



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 376 of 2001

LEONARD OCHIENG AWICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Leonard Ochieng Awich was charged with **attempted robbery with violence contrary to Section 297(2) of the Penal code**. The particulars of the offence were that on the 15<sup>th</sup> of January 2001 at Kipsitet area Kericho District, the appellant jointly with others not before court while armed with a dangerous weapon namely a pistol attempted to rob Anyona Moindi of motor vehicle registration number KAL 066S Isuzu Canter and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said Anyona Moindi. He was further charged with **being in possession of a firearm without a firearm certificate** contrary to **Section 4(1) as read with section 4(3) (a) of the Firearm Act**. The particulars of the charge were that on the same day and in the same place the appellant was found in possession of a homemade pistol without a firearm certificate. The appellant pleaded not guilty to the charge and after a full trial was found guilty on both counts. He was sentenced to death as is mandatorily prescribed by the law. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant admitted the offence stating that he had been cheated by his deceased colleague to commit the crime. He pleaded with this court to exercise leniency on him because he was an only child of his mother. He pleaded with the court to exercise leniency on him and order his release from prison. However at the hearing of this appeal, the appellant with the leave of the court presented to this court a supplementary petition of appeal whereby he faulted the trial magistrate for convicting him based on a defective charge. He was aggrieved that he had been convicted on inconsistent and flimsy evidence which could not sustain a conviction. He was further aggrieved that the trial magistrate had failed to consider his alibi defence. At the hearing of the appeal, the appellant with the leave of the court presented to this court written submissions in support of his appeal. He urged this court to allow his appeal. Mr. Koech for the State however made submissions urging this court to uphold the conviction and the sentence of the trial magistrate because the prosecution had adduced overwhelming evidence to prove the charge against the appellant. He urged this court to dismiss the appeal.

Before giving reasons for our decision, it is imperative that we set out the brief facts of this case. On the 15<sup>th</sup> of January 2001, PW1 Anyona Moindi and PW2 Shikanda Evans were traveling in motor vehicle registration number KAL 066S Isuzu Canter. The two were bread salesmen. PW1 was driving the motor vehicle along Kisumu Kericho road at about 12.30 p.m. when they saw two men by the side of the road who stopped them. PW1 slowed down the motor vehicle but before he could reach where the two men were standing by the side of the road, they saw a man run into the nearby bush and come out with a gun.

PW2 told PW1 to accelerate the motor vehicle and not to stop. At the time the two men were hanging on the motor vehicle. One of the men who was later identified as the appellant was hanging at the passenger door while pointing a pistol at PW1.

According to PW2, while PW1 was driving the vehicle he managed to wrest the gun from the appellant and disarmed him. He also succeeded in hauling the appellant into the motor vehicle and subdued him. PW1 then drove the said motor vehicle to Kipsitet shopping centre where he stopped the vehicle and asked the people there to direct them to the police. One of the people at the centre was PW1 Peter Obaga Mogereri. He advised PW1 and PW2 to go and make a report to the nearby D.O.'s office. PW1 and PW2 were then escorted by PW3 to the D.O.'s office, Kapsitet. The appellant was then arrested by PW4 AP Corporal Weldon Rotich.

PW4 testified that he was told by PW1 and PW2 that two men had attempted to rob them on the road. He accompanied them to the scene of the crime and found a man lying besides the road. He was injured. The man and the appellant were handed over to PW5 PC Marcos Mbithi a police officer attached to the CID office Kericho. He took the man to hospital who however died on admission. The appellant was however detained at Kericho police station where he was charged with the offences which he was convicted. The homemade pistol with one round of ammunition which was recovered from the appellant was taken to a ballistic expert who examined the said pistol and confirmed that it was a firearm within the meaning of **The Firearm Act**. The pistol, the one round of ammunition together with the exhibit memo were produced in evidence by the prosecution. The motor vehicle which was being driven by PW1 was also produced in evidence as an exhibit.

When the appellant was put on his defence, he denied that he had been involved in the attempted robbery. He testified that as he was walking along Kisumu-Kericho road on the material day, he saw a motor vehicle knock down a pedestrian. He went to investigate and was asked by the people in the vehicle to show them the direction to the police station. He obliged. When they reached Kipsitet shopping centre, he was surprised when he was accused by the driver of the motor vehicle to be a robber. He testified that the members of the public assaulted him until he lost consciousness. He regained consciousness while admitted at Kericho District Hospital. Upon being discharged from hospital, he was charged with the offences which he claims he was unaware of.

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**). In this case, 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.

The evidence that was adduced by the prosecution to secure the conviction of the appellant is that of PW1, PW2, PW3 and PW4. We have re-evaluated the said evidence and after considering the submissions made on this appeal we have found as a fact that the appellant herein was caught in the act by PW1 and PW2. According to the said witnesses, they were stopped by two men who were standing by the side of the road. They slowed down the motor vehicle. They then saw one of the men run into the bush and return while wielding a pistol. PW2 told PW1 not to stop the motor vehicle but to drive off. PW1 drove off the motor vehicle. The two men however clung on the motor vehicle. One of them held to the front passenger door of the cabin and pointed the pistol at PW1. PW2 struggled with him and managed to disarm him of the pistol. He also managed to haul the appellant into the motor vehicle and subdued him.

PW1 and PW2 then took the appellant to the D.O.'s office at Kipsitet after being directed by PW3. PW4 then arrested the appellant and took him to Kericho Police Station. PW4 visited the scene of the crime and was able to find a man lying by the side of road unconscious. He was taken to Kericho District Hospital where he died on arrival. The man who died was an accomplice of the appellant and had been described by PW1 and PW2 as having been with the appellant when the two attempted to rob them. The

pistol which in possession of the appellant was examined by a ballistic expert and established to be a firearm within the meaning of **The Firearm Act**. The said pistol was produced as an exhibit in evidence.

Having carefully re-evaluated the evidence in this case, we hold that the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt. The evidence was direct. The appellant was apprehended by his would be victims and taken to the police. He was armed with a pistol which is a dangerous and offensive weapon. Although the appellant in his defence testified that he was an innocent bystander who had witnessed an accident and who was later falsely accused of having attempted to commit robbery, in our opinion the said testimony was self serving and did not dent the otherwise strong prosecution case against the appellant. We dismiss the said defence as a sham.

The upshot of the above reasons and after re-evaluating the evidence is that the appeal filed by the appellant lacks merit. We have considered the reasons which were advanced by the appellant in this appeal. We are not persuaded that the said reasons would make us interfere with the decision of the trial magistrate when he convicted the appellant. His appeal is therefore dismissed. His conviction and sentence is confirmed.

It is so ordered.

**DATED at NAKURU this 24<sup>th</sup> day of March 2006.**

**M. KOOME**

**JUDGE**

**L. KIMARU**

**JUDGE**