



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 6 of 2006

NGIRISA LELUKAI.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(FROM ORIGINAL CONVICTION AND SENTENCE IN MAUA CRIMINAL CASE NO. 1785 OF 1997)

J U D G M E N T

The appellant in this appeal, Ngirisa Lelukai, was convicted after trial by the Senior Resident Magistrate, Maua Law Courts, Mr. M.N. Gicheru, of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. He was dissatisfied and hence this appeal. The facts giving rise to this appeal are that on 3rd November 1997 at about 1 pm, Pw1, Joshua M'Itabati M'Lingera (Joshua) in the company of Pw2, Joshua Kaenga (Kaenga) took food to the former's father, Julius M'Lingera Bishari (Julius) and brother, Jeremiah Mutia (Jeremiah) at a grazing filed at a place called Kamaritha. The four were approached by a person, who was later identified as the appellant, who wanted a cigarette and miraa from them. They suspected him to be a bandit. Joshua asked Kaenga to go and make a report to the police.

At this stage the accused began shooting while other bandits appeared, five of them armed with guns. The appellant and his colleagues began to drive away the cattle as Julius and Jeremiah who were armed with bows and arrows attempted to stop them. The two were shot dead.

Meanwhile the police heard the gunshots and led by Pw3, Cpl. Florian Wanjala, proceeded to the scene of shooting where they found both Julius and Jeremiah lying dead. Cpl. Wamalwa recovered from the scene three spent cartridges. The gang was pursued and when the police caught up with them, a shootout ensued between them whereby one of the members of the gang was shot in the thigh. Some of the stolen cattle were recovered after the shoot-out.

On 14th November, 1997, after some 11 days from the date of the incident, the local provincial administration comprising of the local D.O. and chief and the police mounted an operation in parts of Samburu which lasted six days and yielded more of the stolen cattle and a rifle. The appellant was also arrested.

Both the rifle and spent cartridges recovered from the scene were submitted to a ballistic expert for forensic analysis. A report produced in the trial court confirmed that the three spent cartridges were fired from the rifle recovered in the possession of the Appellant. The bodies of Julius and Jeremiah underwent post mortem examination the result of which revealed that Julius had a bullet wound on the head while

Jeremiah suffered two bullet wounds in the abdomen area and on the leg.

In his unsworn defence, the appellant denied involvement in the robbery of the 3rd November, 1997. He narrated how he had been asked by the local area chief on 16th November 1997 to take his firearm which he was licence to carry, being a homeguard, together with a copy of his identification card to the police station. The following morning while going to the police station, he met several police officers, a chief, an assistant chief and the D.O. He accompanied them on the search. They found seven heads of cattle at Barasori Manyatta which were alleged to have been stolen from members of the Meru community and the same were detained at the Archer's Police Post awaiting collection by the owners. The appellant then returned his firearm to the armoury. The following day he was arrested in connection with the robbery of 3rd November 1997 and subsequently charged. That, in summary, constitutes the evidence adduced in the court below.

In a three-pronged petition of appeal, the appellant is challenging the decision of the court below on the grounds that the prosecution evidence was contradictory; that there was no evidence of identification; and the sentence imposed was against the weight of the evidence and the law.

Before we consider these grounds and the appeal, it is our duty as the first appellate court to carefully re-evaluate the evidence on record in order to arrive at our own independent conclusion, always bearing in mind the fact that we lack the advantage of the trial court where evidence was received and witnesses' demeanour observed. See **Okeno V R** (1972) EA 32. See also **James Otengo Nyarombo & 2 others V R**, Cr. Appl.No. 184 of 2002. It is plain from the record that the incident of 3rd November 1997 took place in the afternoon at about 1 pm. When the first member of the gang approached their victims there were only four people, Julius, Jeremiah, Joshua and Kaenga. The first member of the gang spoke to the four, asking for a cigarette and miraa. This first encounter is estimated to have lasted for long according to Joshua. Then there was the second encounter when the police engaged the gang in a shoot out. Again Cpl. Wamalwa estimated this to have lasted between 5 to 6 minutes and meanwhile Cpl. Wamalwa was able to identify the appellant during this engagement. After the shoot-out, one member of the gang was shot and arrested. Before he died, he was able to give the police the details of the other members and their manyatta.

Learned counsel for the appellant argued that this amounted to a dying declaration and ought to have been recorded in the language it was spoken, read over to the person making it before signing it. Counsel was, however, not able to cite any authority for this proposition.

With respect to counsel that is certainly not the law as we understand it. We believe though that that argument was based on a similar argument which was overruled by the Court of Appeal in **Kimeu V R (2002) 1 KLR 756 at pg 762 and 763**.

Secondly, the remarks by the dead gangster identifying the appellant and others as well as the details of their manyatta cannot amount to a dying declaration in terms of section 33 (a) of the Evidence Act.

A statement of a deceased person amounts to a dying declaration if it is made by the deceased as to the cause of his death or as to any of the circumstances resulting in his death. The trial did not concern the circumstances leading to the death of the gangster. We are, however, alive to the provisions of Chapter V of the Penal Code and have no doubt in our mind that the deceased gangster was an accomplice whose statement should not generally be acceptable in evidence unless there is some other independent evidence which points to the guilt of the suspect.

The third aspect of this appeal is the recovery of the stolen livestock in the appellants' manyatta a few days after they were stolen. Although he was not personally found with the livestock, the same were found in his manyatta and the circumstances of the case clearly point to him as one of those who had driven them from Meru to Samburu.

Finally there is the evidence of the firearm examiner contained in a report dated 26th June 1998 and produced by Cpl. Wamalwa to court under the provisions of section 77 (i) of The Evidence Act. Learned

counsel for the State urged us to dismiss this appeal as the prosecution evidence, in his view, is overwhelming as there was clear evidence of identification coupled with the recovery of the rifle.

Going back to the first instance, namely the afternoon of 3rd November, 1997, we are satisfied beyond doubt that Joshua and Kaenga were able to observe the appellant for sufficient time to be able to identify him later. They were able to identify him from his appearance and the clothes he wore on the fateful afternoon. It was in broad daylight. The appellant talked to them and they answered back. Joshua was suspicious of the appellant and asked Kaenga to call the police. Cpl. Wamalwa was similarly categorical that he was able to identify the appellant clearly during the shoot-out which, according to him lasted some 5 to 6 minutes. He noted that the appellant was taller than the rest of his colleagues. The statement of the dead gangster implicating the appellant as to his identify and his manyatta were confirmed when the police went to the manyatta and indeed recovered the stolen livestock. That statement is also corroborated by the evidence of Cpl. Wamalwa, Joshua and Kaenga. Finally the report from the firearm examiner confirmed that the three spent cartridges which were collected at the scene of robbery were fired from the firearm which was recovered from the appellant.

The evidence of Joshua, Kaenga, Cpl. Wamalwa and that of the firearm examiner places the appellant squarely at the scene of the robbery.

In this appeal, it has been argued that there were contradictions regarding when the stolen livestock was recovered; when and where the firearm was recovered.

Looking at the totality of the evidence adduced by the three main prosecution witnesses, Joshua, Kaenga and Cpl. Wamalwa, we understand the effect to be that some 36 heads of cattle were recovered on the day and the scene of the robbery while others were recovered during the subsequent operation at Archers Post.

During the operation some other cattle that had been stolen earlier were also recovered. It is on this occasion that the appellant was arrested and the firearm recovered.

We, therefore, find no contradiction on the dates of recovery of the livestock and the firearm.

We turn to the appellant's alibi defence which was considered but rejected correctly by the learned trial magistrate. As we understand it,

“(i) As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (R V Johnson, (1961) 3 All ER 969 applied; Leonard Aniseth V R (1963) EA 206 followed)

(ii) the burden of proving an alibi does not lie on the prisoner.....”

See Sekitoleko V Uganda (1967)m EA 531.

We are in agreement that this is the correct statement of the law.

We are similarly satisfied that in the appeal before us the prosecution evidence displaced the appellant's alibi defence.

In conclusion and for the foregoing reasons we are satisfied that the appellant's conviction was based on sound assessment of the evidence adduced before the trial court and we find no merit in the appeal laid before us.

It is dismissed in it's entirety.

DATED AND DELIVERED AT MERU THIS 13TH DAY OF JULY, 2007

I. LENOLA

JUDGE.

W. OUKO

JUDGE.