



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 316 & 317 of 2002

(From original conviction and sentence in Criminal Case No. 501 of 2002 of the Senior Principal Magistrate’s Court at Naivasha – M. M. Muya [S.P.M.]

JOHN NJUGUNA KIMANI.....1ST

APPELLANT

SIMON NJOROGE KABUI.....2ND

APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellants, John Njuguna Kimani (hereinafter referred to as the 1st appellant) and Simon Njoroge Kabui (hereinafter referred to as the 2nd appellant) were charged with another who was however found guilty of a lesser charge of simple robbery, with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 3rd of March 2001 along Mai Mahiu-Naivasha Highway, Nakuru District, the appellants jointly with others not before court while armed with a dangerous weapon, namely a pistol, robbed Gabriel Okindo of motor vehicle registration number KAL 389K and 410 bales of wheat flour valued at Kshs 3,277,750/=, the property of Pembe Millers and also robbed Boniface Kaleli Ngao of Kshs 2,200/= and at or immediately before or after the time of such robbery shot and killed the said Gabriel Okindo and used actual violence to the said Boniface Kaleli Ngao. The appellants were further charged with two counts of being found in possession of a firearm and ammunition without firearm certificates contrary to Section 4(2)(a) of the Firearms Act. The particulars of the charge were that on the 3rd of March 2001 at Nyakinyua Farm in Naivasha, the appellants were found in possession of a Star pistol and four rounds of 9mm ammunition without a firearm certificate. The appellants pleaded not guilty to the charge and after a full trial were found guilty of all the charges. They were sentenced to death as is mandatorily provided by the law in respect of robbery with violence. They were sentenced to serve four years imprisonment each in respect of the 3rd and the 4th counts under the Firearms Act. The appellants were aggrieved by the conviction and sentence and each filed a separate appeal against his conviction and sentence to this court. The two separate appeals were however consolidated and heard as one during the hearing of the appeals.

The appellants, in their petitions of appeal presented more or less similar grounds of appeal. They were aggrieved that they had been convicted based on insufficient evidence of the prosecution. They faulted the trial magistrate for convicting them based on the evidence of an identification parade which

was irregularly conducted. They were further aggrieved that they had been convicted on the charge of being found in possession of a firearm and ammunition in the absence of any evidence being adduced by the prosecution witnesses to connect them to the said firearm and ammunition. They were further aggrieved that the trial magistrate had failed to consider their alibi defence before convicting them on the charges which were preferred against them. They were finally aggrieved that they were convicted by the trial magistrate based on weak prosecution evidence. At the hearing of the appeals, the 1st appellant, with the leave of the court presented to the court written submissions in support of his appeal. He further made oral submissions urging this court to allow his appeal and acquit him. The 2nd appellant made oral submissions urging this court to allow his appeal and quash his conviction. Mr Gumo, Assistant Deputy Public Prosecutor supported the convictions and the sentences imposed upon the appellants. He urged this court to disallow the appeal. We shall revert to the arguments made on these appeals after briefly setting out the facts of this case.

On the 3rd of March 2001, PW1 Francis Mwaka Mutevu, the Financial Manager of Pembe Flour Millers instructed PW2 Boniface Kaleli Ngao and Gabriel Okindo (*hereinafter referred to as the deceased*) to deliver 410 bags of wheat flour to Naivasha. The deceased was to drive the lorry registration number KAL 389K Nissan which was to carry the said bags of wheat. PW2 was the turn boy. The journey was uneventful until when they reached just past Mai Mahiu, some few minutes after midday. The deceased stopped the lorry and instructed PW2 to check its tyres. Meanwhile two men who were standing besides the road, asked the driver to give them a lift to Naivasha. The deceased acceded to their request. The two men entered the front cabin of the lorry. The driver then drove off towards the direction of Naivasha. On the way, one of the men, whom PW2 later identified to be the 1st appellant, whipped out a pistol from his pocket and ordered the deceased to stop the lorry. The deceased refused to stop the vehicle. He told PW2 that the pistol which was being pointed at him was fake and refused to do as he was ordered by the two men. The deceased continued driving the vehicle. One of the men, whom PW2 identified as the 1st appellant struggled with the deceased after holding the steering wheel. The struggle continued for a while.

Meanwhile the other man, whom PW2 later identified to be the 2nd appellant overpowered him and subdued him. The two men then were able to stop the lorry after overpowering the deceased. After the lorry stopped, PW2 testified that the 1st appellant ordered the deceased to let go of the vehicle but the deceased refused to heed to the order. According to PW2, it is at this point that he saw the 1st appellant shoot the deceased twice on the chest with a pistol at a point blank range. The deceased fell to the ground. He was picked by the 2nd appellant and put at the back of the cabin. The 1st appellant then took control of the motor vehicle and drove it towards a direction which PW2 could not tell as he had been blind folded. Before he was blind folded, PW2 testified that the 2nd appellant ransacked his pocket and took from him Kshs 2,200/=.

After a while, the lorry was stopped and PW2 was taken to a nearby tree and tied to a tree. After a few minutes, PW2 managed to untie himself and escape from the scene. He later sought directions to Satellite Police Station where he made a report of the robbery. PW2 testified that he was able to positively identify the appellants as he was in close contact with them during the robbery ordeal. He further testified that the robbery took place in broad daylight and he was able to identify the facial features of the appellants. PW2 confirmed his identification of the appellants on the following day (*i.e. on the 4th of March 2001*) when an identification parade was conducted by PW14 Inspector Mureithi at the Naivasha Police Station.

Meanwhile, PW4 Peter Ole Keringe, a sand dealer was at his place of work by a dry river bed at a place called Mukuru when he saw a lorry registration number KAL 289K being driven towards his sand harvesting quarry. PW4 walked towards the vehicle because he thought the occupants were customers. However before he could reach the vehicle, he saw a man who had been tied being taken towards the bush. He again saw two men whom he identified as the appellants bury something behind the lorry. He later learnt that the 'thing' which was being buried in the ground by the appellants was the deceased. PW4 testified that he was certain that it was the appellants who had buried the deceased on the material

day.

PW3 Salong Ole Kilusu testified that on the material day, he received information that a person had been killed and dumped by the river side. He went to the scene accompanied by PW7 Lasit Ole Kibelekenya, the area chief Longonot and two administration police officers, PW10 APC Abdul Rashid Billo and PW11 APC Patrick Konge. Before they could reach the scene, they saw the appellants emerge from the bush while running and being pursued by Masai herdsmen who were shouting that they were thieves. According to PW10, when the appellants saw them they fired at them with a pistol and an exchange of fire ensued between them. The two appellants changed direction and continued running. They split directions. PW10 managed to pursue the 1st appellant and arrested him. PW11 chased the 2nd appellant and similarly arrested him.

After the appellants were arrested together with another person who was convicted for the lesser offence of simple robbery, they were handed over to PW12 Police Constable Nicholas Omondi of the CID Naivasha who investigated the case and later charged the appellants with the offences for which they were convicted. PW6 Dr. Musalia performed the post mortem on the body of the deceased and was of the opinion that the cause of death of the deceased was cardio pulmonary arrest due to a bullet wound on the chest which damaged the left lung and the surrounding muscles and caused it to collapse. PW5 Benson Gichuki, a Firearms examiner, examined the firearm which was allegedly found in possession of the appellants and confirmed that it was a Makorev pistol which was a firearm within the meaning of the **Firearms Act**. The ammunition was also found to be live and to be ammunition within the meaning of the **Firearms Act**.

When the appellants were put on their defence, they denied that they were involved in the robbery. They offered alibi defence. The 1st appellant testified that he was arrested by the police as he was running away from what he thought were tribal clashes which had started at Suswa area by the Masai. He denied that he was running away from the scene where the body of the deceased was found. He denied that he was found with a firearm and ammunition which was produced in evidence by the prosecution. He testified that after he was arrested, he was beaten and charged with the offences of robbery which he had no knowledge of.

The 2nd appellant similarly denied that he was involved in the robbery or was found with the firearm which was produced in evidence by the prosecution. He testified that on the material day he had hired the 1st appellant to take fertilizer for him to a place called Nkiaragere. He testified that on their way back, their motor vehicle developed a mechanical problem and they were forced to stop by the road side. While they were checking the motor vehicle, they suddenly saw Masai herdsmen armed with pangas and clubs emerge from the bush. He thought that tribal clashes had started and therefore immediately ran for his dear life. He ran for some distance and when he stopped was arrested by the police, taken to Suswa Police Post and later to Naivasha Police Station he was beaten and later charged with the robbery offences. He denied that he had in any way been involved with the said robbery.

The duty of the first appellate court in criminal cases is to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellants. 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 (See **Njoroge –vs- Republic [1987] KLR 19**). Having re-evaluated the evidence adduced and considered the submissions made by the appellants and by the State, the issue for determination by this court is whether the prosecution adduced sufficient evidence to enable the charges against the appellants to be proved to the required standard of proof beyond reasonable doubt.

In this case, the evidence that was adduced by the prosecution to secure the conviction of the appellant were basically two fold; firstly the evidence of identification of the appellants by PW2, PW3, PW11 and PW10; secondly, the evidence of the recovery of the pistol which was allegedly used to kill the driver of the lorry. The only eye witness to the fatal shooting of the deceased was PW2. He testified that they were approached by two men whom PW2 later identified to be the appellants and requested to be given a lift to Naivasha when the deceased stopped the lorry to check its tyres. The deceased acceded to

the request by the appellants for a lift. From the evidence adduced in court by the witnesses, the time span between the time when the two men boarded the lorry and the time the lorry was hijacked and the deceased shot was not stated. However all the witnesses testified that the incidents on the material day took place during day time. PW2 testified that they gave the lift to the appellants at midday. It was therefore in broad daylight. The two men boarded the front cabin of the lorry.

PW2 was therefore seated in close proximity to the two men. He testified that he was able to identify them by their facial appearance and by their physique because he was in close proximity with them. Although he later testified that he was blindfolded and tied with ropes by the appellants, this was after he had witnessed the deceased being shot dead by the 1st appellant. PW2 pointed out the appellants in an identification parade which was conducted by PW14, a day after the appellants were arrested. This was a day after the robbery incident.

There is no evidence to suggest that the police identification parade was irregularly conducted. The submission by the appellants that the same people were placed in the identification parade whereby PW2 was able to identify them is without merit. There is no evidence that PW2 saw the appellants prior to the conduct of the said identification parade by PW14. The evidence of the prosecution witnesses particularly PW9 clearly indicate that PW2 did not have any contact with the appellants after he escaped from the place where he was dumped after the robbery ordeal. We have no doubt that PW2 positively identified the appellants as the robbers who hijacked them after they had been given a lift by the deceased. PW2 further narrated in detail the role each of the two appellants played in the robbery and in the subsequent fatal shooting of the deceased.

The evidence of PW2 on identification is corroborated by the evidence of PW4 who saw the appellants drive the stolen lorry into his sand harvesting site, dump PW2 (*whose hands were bound*) and likewise saw the appellants remove the body of the deceased from the lorry and bury it in a shallow grave. PW4 recalled how he saw the appellants run away from the scene when the Masai herdsmen in company of PW3, PW7, PW10 and PW11 arrived at the scene. PW10 and PW11 corroborated the evidence of PW4 when they testified that upon arriving at the scene, they saw the appellants running towards their direction but when challenged to stop, they shot at PW10 and PW11 with a pistol. PW10 and PW11 returned fire. The appellants then ran away. PW10 and PW11 chased them for some distance until they arrested them. From their evidence, it is apparent that PW10 and PW11 did not lose sight of the appellants when they were chasing them and managed to catch up with them when they became exhausted. Although the appellants split when they were escaping from the scene where the body of the deceased was found, PW10 and PW11 separately managed to chase them and arrest them.

The evidence adduced by the prosecution witnesses therefore gives an unbroken narration of the chain of events as they took place from the time the deceased gave the lift to the appellants, to the time the appellants hijacked the lorry and killed the deceased, to the time the appellants drove the said lorry to the sand harvesting site owned by PW4, to the time they were chased and arrested by PW3, PW10 and PW11 and to the time they were arrested by the police and taken to Naivasha police station.

The evidence adduced by the prosecution was overwhelming and was not dented by the alibi defence which was offered by the appellants and which could not exonerate them from the charges that they faced. In fact the alibi defence offered by the appellants places them at the scene where the robbery took place and where the body of the deceased was recovered after the robbery incident and the fatal shooting of the deceased. In the circumstances of this case, we find no merit whatsoever with the submissions made by the appellants that they were not properly identified by the prosecution witnesses. We therefore disallow their appeals.

We are not satisfied with the evidence adduced by the prosecution connecting the appellant with the pistol which was found in possession of the appellants co-accused in the trial before the subordinate court who was convicted for a lesser charge of simple robbery. The evidence adduced by the prosecution witnesses clearly points to the fact that the said pistol was recovered in possession of the appellants co-accused and not the accused. From the evidence adduced by PW10 and PW11, the pistol which was in possession of the appellants was thrown in the bushes by the appellants when PW10 and PW11 were in

their hot pursuit. However, our finding as regards the recovery of the pistol does not in the final analysis alter our finding that the appellants were properly convicted for the four counts of robbery with violence and being found with a firearm and ammunition without a licence. We therefore hold that the appeals filed herein lack merit and we consequently dismiss them.

The convictions of the appellants by the trial magistrate are hereby confirmed. The sentences imposed on the appellants are similarly confirmed. It is so ordered.

DATED at NAKURU this 10th day of May 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE