



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 206 of 2002

ALICADIOCI MWANGI WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Alicadioci Mwangi Wainaina was charged with others with two counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charges were that on the nights of 31st October and 1st of November 1998, the appellant jointly with others, at Mobil Petrol Station Naivasha while armed with dangerous weapons, namely pangas and knives robbed Josephat Ruchachu Mugo and Paul Mbugua Gichuhi of cash, one gas cylinder, a motor vehicle radio cassette and a motor cycle registration number KAD 768H and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Josephat Ruchachu Mugo and Paul Mbugua Gichuhi.

The appellant was further charged with two counts of being in possession of a firearm and ammunition without a firearm certificate contrary to **Section 4(2)(a) of the Firearms Act**. The particulars of the charges were that on the night of the 14th December 1998 at Site and Service Estate Naivasha, the appellant was found in possession of one colt .45 Pistol with four rounds of ammunition without a Firearm Certificate. The appellant pleaded not guilty to the charges and after a full trial he was found guilty as charged on the 1st count of robbery with violence. He was also found guilty of the two counts of being found in possession of a firearm and ammunition without a certificate. On the count of robbery, he was sentenced to death as is mandatorily provided by the law. On the two offences under the **Firearms Act**, the appellant was sentenced to serve seven years imprisonment on each of the count. The sentences were however ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised six grounds of appeal challenging the decision of the trial magistrate convicting him. He was aggrieved that he had been convicted based on the sole evidence of identification which identification was made in difficult circumstances. He was aggrieved that the trial magistrate had convicted him for being in possession of the firearm and ammunition whereas no evidence was adduced to support such a finding. He was aggrieved that the trial magistrate had erroneously considered the evidence of the recovery of the motor cycle and thereby wrongly convicted him. He faulted the trial magistrate for disregarding his defence before arriving at the said decision convicting him.

During the hearing of the appeal, the appellant made oral submissions urging this court to allow his appeal. Mr. Koech, learned state counsel however urged this court to uphold the conviction and the

sentence of the trial magistrate. He submitted that the prosecution had adduced sufficient evidence which proved the charges against the appellant to the required standard of proof beyond reasonable doubt. We shall consider the said submissions made after briefly setting out the facts of this case.

On the 1st of November 1998, at about 3.00 a.m. PW1 Paul Mbugua Gichuhi was at his place of work at Mobil Petrol Station Naivasha. He was with his work mate, Josephat Muchachu. There were no customers at the station at the time, therefore PW1 decided to rest inside a mini bus which was parked at the petrol station. He testified that while inside the mini bus he heard noises. He sought to investigate what had caused the noise. He saw three men enter the mini bus. They ordered him to give him money. He hesitated, then he was hit on the head with a piece of iron. He gave them Kshs 30,000/= which was in his pocket. He testified that he was able to identify one of the robbers because the robber had a big visible healed scar on his left hand. The person whom he identified was however not the appellant in this case but his co-accused in the lower court. He testified that the robbers were scared away when a motor vehicle was driven into the petrol station. He testified that the robbers stole a gas cylinder and a motor cycle which was parked at the petrol station. He however did not identify what type of motor cycle was parked at the station. He did not state the registration number of the motor cycle that was stolen from the petrol station.

PW2 Njuguna Karanja, a taxi operator at Naivasha township testified that on the 1st of November 1998 at around 3.00 a.m., he was hired by a man who (was not the appellant) to carry for him a red motor cycle from Naivasha to a place called Karati. He testified that the man appeared drunk. They agreed on the fare. He took the man to Kabati. The motor cycle was later produced in evidence in court as the one which was stolen from the petrol station. PW4 PC Elijah Mbaluka testified that he received information when he was investigating the robbery at the Mobil petrol station that the appellant was involved in the said robbery. He testified that he went to the house of the appellant at the County council estate, Naivasha and found him sitting on his bed. When the appellant saw them he drew a pistol. PW4 and his colleagues were however able to disarm the appellant. They found the appellant in possession of one pistol and four rounds of ammunition which were produced in evidence in the trial. PW4 testified that after the appellant was arrested, he volunteered to take the police to Githunguri where the motor cycle which was stolen from the petrol station was recovered.

When the appellant was put on his defence, he testified that he was arrested by the police on the 14th of December 1998 when he was at his girlfriend's house. He denied that he had been involved in the robbery. He testified that the robbery charge was brought against him because one of the police officers who was among the police officers who arrested him, was a former boyfriend of the girl who was then his girlfriend. He denied the allegation that he was found in possession of the firearm and the ammunition. He further denied that he had led the police to the place of recovery of the motor cycle which was stolen from the said petrol station.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (See **Njoroge -vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. We have carefully considered the submissions which were made before us by the appellant and by Mr. Koech, learned state counsel. We have also re-evaluated the evidence which was adduced by the witnesses before the trial magistrate's court.

The evidence that was adduced by prosecution to secure the conviction of the appellant on the charge of robbery with violence by the trial magistrate is based on the recovery of the stolen motor cycle which was allegedly found in the possession of the appellant. According to the evidence which was adduced by PW1, a motor cycle was stolen from the petrol station during the night of the robbery. PW2 testified that a man who he could not identify hired him to carry a motor cycle at 3.00 a.m. on the 1st of November 1998. This was the night when the robbery took place. PW2 testified that the man who appeared drunk hired him to transport the said motor cycle from Naivasha Township to a place called Karati. PW4, a

police officer who was investigating the case testified that on unknown date in the month of November 1998 he went to the house of the appellant and arrested him after finding him in possession of a firearm and ammunitions without a firearm certificate. He testified that the appellant who was a suspect in the robbery at the police station volunteered to escort them to Githunguri where the motor cycle was recovered from someone. The person from whom the motor cycle was recovered from, was not called to testify by the prosecution. It is the recovery of the said motor cycle that led to the conviction of the appellant by the trial magistrate.

The evidence of recovery of the motor cycle does not prove to the required standard that it is only the appellant who could have had the exclusive possession of the said motor cycle. A disturbing aspect of the evidence adduced by the prosecution is that none of the witnesses called by the prosecution was able to identify the said motor cycle. Although the witnesses told the court that the motor cycle which was before the trial court was the one which was stolen from the petrol station, no one testified that he was the owner of the said motor cycle. Furthermore none of the witnesses pointed out the distinctive features of the said motor cycle that could have tied it to the particulars stated in the charge sheet.

As it were, we are only left with a vague description of an alleged motor cycle which was stolen from the petrol station during the night of the robbery. The prosecution witnesses did not give any evidence as to the specific date when the appellant is alleged to have escorted the police to Githunguri where the motor cycle was allegedly recovered. In the absence of such evidence, there is no evidence which connected the appellant to the motor cycle which was allegedly stolen from the Mobil petrol station, Naivasha. In his defence the appellant testified that he was arrested on the 14th of December 1998. If the evidence of PW4 were to be believed, then the said motor cycle which was allegedly recovered in the month of November 1998 was recovered before the arrest of the appellant. The appellant could not therefore be said to have been in possession of the said motor cycle.

In the premises therefore we hold that the submissions made by the appellant that he did not participate in the robbery could well be true. There is no other evidence which connects the appellant to the robbery. In the circumstances of this case therefore, his conviction by the trial magistrate on the charge of robbery with violence based on the evidence of the recovery of the motor cycle was unsafe. We therefore quash the conviction of the appellant on the charge of robbery with violence contrary to **Section 296(2) of the Penal Code**. We set aside the death sentence that was imposed upon him.

As to the two counts of being found in possession of a firearm and ammunition without a firearm certificate contrary to the provisions of **Section 4(2) (a) of the Firearms Act**, we find that the prosecution proved its case against the appellant to the required standard of proof. The appellant was arrested by PW4 in his house. When he saw the police, he drew the pistol but surrendered when he realized he was cornered. PW4 recovered the pistol from the appellant. The pistol had four rounds of ammunition. The pistol and the ammunition were examined by a ballistic expert and established to be a firearm within the meaning ascribed to it by the **Firearms Act**. In the circumstances therefore, the appellant's defence to the effect that he was not found in possession of the said pistol and ammunition is a sham. We reject it. The appellant was therefore properly convicted for the said offences under the **Firearms Act**.

On sentence the appellant was sentenced to serve seven years imprisonment by the trial magistrate on the 7th of March 2000. The appellant has been in lawful custody since the 14th of December 1998 when he was arrested by the police. In the circumstances of this case the sentence of the appellant is commuted to the period already served. He is set at liberty and ordered released from prison unless otherwise lawfully held.

DATED at NAKURU this 31st day of March, 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE