



REPUBLIC OF KENYA

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

Criminal Appeal 1131 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 6925 of 2002 of the Senior Principal Magistrate's Court at Makadara (Mrs. Juma – PM)

MICHAEL LOPOYOK LUENA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

MICHAEL LOPOYOK LUENA was found guilty and convicted in all four counts for various offences under the **Penal Code** and **Firearms Act**. Count 1 and 2 was **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code, count 3 was **POSSESSION OF IMITATION FIREARMS** contrary to Section 34(1) of the Firearms Act and count 4 of **PERSONATING A PUBLIC OFFICER** contrary to **Section 105(5)** of the **Penal Code**. All four offences are alleged to have been committed on 23rd March 2002 at Soweto Village in Nairobi. The Appellant was sentenced to death in counts 1 and 2 and to 3 years imprisonment in count 3 and 1½ years imprisonment in count 4 with the imprisonment terms running concurrently and with an order that they be served before the sentence in count 1 and 2 is served.

Before we delve into this appeal we must mention once again that where a capital sentence is imposed no other sentence can be ordered to be served whether before or after the Capital sentence. What the learned trial magistrate ought to have done in this case was to order a death sentence in count 1 and suspend the rest of the sentences in counts 2, 3 and 4.

Turning back to the case, the Appellant raised three grounds of appeal. The first ground was that the offence of **ROBBERY WITH VIOLENCE** was not proved to the required standard. The second ground was that the charge was defective. Both of the grounds were raised in support of counts 1 and 2. Finally that there was sufficient doubt raised in the case to secure his acquittal.

In brief the facts of the prosecution case were that the Appellant had at Makadara area boarded a Matatu Registration No. KAN 512 H, ISUZU, traveling from city centre towards Kayole. On reaching Soweto Village, the Appellant alighted and hand-cuffed the first Complainant PW1, on the grounds that he was harassing passengers. The Appellant also hand-cuffed PW2, the Complainant in the second count for the same reason. The two Complainants decided to negotiate with the Appellant to give him a bribe in order to secure their release. PW1 offered Kshs.50/- while PW2 offered Kshs.200/-. The Appellant refused saying he wanted at least Kshs.500/-. At the same time he walked with the two Complainants saying he was taking them to the police station. At some point the Appellant showed the two a gun-like object. However, on reaching Soweto/Embakasi junction they met with Police Officers including PW3. After interrogating the Appellant they suspected that he was not a police officer. They therefore arrested

him. From him they recovered the money taken from the two Complainants, Kshs.250/- and a toy pistol.

The Appellant in his defence said that he was walking to Kayole at 7.50 a.m. when he met four people. That he was stopped. He was searched and Kshs.10,280/- he had in his pocket was taken away from him together with his employment card showing he worked for Wellsfargo Security Firm. That when he insisted on getting back his property he was beaten and taken to Buru Buru police station. At the station he found the Complainants and some exhibits, a toy pistol, cash Kshs.250/-, hand-cuffs and a photo. Eventually he was charged.

We have carefully analyzed and evaluated afresh the evidence adduced before the lower court while bearing in mind that we neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32.**

The facts of the prosecution case were disputed by the Appellant who gave a totally different version of the case. Faced with the two versions the learned trial magistrate, after analyzing the entire evidence adduced before her found that the prosecution witnesses were truthful and believed them. As we started by stating that we did not have the benefit of seeing the demeanour of the prosecution witnesses and of the Appellant, the learned trial magistrate had that benefit and on weighing the demeanour of all before her against their evidence, believed the prosecution case. The learned trial magistrate cannot be faulted in her assessment of the demeanour of those who appeared before her.

As for the offences before the Court, the learned trial magistrate ably addressed the evidence in regard to the last two counts. That is concerning possession of a toy pistol and of personating a Police Officer. The learned trial magistrate however failed to consider the ingredients of each offence.

MISS NYAMOSI for the State conceded the appeal in regard to the robbery with violence charges. Learned counsel simply submitted that the ingredients of the offence were not made without elaborating. We agree that the ingredients of the offence were not met. For the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** can only be committed by one person if the prosecution adduces evidence to prove that he stole while armed with a dangerous or offensive weapon. In this case, the Appellant was armed with a toy pistol. A dangerous or offensive weapon has been interpreted to mean an object or instrument which can be used to cause injury or harm to another or which can be adopted to cause such injury or harm. The toy pistol cannot be put to either use by any stretch of imagination. The two charges were therefore not proved.

As for the offence of being in possession of an imitation firearm, under **Section 34(1)** of the **Firearms Act** the offence is committed if a person “***makes or attempts to make any use of a firearm or an imitation firearm*** with intent to commit any ***criminal offence.***”

The offence is committed where the person charged makes use of or attempts to use a firearm or imitation firearm for purposes of committing any criminal offence. The evidence of PW2 was that the Appellant had a pistol-like object, identified as exhibit 1. PW1 did not refer to it at all in his evidence but PW2 did. PW2 said that the Appellant showed them the object as they negotiated the amount of money the two Complainants were to pay him in order to secure their release. What was the motive of using the imitation firearm? It appears that from PW2's evidence, the imitation firearm was intended to convince the two Complainants of two facts. One, that the Appellant was a Police Officer and two that they had to part with more money otherwise he was going to take them to the police station. The prosecution successfully proved that the Appellant had a criminal intention when he showed off the imitation pistol to the Complainants. There was no need to adduce the evidence of a ballistic expert to prove that the imitation firearm in court was actually an imitation as the Appellant submitted. Count 3 was therefore proved.

As for count 4 of impersonating a public officer, as learned trial magistrate found, that count was successfully proved. The Appellant had hand-cuffs and keys to open the hand-cuffs. He also used the hand-cuffs on both Complainants passing off as a Police Officer who had arrested both of them. PW3 and his 2 colleagues were able to disapprove the Appellant's claim when it was discovered that he was

actually not a Police Officer at all. We are satisfied that this charge was proved as required in the law.

Having considered this appeal we agree with learned counsel for the State that counts 1 and 2 were not proved. We allow the appeal in respect of both counts, quash the conviction and set aside the sentence.

On the appeal against the third and fourth counts, we find no merit in the same. We uphold the convictions for both counts. The sentences imposed for both counts are quite fair and we do not wish to interfere with them. We confirm the sentences of 3 years imprisonment in counts 3 and 1½ years imprisonment in count 4 with prison terms running concurrently from the date of original sentence.

Those are the orders of the Court.

Dated at Nairobi this 13th day of June 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Nyamosi for State

CC: Tabitha/Erick

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LESIIT, J.

JUDGE

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MAKHANDIA _

JUDGE