



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1127 of 2002

*(From Original Conviction and Sentence in Criminal Case No 161 of 2002 of the Chief Magistrate's Court at Thika – Betty Rashid, P. M.)*

KWAME OWINGO OUGO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **KWAME OWINGO OUGO** was charged with one Count of **robbery with violence contrary to Section 296 (2)** of the **Penal code** and also one count of **being in possession of an imitation Firearm contrary to Section 34 (1) of the Firearms Act** before the Chief Magistrate's Court at Thika. His trial commenced before the Principal Magistrate (Betty Rashid) on 16<sup>th</sup> May, 2002. The Prosecution called a total of eight witnesses to testify.

The facts of the case appear fairly simple and straight forward in that the Complaint (PW1) an army officer was on 29<sup>th</sup> December, at about 6.30 p. m. on his way home to Lang'ata Barracks from Kahawa barracks. He was driving motor vehicle registration number KAN 708K Toyota Corolla Station Wagon. On reaching Githurai round about along Nairobi – Thika Highway he encountered a Traffic Jam as the Matatu's had blocked the road. He slowed down and stopped where upon he saw 2 people at his window. One showed him a pistol and the other was trying to open the door as he ordered to do so as well. The one with the pistol managed to open the door and using the pistol, stabbed him in the left eye thereby piercing it. He was then pushed in the co-drivers seat. PW1 then pushed the person with the pistol and both of them fell out of the motor vehicle. The person with the pistol then woke up and starting running away. In the meantime his colleague entered the motor vehicle and drove off. As all these was going on matatu touts and other members of the public who were present at the round about including PW5 and PW6 and witnessed the incident pursued the person with the gun and managed to arrest him about 100 metres from the scene. Upon arrest and search he was found with what appeared like a pistol. He was then handed over to P. C. James Mwaniki PW3 at Githurai Police station. The alleged pistol was subjected to ballistic examination and was found to be an imitation firearm. In the meantime due to the injures sustained by PW1, he was admitted in hospital for one week, operated upon and the injured eye removed. Subsequent thereto he was issued with a P3 Form that was duly completed by PW2 who classified his injures as grievous harm.

According to PW1, the person who confronted him with the imitation forearm, actually a toy pistol was the Appellant herein. He was able to identify the Appellant because he was at the door and very close and therefore saw him properly as it was during the day. When PW1 came out of hospital he was summoned to an identification parade conducted by PW8 in which he was easily able to pick out the Appellant in the parade. The Complainant's motor vehicle was recovered by PW7 on the same day of the robbery

somewhere in a coffee plantation past Kenyatta University. The Appellant was then charged with the instant offences.

Put on his defence, the Appellant in an unsworn statement of defence testified that he stays at Githurai where he sells mandazis. On the material day he closed business at 7 p.m. and met with one Mohamed who told him that the Chief wanted to see him. He proceeded to the Chief's place where he found the Complainant herein whom he did not know then. He was then told that he was going to be charged with this offence.

The Learned trial Magistrate considered the evidence adduced by the Prosecution, the defence put forth by the Appellant and came to the conclusion that the Appellant was guilty on both counts. She then sentenced the Appellant to suffer death as prescribed by the Law in respect of count one and ten year's imprisonment in respect of the second count.

The Appellant being dissatisfied with trial Magistrate's findings preferred this Appeal. The Appellant faulted the Learned Magistrate for convicting him on identification evidence that was not positive, relying on the evidence of the chase and subsequent arrest of the Appellant which evidence was inadequate and or inadmissible, reliance on the recovery of the toy pistol and failure to consider that nothing incriminatory was recovered from the Appellant at the time of his arrest.

In support of these grounds in his petition of Appeal, the Appellant tendered written submissions that we have carefully read and considered.

The Appeal was opposed. Mrs. Gakobo, Learned State Counsel in opposing the Appeal and supporting both the conviction and sentence submitted that on identification, it was evident that the offence was committed at 6.30 p. m. and PW1 was able to see the Appellant clearly and the role he played in pursuit of the offence as he was very close to him. PW1 was thus able to notice his appearance and was subsequently able to identify the Appellant at an identification parade properly conducted by PW8. Counsel also referred to the evidence of PW5 who was an eye witness to the incident and was among the members of the public who gave chase and managed to arrest the Appellant. According to the Learned Counsel, the Prosecution evidence was watertight and cannot be challenged. On the insufficiency of evidence proving that the Appellant committed the offence, Counsel submitted that the Prosecution evidence proved the ingredients of robbery with violence. There was the evidence of PW2 who examined PW1 and classified the injuries suffered by the complainant as grievous harm. That evidence alone, Counsel submitted was sufficient to justify a conviction for the offence of robbery with violence. As to whether or not the Appellant's defence was considered by the Learned Magistrate, Learned State Counsel submitted that the defence was duly considered by the trial magistrate before it was rejected.

In brief reply to the Learned State Counsel's submissions, the Appellant submitted that the evidence of PW1 and PW5 as to whom they saw was inconsistent. That PW1 said he saw 2 people whereas PW5 said he saw 3 people.

It is a requirement that as the first Appellate court handling this Appeal, we must subject the evidence tendered in the trial Court to fresh appraisal and evaluation so as to reach our own independent conclusion as to the guilt or otherwise of the Appellant. In doing so we must give due allowance for the fact that the we neither saw or heard the witnesses as they testified. See **OKENO VS REPUBLIC (1972) EA 32.**

To our mind this Appeal really turns on the issue of identification of the Appellant at the scene of crime. All the grounds of appeal raised in the petition of appeal by the appellant coalesce around the issue of identification. Dealing with this issue in the course of her Judgment the Leaned trial Magistrate stated:-

***“.....This Court has carefully considered all the evidence on record and noted that this incident occurred at about 6 p. m. when it was still light and the Complainant identified him as he (accused) tried to gain entry into his motor vehicle but PW1 managed to repulse him and pushed him outside. But not until the accused person had poked the eye of the Complainant twice thereby gorging it out.***

***PW5 an eye witness and a matatu conductor at Githurai..... Saw accused person in the m/v of PW1 poking PW1 with a gun-like object. When members of the public shouted “thief” many times PW5 saw accused try to flee he (accused) was pursued and arrested and handed over to PW3 together with the pistol.....”***

We agree with this analysis and evaluation of the events of the day. The incident happened at about 6.30 p. m. according to the recorded evidence. There is no suggestion by the Appellant either in the cross-examination of the witnesses or in his defence that it was dark and therefore need to have light if there was to be any positive identification of the Appellant. Indeed PW1 was forthright in his testimony that he saw the Appellant properly ***“as it was daytime”*** This fact was not disputed at all. It is a requirement in matters of identification that the Court also makes inquiries as to the time that the witness may have kept the accused under observation as to be able to positively identify him subsequently. This was unfortunately not done in the instant case. However on our own evaluation of the evidence, we are satisfied that the incident did not happen suddenly. PW1 had stopped in the traffic jam when he saw 2 people at his window. One showed him pistol like object as the other tried to open the door and letting him to open the door as well. Apparently PW1 had closed all the windows. Eventually when one of the appellant managed to open the door a struggle ensued between him and PW1. The Appellant hit him first with pistol like object before using the same to pierce his eyes. Despite this injury PW1 still managed to struggle with the Appellant and pushed him outside the vehicle. In our Judgment as the incident did not happen so suddenly, PW1 had sufficient time to observe the Appellant whilst he struggled to open the door of the vehicle and as they struggled before and after he was pierced with a pistol like object.

The Appellant argues that brevity of the attack was such that PW1 could not have been in a position to identify him. Yes, the attack no doubt was extremely brutal and led to PW1 loosing an eye subsequently. However as we have already observed the violent attack was not to immediate. It took sometime. It was during the day. We are satisfied as indeed was the trial court that PW1 was in a position to positively identify the Appellant.

When the Appellant was pushed out of the motor vehicle by PW1 they both fell down. The Appellant then stood up and ran away. Members of the public who had witnessed the incident shouted “thief” many times whilst pursuing him. Among the members of the public was PW5. They pursued him for about 100 metres and managed to arrest him. Upon arrest, the Appellant was searched and a pistol like object recovered. There is no suggestion in the recorded evidence that during the chase the members of the Public ever lost sight of the Appellant or that there were other impediments in the way that could have interfered with the view of those who were chasing the appellant. It has been held that:

***“.....The identification of a person who took part in the alleged offence and was chased from the scene of crime to the place where he was arrested is ofcourse strong evidence of identification and if all links in the chain are sound, it may be safely relied upon.....”***

See ***ALI RAMADHAN VS REPUBLIC, CR. APPEAL. NO. 79 OF 1988 (unreported)***. We have no doubt at all that from the time the Appellant confronted PW1 to the time he was pursued and eventually arrested were broken. When the Appellant was eventually arrested he was found in possession of the pistol like object which turned out to be a toy pistol. Although the Appellant does not directly deny possession of the toy pistol, however by his alibi defence, he does so. However the evidence of PW5 and PW6 counters that denial. The two witnesses all stated that the Appellant when arrested had in his possession a toy pistol. It has not been suggested that the two witnesses had a personal grudge against the Appellant as would have acted as an incentive for them to frame the Appellant with the case. In any event the sequence of events is such that they militate against the theory that the Appellant could have been framed. The toy pistol is used in the robbery. Before the Appellant and his cohort could drive off with PW1’s motor vehicle, he is wrestled to the ground and ejected from the vehicle by PW1. He is then pursued and when arrested he is found in possession of the toy pistol. Is this coincidental? We do not think so. In our view the evidence of PW5 and PW6 sufficiently corroborates the evidence of PW1 on the issue of identification of the appellant with particular regard to the toy pistol.

The Appellant on 14. 1. 2002 underwent an identification parade in which he was positively identified by

PW1. However, the Appellant faults the identification parade on the basis that PW1 had seen him at Githurai Police Station prior to the identification parade. In our Judgement this allegation is an afterthought. He never raised the issue in his cross-examination of PW1 nor his defence. Further in his own defence the Appellant suggests that he found the Complainant at the chief's office on the same day of the robbery. However this cannot be true as from the recorded evidence, following the incident, PW1 was taken to hospital where he was an in-patient for one week. Infact he was operated upon and the left eye removed on the very same night of the robbery. Consequently it could not have been possible for PW1 to have been at the Chief's office at the time and date alleged by the Appellant in his defence. This is the only evidence which tends to show that the Appellant was exposed to PW1 before the identification parade. However we have discounted the same as incredible. In our view the identification parade was properly conducted.

The Appellant also raised the issue as to the sufficiency of the evidence to sustain the charge of robbery with violence. As stated in the case of **JOHANA NDUNGU VS REPUBLIC, CRIMINAL APEAL NO. 116 OF 1995 (unreported)** there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under Section 296 (2) of the Penal Code. If the offender in the course of robbery is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if the offender is in the company with one or more other one or more other persons that would constitute the offence as well. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or used other violence to any person that would be yet another set of circumstances to constitute the offence. In the circumstances of this case, the prosecution was able to prove all the three ingredients of the offence. The Appellant was a armed with a dangerous weapon a pistol like object which turned out to be a toy, he was in the company of other persons and he visited violence on PW1 by piercing his left eye which was subsequently removed following an operation. The P3 Form produced in evidence by PW2 attests to this fact. Further the Complainant lost his vehicle and Kshs.17,000/= in the process though the motor vehicle was subsequently recovered vandalized. In our view we do not think that the Complaint by the Appellant that the evidence tendered against him by the prosecution was insufficient to sustain a conviction on the charge of robbery with violence has any merit and we reject it.

The Appellant did also raise the issue that when arrested, nothing incriminating was found on him. PW1 did not testify that in the course of robbery the Appellant stole from him. He nonetheless lost 17,000/= as well as his motor vehicle. What is certain is that the motor vehicle was driven away by the Appellant's cohort. The same person could have gone with the money. Perhaps that was why nothing incriminating could have been found on the Appellant on arrest.

Regarding his defence, we agree with the Learned State Counsel that the same was duly considered by the learned trial Magistrate and rightly rejected. In rejecting the Appellant's defence the Learned trial Magistrate delivered herself thus:-

***“.....The Court carefully considered the defence tendered by accused person that he was asked by Mohammed to go to Chief's camp where he met PW1 and he was informed of his charge and dismiss it for lack of merit..... Its inconcievable that he would have been summoned to the Chief's camp and arrested for no apparent reason....”***

We agree with this reasoning and wish to add that could the said Mohammed have been the same Mohammed Salim Said PW5? If so what a coincident?

On second count, there is overwhelming evidence that the Appellant was upon arrest found in possession of the toy pistol. Further the Appellant had been seen with the toy pistol by PW1. The toy pistol recovered was examined by a firearm examiner who formed the opinion that the toy pistol was an imitation firearm in terms of the Firearms Act. The report of the examining office was tendered in evidence exhibit 5 by PW4. We think that the conviction of the Appellant on this count cannot be faulted at all.

We wish finally to comment on sentence. The Appellant was sentenced to death on the 1<sup>st</sup> count and ten

years imprisonment on 2<sup>nd</sup> count. Once the trial Magistrate imposed the death sentence in respect of the 1<sup>st</sup> count, she should have left in abeyance the sentence in respect of the 2<sup>nd</sup> count for once a person has been sentenced to die there can be no sense in imposing on him a prison term. The long practice which we are aware of is that once a sentence of death is imposed, the other counts are left in abeyance so that if there was a successful Appeal on the count on which the death penalty has been imposed, the Court dealing with the Appeal would consider all the counts and if necessary, impose the appropriate sentence on the Court on which the Appeal is not allowed. In the premises we shall order that the sentence of 10 years imprisonment be kept in abeyance.

The upshot of the foregoing is that this Appeal is dismissed in its entirety.

Dated at Nairobi this 6<sup>th</sup> day of May, 2006.

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**LESIIT**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**