



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Criminal Appeal 240 of 2000**

**MICHAEL MURITHI ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of Mr. A. O. Muchelule, CM in Meru Criminal Case No.546 of 2000)**

**JUDGMENT**

The appellant's appeal was heard by this court (Juma and Tuiyot, JJ) on 13<sup>th</sup> November, 2001 and judgment slated for 14<sup>th</sup> February, 2002. It appears that the same was delivered but not signed or dated.

The appellant appealed against the judgment to the Court of Appeal, which appeal was considered on 16<sup>th</sup> May, 2006. After failing to trace the judgment of the High Court, signed and dated the Court of Appeal remitted the appeal for hearing. That is the brief background of this appeal. The appellant, Michael Murithi, was charged and tried in the court below in count 1 for attempted robbery with violence contrary to Section 297(2) of the Penal Code and unlawful possession of ammunition without a firearm certificate Contrary to Section 4(1) of the Firearms Act in count 2. After a full trial the court below found the appellant guilty in both counts and sentenced him to death in count one and ten years in count two which was ordered to be held in abeyance.

It is our duty, as the first appellate court, to appreciate that parties are entitled to demand of us a decision on both questions of law and of fact and for this we must weigh conflicting evidence and draw our own inferences and conclusions, but bearing in mind always that we have neither seen nor heard the witnesses and we have made due allowance for this.

In discharging this duty we must start with an outline of the evidence adduced before the trial court.

It was the testimony of PW1, Sospeter Kaumbuthu Musili(Kaumbuthu) that while in his shop at Karaa Market on 14<sup>th</sup> October, 1998 at about 7pm, in the company of his neighbour, PW2 James Mugo Kamau(Mugo), the appellant went to buy cigarette. Both Kaumbuthu and Mugo confirmed that the appellant was known to them. The appellant went to the shop wearing a brown sweater and hat almost covering his face. After buying cigarettes the appellant left. Mugo also left shortly to go and watch the 7pm news.

According to Kaumbuthu, the appellant returned as he(Kaumbuthu) was about to close his shop and

threatened him with a pistol while demanding money. Being a retired police officer with experience in firearms, Kaumbuthu wrestled the gun from the appellant while calling out Mugo for assistance. Mugo responded and found as the appellant was fleeing but not before threatening him too with the gun.

They reported this incident to the police the following day. PW4, PC Githongo Kiilu who received the report confirmed that the Kaumbuthu gave him the name of the appellant as the person who had tried to rob him.

On 26<sup>th</sup> February, 2000, after nearly 1 year and 4 months PW3, Cpl. John Muguna and other officers including PW5-PC Kipkemboi Soi, acting on information, proceeded to Kirigi village where they arrested the appellant while sleeping in his aunt's house. On being searched he was found in possession of five (5) rounds of ammunition.

The ammunition were subjected to ballistic examination. The report was produced by PW6, PC Peter Nderi. In his unsworn statement the appellant denied the charges stating that on the day he is alleged to have robbed Kaumbuthu he was splitting timber in Mt. Kenya forest. He attributed his troubles to Kaumbuthu's bitterness following his (the appellant's) resistance to the former's attempt to buy their land. He also alleged that as a result Kaumbuthu caused his arrest and was subsequently charged in Makadara court but was acquitted after being in remand for 7 months.

No sooner had he returned to his work at the forest than Kaumbuthu again made this complaint against him. The trial magistrate considered this evidence and came to the conclusion that the evidence against the appellant was beyond any reasonable doubt.

We have, on our part, considered the evidence adduced and the judgment of the court below. The appellant's grounds of appeal may be summarized as follows;

1. That the charge of attempted robbery with violence was not proved
2. That the evidence of recognition was fabricated
3. That there was no evidence linking the appellant with the ammunition
4. That the trial court failed to consider the defence.

These grounds formed the basis of the appellant's written submissions which he relied upon and which were adopted as part of the proceedings in this appeal.

Counsel for the respondent used us to dismiss the appeal as the appellant was clearly identified as the person who robbed the complainant.

The real issue in our view is that of identification in that the appellant has raised an *alibi* defence, yet the two prosecution eye witnesses maintain that they identified him during the attack. We bear in mind, as we consider this aspect of the appeal, the general rule of law that the burden on the prosecution to prove the guilt of the appellant beyond reasonable doubt never shifts whether the defence set up is an alibi or any other defence.

See Sekitoleko V R (1967) EA 531 followed in Dickson Mwaniki M'Obiki & Another V R, Criminal Appeal No.78 of 2006. We are equally alive of the need of this court to consider carefully the evidence of identification, especially in view of the fact that the robbery is said to have been committed at about 7pm. This court must, in this instance, be satisfied that conditions for positive identification were favourable.

The evidence in this case is that the appellant was known to Kaumbuthu for over ten (10) years. His parents and grandparents were also known to Kaumbuthu.

To Mugo, the appellant was only known to him by appearance having split timber with him in the past. Both saw the appellant come to Kaumbuthu's shop shortly before 7pm. He acted in a strange manner from the way he walked and by covering his face.

Kaumbuthu and Mugo discussed this appearance and Kaumbuthu confirmed to Mugo that the appellant is Muriithi son of Reuben. From Mugo's evidence, five minutes after he left Kaumbuthu he had him (Kaumbuthu) call for his assistance and he responded immediately. Kaumbuthu confirmed that the appellant returned to his shop still dressed in the same jacket and wearing the same hat.

Mugo on arrival at the shop faced the appellant who dared him to move near to him as the latter pointed the gun at him. Both witnesses also testified that there was sufficient electricity light both in the shop and outside. The appellant has also confirmed in his defence that he was known to Kaumbuthu prior to this date

With all this, we are satisfied that the two witnesses were able, given the period spent with the appellant, the fact that he was known to them before this day and the light, to positively recognize the appellant.

The *alibi* defence raised by the appellant was displaced by the overwhelming prosecution evidence which placed the appellant at the scene of the robbery.

Regarding the charge under Section 297(2) of the Penal Code, the particulars provided in the charge sheet read;

“On 14<sup>th</sup> day of October, 1998 at about 7pm at Karaa Market, in Meru South District of the Eastern Province, being armed with offensive weapon namely a pistol, attempted to rob Sospeter Kaumbuthu

Musili of his shop goods and at or immediately before or immediately after the time of such attempt threatened to use personal violence to the said Sospeter Kaumbuthu Musili”.

From the evidence adduced by Kaumbuthu the appellant demanded for money from him by saying “pesa” while pointing the gun at him. When he called for Mugo’s assistance he said the appellant wanted to kill him. The trial court considered this matter and found that the charge was at variance with the particulars but held that the same was not prejudicial to the appellant.

We have ourselves considered this matter and come to the same conclusion as the learned trial magistrate. The position in law is that not every conflict between the particulars of the charge and the evidence which will vitiate a conviction. The conviction will be vitiated only if the conflict or variance is of such a nature that prejudice will clearly be caused on the suspect. For minor variance such as the one identified in this appeal, Section 382 of the Criminal Procedure Code is applicable.

The position of variance between the particulars of the charge and the evidence adduced was considered thus in Njuki V R (2002) 1KLR 771,

“In certain criminal cases, particularly those which involve many witnesses discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. .... However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.

See also Kimeu V R (2002) 1 KLR 756 at 765. We have no doubt as we have stated earlier, that the appellant was involved in the attempted robbery. The discrepancy as to what he attempted to steal from Kaumbuthu, and the dates when the rounds of ammunition were recovered are minor considering the facts and circumstances of the case.

Finally on the first count, it was the appellant’s contention that the charge, Under Section 297 (2) of the Penal Code was not proved as no medical evidence was called to prove assault.

Section 297(1) and (2) provides;

“(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of that assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

The distinction being drawn between sub-section (1) and sub-section (2) is whether or not the offender is armed with a dangerous or offensive weapon. Where he simply assaults, and uses or threatens to use violence while unarmed, the sentence is 7 years. But where he is armed as aforesaid or is with others or where he wounds, strikes, beats or uses any other personal violence to any person, the sentence is death.

The evidence on record is to the effect that the appellant was alone. But he was armed with a pistol, a dangerous weapon, which both Mugo and Kaumbuthu identified. He confronted Kaumbuthu and as the latter tried to disarm him there was a struggle. He overpowered Kaumbuthu before escaping.

In our view this struggle between the appellant and Kaumbuthu amounted to “any other personal violence” within the meaning of Sub-section (2). There was no need for medical evidence to prove the violence on Kaumbuthu as he was not wounded, struck or beaten.

Assault can mean personal violence in terms of striking, beating or wounding. But it can also mean reasonable apprehension of personal violence. On being confronted by a gun pointed at him, Kaumbuthu must have naturally apprehended personal violence.

We have already dismissed the appellant’s *alibi*. His claim of land dispute has no basis. We also find no merit in his denial that he was found in possession of five rounds of ammunition. If his claim that Kaumbuthu was out to “fix” him it did not require two counts to accomplish this.

The trial court where the witnesses testified was satisfied that PW3 and PW5 found the five rounds of live ammunition in the appellant’s pocket. Their testimony was consistent and we find no basis of departing from the lower court’s finding. The five rounds of ammunition were examined and found to be live as defined under the Firearms Act.

We find no merit in this appeal which we hereby dismiss.

**DATED AND DELIVERED AT MERU THIS 11<sup>TH</sup> DAY OF JULY, 2007**

**ISAAC LENAOLA**

**JUDGE**

**WILLIAM. OUKO**

**JUDGE**