



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL 62 OF 2003
DEGOW DAGANE NUNOW.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, Degow Dagane Nunow, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

He also faced two other counts of possession of a firearm and possession of ammunition contrary to section 89(1) and S.89(2) of the Penal Code, respectively. He was convicted of all the three counts and sentenced to death on the count of robbery with violence and to a prison sentence of 10 years in respect of each of the counts of possession of a firearm and possession of ammunition, respectively, the latter two sentences to run concurrently. He appealed against the convictions and the sentences in respect to all the three offences.

The prosecution facts were as follows: The complainant, Mohamed Ali Bilali, Pw1, was at his shop in company of his wife Batula Ali, Pw2, on 14.10.2000, at about 7.30 p.m. They were waiting for potential purchasers of their shop goods when the appellant who was well known to them before, appeared and asked for sugar to buy. As complainant prepared to serve him, appellant is said to have removed G3 gun from inside his long jacket and pointed it at the complainant and his wife whom he ordered to lie on the floor. At that moment two more men entered the shop, one of them also armed with another gun. One of them entered inside the shop- counter as the other closed the door to the shop. Appellant is said to have pulled off the complainant's wristwatch of Casio make valued Kshs.1050/= and stepped on the complainant's feet as complainant faced the floor. He then stole Kshs.5000/= from the sales cash box, after which they drank soda and milk from the shop. Appellant demanded for more money as he assaulted the complainant on the head using the gun butt, as a result of which complainant fainted.

The whole incident took about 30 minutes before the three assailants left the shop when the neighbours who had become aware of the incident, threw stones to the complainant's shop. That is when the appellant discharged his firearm twice into the air before he and the other attackers disappeared. The neighbours who included the area chief then visited the complainant's house. The chief helped the complainant to report the incident to the District Officers Camp from where the Administrative Police Officers came and investigations started as the police started tracking the assailants. On 1.11.2000, complainant saw the appellant in town but when he went to seek help from the home guards the appellant is said to have disappeared. On 9.12.2000 the appellant was arrested in a Manyatta by the police whom the complainant had directed there.

The above facts stated by complainant, were in particular details, corroborated by complainant's wife, Batula Ali, who testified as Pw2. The witness had testified that she had observed the assailants as they went about collecting shop goods and placing the same in a sack. She witnessed as her husband's watch and money amounting to Kshs.30,000/= were being forcefully taken away from him by the appellant. The money was intended for the purchase of a camel for slaughter. They took away the day's sales cash from her amounting to Kshs.5000/=. She saw her husband bleed from the injury inflicted on him with a gun butt by the appellant. She later saw people come to help them, including the area Chief who was a neighbour, after the attackers had escaped. She confirmed also that after the robbery the incident was reported to the police and that they never stopped looking for the attackers. When police identification parade was staged, she identified the appellant as one of the attackers who had pointed a gun at them and who removed the Kshs.30000/= from her husband's pocket.

Other evidence came from Pw3, IP. Peter Njoroge who was then stationed at Garissa Police Station. He was at the station at 9.30 a.m. on 18.12.2000 when he was requested to conduct a police identification parade in respect of the appellant as suspect of robbery with violence. The witness was Batula Ali, Pw2 and wife of the complainant. Batula Ali was able to pick the appellant as one of the people who robbed them. The appellant did not raise any objections or register any protest in relation to the identification parade.

Senior Assistant Chief, Billow Bashir Adow testified that he was a neighbour of the complainant. On 14.10.2000 at about 8.30 p.m. he heard gun shots as he sat in his house. When he soon got information that the complainant had been robbed, he visited the complainant's house and found that the latter's shop had indeed, been robbed during which the complainant had lost Kshs.35,000/=. The Chief took the complainant to the Administrative Police Camp where a report was made and O.B. recorded. He informed the District Officer of the incident and thereafter the police were informed and asked to start investigations. Since the complainant had identified one of the attackers, and in particular, the appellant, efforts to arrest the latter had started. He further testified that complainant had pointed out the house of the appellant and had kept informing the witness complainant's efforts to track the appellant for the purpose of arrest. The chief further testified that the accused was arrested at a place called Bulla College. It was on arrest that the appellant admitted possessing a gun which was finally recovered at Bulume with the help and directions of the appellant. The firearm was found buried in an abandoned camel boma of appellant's brother. It was serial number 607012. According to this witness, the firearm was not surrendered in the process of an amnesty as claimed by the appellant.

Pw5, Sgt Mohamed Rage Bulle was an Administrative Police Sergeant who first received the robbery report from the complainant and Senior Assistant Chief Billow Bashir Adow. He testified that the complainant had reported recognizing one of the attackers and had sought help to have him arrested. He further testified that on 9.12.2000 the Assistant Chief reported to him that appellant who was the suspect had been seen at Bulla College at his house. Sgt. Mohamed Rage Bulle had then taken ten police officers in a motor vehicle G.K 851H to Bulla college where they arrested the appellant at his boma. Appellant revealed that he had a firearm but he first misled the police to Bakore area, but on 11.12.2000, the firearm was recovered at Manyatta, where it was dug from the ground in an abandoned camel boma. It had four rounds of ammunition. Its serial number was 607012. This witness also denied the appellant's claim that appellant had surrendered the gun in a firearm amnesty.

Pw7, P.C. John Shegu took over the investigation of this case from DCIO IP Mate on 12.12.00. He recorded statements from the witness and arranged for the gun and ammunition to be sent to the ballistic expert's headquarters for tests and for a certificate. He personally filled the exhibit memo and escorted the exhibits to Nairobi. He later received the ballistic expert's report and the tested and untested ammunition back and he produced the same in evidence, as exhibits 2, 3 and 4.

Upon the above prosecution evidence, the appellant was put on his own defence. He stated his defence under oath. His story concentrated on the firearm. He stated that the Ass. Chief Pw4 and the A.P Sergeant, Pw5 had visited him in his home where he had entertained them. That the issue of possession of a gun cropped up during their conversations and he got convinced that he should surrender a gun he had hidden somewhere during the then existing amnesty. That it was at night when the conversation took

place and he told the two to come in the morning for the gun, which they did. That the two and the appellant then went to Manyatta, at the home of his brother where they retrieved the gun and ammunition. That they then went to Garissa to surrender the firearm and ammunition at the D.O's office. The D.O. had then reported to the D.C. whom he asked to write a certificate of surrender. However, he continued, the certificate did not come forth as the D.C. was involved with relief food distribution. Appellant made several visits to the D.C's office in vain. That later the Chief and complainant went to him at Garissa and had him arrested by the police who later charged him with these offences. The appellant admitted possession of the gun and ammunition but blamed the Chief for betraying him over the firearms. He denied being arrested for firearm possession as such. He summoned the D.C. Garissa as his witness but the D.C. who testified for the defence denied knowledge of him or of any firearm and ammunition surrender as claimed by the appellant. He also called Dw3, Inspector of Police, Mohamed Osman to come and testify for him in respect of the surrender of the gun but, the latter denied any such knowledge.

The honourable trial Magistrate found no difficulty in convicting the appellant of all the three charges. He found the prosecution witnesses reliable and truthful. He examined the issue of identification of the appellant as one of the robbers and concluded that the conditions for positive identification of the appellant by, the complainant and his wife, were good and reliable. He accordingly relied on the prosecution evidence to convict the appellant after disbelieving the appellant's version of the story.

We have perused the evidence and have carefully considered the same. We note that the complainant pw1 and his wife Pw2, knew the appellant before the robbery, since 1987. The complainant confirmed in his evidence that the fluorescent electric bulb was on in the shop where they stood behind the counter. It is clear that when the appellant entered the shop he diverted the complainant's attention to the issue of selling him sugar. It is our view that in choosing to first talk to them, the appellant had given the complainant and his wife a good chance to look at him directly and without fear. Clearly, the witnesses did not expect an attack from the appellant but by the time he ordered them to lie on the floor, they had both observed him and recognized the man they had known for a long time. Thereafter it took a long 30 minutes for the appellant to stay in the shop as the two other robbers were collecting and packing into a sack, various shop items. Their evidence also, and there was no other evidence negating it, was that appellant took time to remove Kshs.30,000/= from complainant's pocket apparently with complainant's wife, Pw2, watching under the electric light. There is also the evidence from both the complainant and his wife that the appellant decided to directly command the other robbers to make a search and collect the days sales cash, which was under the control of complainant's wife, which the two did. All this time, the complainant and Pw2 had opportunity to observe the robbers as there is no evidence that they were ordered not to look at the attackers. What is more important, however, is that the two witnesses had already recognized the appellant and were thereafter aware of the person who was robbing them and who apparently from the evidence, was in charge of the robbery. In our view, therefore, it was not unlikely that the complainant would soon afterwards inform the Chief and the Administrative Police Officer the identity of the person who should be looked for arrest. It is in evidence of the complainant also that about two weeks later he saw the appellant in town but when he sought help to have him arrested the appellant had disappeared. It is in evidence further that the complainant worked hard to trace the appellant's whereabouts, including his homestead. When he succeeded, he is shown to have informed the Chief who also informed the A.P. Sergeant, Pw5, Mohamed Rage Bulle. There is further evidence from the complainant, the Ass. Chief and the A.P. Sergeant, that persistent effort was made throughout the period by the complainant to have the appellant arrested, which finally succeeded on 12.12.2000. That all these efforts were made, shows, in our view, that the complainant knew who he was pursuing for arrest. The evidence does not directly show that the name of the appellant was soon after the robbery, mentioned by the complainant. But that the complainant and those he reported the incident to, immediately appear to have struggled to trace the appellant points to the fact that the complainant must have mentioned the appellant as one of the attackers.

It is not clear from the evidence why the complainant was not summoned to the police identification parade to try and pick the attacker. However, the complainant's wife did, and it is shown that she easily picked out the appellant and the appellant raised no objection or protest. We hold that her evidence from the beginning corroborated that of the complainant that the appellant was leading the other two thieves to rob the complainant. There is evidence that they were carrying at least two guns, which no doubt, are

dangerous weapons. The appellant is shown to have used the gun, when pointing it at the complainant and his wife, to threaten the two to produce money or more money or he would use it against them. He had threatened to use it before, during and after he relieved the complainant and his wife of the Kshs.35,000 and the shop goods worth Kshs.20,000/=. In fact appellant used the gun butt against the complainant which made him bleed. It is our view and finding therefore, based on the evidence on record, that all the three ingredients provided under S.296(2) of the penal code, for robbery with violence were constituted during the appellant's and his colleagues attack.

We also considered the evidence of the G3 gun recovery at the Manyatta and what part it played in the proof of this offence with which the appellant was charged. The appellant's case was that he led the Ass. Chief and A.P. Police Sergeant to the place where the gun was hidden for the purpose of his surrendering the gun in compliance with a firearm amnesty. But careful consideration of the prosecution evidence proves that he, the appellant, produced or surrendered the gun and ammunition after being arrested, and in the manner of giving up the firearm after keeping it for a period before then. What we find important about this recovery of the gun and ammunition is the fact that the same turned out to be a G3 gun looking similar to the gun the appellant was said to have been wielding on the material night of the robbery. This piece of evidence fills up a small but important gap remaining to be filled. The evidence confirms, that the evidence of Pw1 and Pw2, that the appellant wielded a G3 gun, likely to be the gun that appellant eventually turned in, was true and therefore reliable.

And finally, in the analysis of the evidence in this case, there is adequate evidence that the appellant was in possession of the G3 gun, exhibit 2 and ammunition, exhibit 3.

He led the Chief, Pw4 and the AP Sergeant Pw5 to Manyatta and pointed out to the camel boma from which the gun was dug. He did not in his defence deny the possession. We have as well considered the manner the honourable trial magistrate handled the evidence touching possession before relying on it to convict and we are satisfied that he properly considered and acted on the same. We accordingly support the conviction which we hold was based on more than sufficient evidence and upon a well-reasoned out judgment. We find no legal ground upon which we can interfere with the convictions. For the above reasons this appeal must fail. It is dismissed as the convictions and the various sentences are confirmed.

We however note that the honourable trial magistrate failed to suspend the concurrent prison sentences on count II and count III of 10 years each. There is no way the appellant could serve the prison sentences if the death sentence in the robbery charge in count I was executed. We accordingly suspend the two prison sentences pending execution of the death sentence. It is so ordered.

Dated and delivered at Meru this 28th June, 2005.

D.A. ONYANCHA

JUDGE

RUTH SITATI

JUDGE.