REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1087 OF 2002
(From original conviction(s) and Sentence(s) in Criminal Case No. 3857 of 2001 of the Senior Principal Magistrate's Court at Kiambu (J. Ondieki – S.P.M.)

JAMES MWANGI NJOROGE…..……..……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant **JAMES MWANGI NJOROGE** was convicted of one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. He had not guilty to the charge. He was sentenced to suffer death as mandatorily provided in the law. Being dissatisfied with the conviction and sentence he lodged this Appeal.

Initially the Appellant had filed a Petition of Appeal in which he raised seven grounds of Appeal. On the day of the Appeal, the Appellant filed amended supplementary grounds of Appeal and these are the ones he relied upon in this appeal. Having perused both the Petition of Appeal and Grounds of Appeal, we are satisfied that the issues raised in both are similar. We have set herein below the amended grounds of appeal.

1. That the trial magistrate seriously erred in law and fact to uphold that the Appellant was arrested after a chase without conclusive evidence.

2. That the learned trial magistrate equally erred in law and fact by failing to appreciate that the prosecution had not discharged its onus of proof against the Appellant.

3. That the learned trial magistrate gravely occasioned a miscarriage of justice by failing to make any reference to the Appellant's defence in his judgment.

The prosecution case was that the Complainant was inside his wholesale shop, 'Ngotho Stores' at Kwa Maiko at 9.00 a.m. when a customer, Kabando Kimani who was PW3 in the case went in there. As PW3 made his order, two men entered the shop. The Complainant described one as dark while the other one was of brown complexion. The Complainant said that the dark man went straight to him while the brown man stood behind PW3. The dark man had a sword and he ordered him to give him his mobile phone which he immediately surrendered to him. He also asked the Complainant where the money was before ordering him and his customer to lie down. The dark man took the money inside the counter. The Complainant described the attacker's accomplice as a brown man, who produced what looked like a pistol. That he threatened to shoot. He ordered PW3 to lie down. That as they were being robbed, one KARUME's vehicle came. The Complainant said he could identify it by its sound. That it always delivered cigarettes to him and it was always escorted by armed Administration Policemen.So on hearing

it, the Complainant started screaming and shouting “thief, thief”. That the two robbers looked confused and asked loudly, “God, what shall we do?” That the dark man ran out first. The brown man ran out of the shop later. PW2, the AP who came in the cigarette van, saw the brown man run out of the shop as the Complainant shouted *“thief, thief”*. He immediately chased him while his colleague guarded the shop and the van. The Complainant also gave chase and so did members of public. They were able to corner the brown man whom PW2 arrested. PW2 said he did not loose sight of him from the time he ran out of the Complainant’s shop to the time he arrested him. The Complainant PW1, the AP, PW2 and Complainant’s customer, PW3, all identified the arrested man as the brown man who had had what looked like a pistol. He was identified as the Appellant. The “pistol like” object he had was recovered from him. It was exhibit 1. He had used it to threaten members of public. PW4, the Investigating Officer produced the firearms report which certified that the object recovered from the Appellant was a home made gun which was incapable of being fired but which was a firearm in terms of the Firearms Act. The report was exhibit 2.

In the Appellant’s unsworn defence, he denied the charge. He said that he had a shop and on the day in question the Complainant went to him and informed him that he owned the shop and that he intended to take it over. That he argued with the Complainant because he resisted the Complainant’s bid. That later, on same day the Complainant went back with 2 APs and 3 men and forcefully ejected him, beat him up and alleged he had stolen from somebody. That was how he was arrested.

We have re-evaluated the evidence adduced before the trial court

. In his oral submission before the court, the Appellant raised an additional issue which was a legal one, that the charge was not supported by the evidence. It was his contention that the particulars of the charge indicated that the offence took place at Kwa Maiko shopping centre and that the offenders were armed with swords and toy pistol. That in his evidence the Complainant stated that his shop was at Ngewa Trading Centre. That the report produced by PW4 indicated a home made gun was produced.

On the issue of the charge, M**ISS NYAMOSI**, learned counsel for the State submitted that she was convinced that the charge proved against the Appellant was not the one charged but **SIMPLE ROBBERY** contrary to **section 296(1)** of the **Penal Code.**She submitted that since the weapon the Appellant had during the robbery was a home made gun and not a toy pistol, then the charge ought to have been reduced to simple robbery.

On the issue of the evidence not supporting the charge, we do not find the issue of the name of the place where offence took place to be material. This is more so on the grounds that PW2 and 3 described the place as Kwa Maiko. Only the Complainant referred to the place as Ngewa. We find that there was an inconsistency in the evidence of Complainant on one hand and PW2 and 3 on the other. However, particulars of the charge, found support in the evidence of PW2 and 3. The inconsistency does not, in our view, go to the substance of the charge and is therefore disregarded. On the issue of toy pistol vis-à-vis a home made gun, this cannot be considered in isolation but must go hand in hand with what constitutes an offence of Robbery with Violence unde**r Section 296 (2**) of the **Penal Code.** In dealing with this issue, the issue raised in the submission by **MISS NYAMOSI** will be covered.

It is trite law that the offence of **ROBBERY WITH VIOLENCE** under **Section 296(2)** of Penal Code specifies three modes or ways in which the offence, created by that section, can be committed.

These modes are;

(a) If the offender is armed with any dangerous or offensive weapon or instrument; or

(b) If the offender is in company with one or more other person or persons; or

(c) If, at, or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other personal violence to any persons.

See **ALUOCH vs. REPUBLIC 1985 KLR 549.**

MUIRU KARANJA & ANOTHER vs. REPUBLIC

C.A. No. 271 of 2002 (Mombasa).

From the evidence adduced by the prosecution, this case falls under category (a) and (b) and the particulars of the charge clearly brought this out. Even though the expert report described the weapon recovered from the Appellant as a home made gun, and the charge describes it as a toy pistol, that alone does not render the charge defective as the Appellant alleges or unproved, as learned counsel for the Respondent suggests. We hold that the evidence adduced establishes the fact that the Appellant was in company of another person, who escaped before arrest, and that both were armed with a sword. A sword is a dangerous and offensive weapon and was correctly described in the particulars of the charge

As to the submission by the learned counsel **MISS NYAMOSI,** we have set out herein above what constitutes the charge of Robbery with Violence contrary to **Section 296(2)** of **Penal Code**. We now wish to set out what constitutes the charge of Robbery contrary to **Section 296(1)** of the **Penal Cod**e. In **OLUOCH vs. REPUBLIC (Supra) CHESONI, NYARANG**I and **PLATT Ag. JJA, h**eld in an Obiter

"The ingredients of the offence of robbery under section 296(1) of the Penal Code are: -

i) stealing anything and

ii) at or immediately before or immediately after the time of stealing

iii) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained".

The ingredients of the offence of Robbery contrary to **Section 296(1) of Penal Cod**e are conjunctive as opposed to those unde**r Section 296(2) of Penal Cod**e which are not taken conjunctively. In addition, the charge under Section 296(1) makes no reference to weapons used or the number of offenders involved. Quite clearly therefore, where a weapon or weapons are used, or where more than one offender is involved, the offence committed in such circumstances clearly falls under **Section 296(2)** of the **Penal Co**de. For the above reasons, the Appellant's submissions, about the particulars of the charge not being supported in evidence and further, that the evidence adduced did not support the charge is without merit. **MISS NYAMOSI**'s submission that the offence proved in is only that of simple robbery is also incorrect, in the circumstances.

Turning now to the grounds raised in the Petitions of Appeal filed, all the Appellant said in the first two grounds, is that the evidence of identification was questionable and that the prosecution did not prove its case as required by the law. We shall consider both grounds simultaneously.

We have re-evaluated the evidence adduced before the trial court at great length. On the issue of arrest after a chase, as alluded to in the first ground, the evidence of PW1, 2 and 3 in this case were very clear. Each witness gave evidence from the point of view of how they saw the events unfold before them. So PW2, one of the AP's who came to PW1's shop as the robbery was in progress was outside the shop. What he saw was just one man run out, then he heard shouts of "thief, thief" as a second man ran out of the shop. The second man was identified as the Appellant. He ran to a different direction from the first one. Immediately on hearing and seeing what he heard and saw, it was PW2's evidence that he embarked on chasing the Appellant. He explained that he could not fire at the Appellant due to presence of other members of public. However, he says he followed him without loosing sight of him until the point that the Appellant was cornered by members of public.

The evidence of PW1 and 3 was similar. Their evidence corroborates PW2's evidence, that the Appellant was the second (and last) person to run out of the Complainant's shop. They all corroborate

each other that the Appellant was armed with a pistol-like object and that he used it to threaten PW1 and PW3 and later members of public as he attempted to escape arrest.

We find that there was both direct evidence against the Appellant and that PW1, 2 and 3 positively identified him at the scene of this incident, as one of two people who robbed the Complainant. There was circumstantial evidence against him not just that of running away from the scene but also being found with the pistol, exhibit 1, which both PW1 and 3 identified had been used in the robbery. We therefore, agree with the learned trial magistrate's finding that the Appellant was properly identified as one of those who robbed the Complainant in this case. We find that the prosecution proved its case against the Appellant beyond any reasonable doubt.

On the last ground raised, that the Appellant's defence was not given due consideration, we have perused the learned trial magistrate's judgment. At page 5 of the Judgment, the learned trial magistrate clearly summarizes the Appellant's defence. Next, the learned trial magistrate considered that defence in totality with the rest of the evidence adduced before her and concluded that she could not believe the Appellant, and that the Prosecution evidence against him was overwhelming. We cannot fault the learned trial Magistrate's finding. We find that she gave due consideration to the Appellant's defence.

We have gone further and considered it afresh, as we are enjoined to do as the first Appellate Court. We find the Appellant's defence was clearly an afterthought. The alleged quarrel he had with the Complainant and which happened on the day before his arrest was never raised during the Complainant's cross-examination. The Appellant also alleged that those Police officers who arrested him went to his (Appellant's) shop accompanied by the Complainant. No such a question was put to PW2, the sole arresting Officer. Neither did he cross-examine PW4, the Investigating Officer over that issue. Even though the Appellant needed not prove his innocence, the defence he gave did not in anyway raise doubts as to the credibility of the Prosecution witnesses or their integrity, character and propriety, as the Appellant intended. We are satisfied that the learned trial magistrate came to the right conclusion in this matter and the same cannot be faulted.

Accordingly we find that the Appeal lacks in merit and is dismissed. The conviction is upheld and the sentence confirmed.

These are the orders of the court.

Dated at Nairobi this 27th day of January 2005.

LESIIT **F. A. OCHIENG'**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

Ms. Nyamosi for Respondent

Appellant in person

C/C: Muia/Ode**ro**

LESIIT F. A. OCHIENG'

JUDGE