is the evidence of P.W.2 that the thugs were people not known to him and that he was terribly frightened. P.W.2 said that the ordeal lasted for one minute. P.W.3 gave a similar account like that of P.W.2. He said a man who was armed with a pistol entered his office while he was busy arranging the morning's collections in readiness for banking. The man ordered him to lie down and to surrender all the money. The robber collected the money stashed it in a dustbin

and then fled the scene. P.W.3 said members of public gave a chase while he remained lying down as ordered by the robbers. P.W.3 said the ordeal lasted for less than 10 minutes. Both P.W.2 and P.W.3 attended an identification parade where they picked the appellant. He said the appellant was a stranger to him. A guard with the complainant Ezekiel Ngone (P.W.5) said he saw two people who were armed with pistols ordering people to lie down. He was forced to lie down and within two minutes they had disappeared out of the entrance. He said the police brought one whom he identified to be one of those who had terrorized them. Hassan Guyo (P.W.8) said on 7.2.2003 at about 10.20 a.m. he rushed to save the appellant from being lynched by members of the public who had chased him as a suspect for theft. He said he took possession of a pistol which was in his possession and handed over the suspect and the pistol to the C.I.D. officers. P.W.9, John Sheghu confirmed having received the pistol and re-arresting the appellant from P.W.8. P.W.9 prepared an exhibit Memo and forwarded the same plus the pistol and the ammunition to the ballistic expert for examination. Emmanuel Kiptamai Langat (P.W.1), a Ballistic expert, confirmed having received the exhibit memo, the pistol and one round of ammunition. P.W.1 formed the opinion that the pistol and the ammunition were a firearm and an ammunition within the meaning of the Firearms Act. We have re-assessed the evidence tendered before the trial court. We have also considered the submissions of the appellant and Mr. Monda, the learned State Counsel. We are unable to conclude that the appellant was positively identified and placed at the scene of crime. We are satisfied that the appellant was picked out at an identification parade. The evidence reveal that at some stage, P.W.2 and P.W.3 may have had a glimpse of the appellant long before attending the identification parade. This fact is exposed by the evidence of P.W.5 who said the police came with the suspect back to godown. We think P.W.2 and P.W.3 concealed this piece of evidence in order not to prejudice their evidence of the identification parade.

It is important to note that P.W.2 and P.W.3 did not give the physical description of the appellant and the attire he wore at the time of the robbery. It is also clear in our minds that the robbers took a very short time in executing the robbery so that it was very difficult for P.W.2 and P.W.3 to positively say they had clear impression of the appellant who was totally a stranger to the duo. Both P.W.2 and P.W.3 stated that they were terrified by the robbers and that they were forced to lie down. It is inconceivable for such a person to lie down while facing sideways on the face of gangsters pointing guns at them. In the end we are not satisfied that the circumstances and conditions of identification were free from error. On this ground alone we allow the appeal in respect of count I. We quash the conviction and set aside the sentence of death in Count 1.

We have re-evaluated the evidence in respect of counts II and III and we are satisfied that the evidence properly proved the offences disclosed in these counts. The evidence of P.W.1, P.W.8 and P.W.9 established that the appellant was found in possession of a pistol and ammunitions without the relevant firearm certificates. In this regard we have no reason to fault the decision of the learned trial Principal Magistrate. We dismiss the appeal as against the conviction in Counts II and III. Mr. Monda, the learned State counsel has urged this court to correct the sentence given in these counts. A notice of alteration was issued pursuant to the provision of Section 354(3) (iii) of the Criminal Procedure Code. We have already mentioned that the appellant was sentenced to serve 4 years imprisonment each in counts II and III. Under S.4(3) (a) of the Firearms Act Chapter 114 Laws of Kenya such offences attract a sentence of not less than 7 years and not more than 15 years imprisonment. We consequently set aside the sentence of 4 years imprisonment and substitute it with a sentence of 8 years in both counts which sentences should run concurrently. We note that the trial magistrate had ordered the sentences to be kept in abeyance pending the outcome of the appeal in Count I. We set aside that order and direct the sentence to commence immediately.

Dated and delivered at Mombasa this 27 day of July 2007.

J.K. SERGON

J U D G E

L. NJAGI

JUDGE