REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 1124 OF 2001

(From original conviction (s) and Sentence(s) in Criminal case No. 1415 of 2001 of the Chief Magistrate's Court at Nairobi (B. Olao-C.M.)

DAVID KIARIE KAMAU……..…..……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant, DAVID KIARIE KAMAU was charged with ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. It is alleged as follows:

> *"on 23rd June 2001 at Muthurwa Estate in Nairobi jointly with others not before court being armed with dangerous weapons to wit pistols robbed SIMON KINYUA of Kenya shillings 2000/ - and at or immediately before or immediately after the time of such robbery used actual violence to the said SIMON KINYUA ".*

The Appellant was also charged with two other counts under the Firearms Act Cap 114 as follows: -

Count II BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE contrary to Section 4(2) (a) of the Firearm Act.

Count III BEING IN POSSESSION OF AMMUNITION WITHOUT A FIREARM CERTIFICATE contrary to Section 4(2)(a) of the Firearm Act.

The Appellant was tried and convicted in all these counts. In count I, he was sentenced to death as mandatorily required by law. In counts II and III the trial magistrate ordered the sentence to remain in abeyance without imposing any.

Being aggrieved by the conviction and sentence, the Appellant lodged this Appeal. He has pleaded five grounds of Appeal in his Petition and Amended Petition of Appeal. These can be summarized as follows: -

1. That the learned trial magistrate erred in law and fact by convicting on evidence of identification that was made under unfavourable conditions.

2. That the learned trial magistrate relied on inconsistent and contradictory evidence.

3. That the charge was defective.

4. That the Appellants defence was rejected without giving cogent reasons.

In his written submission the Appellant challenged the ability of the three identifying witnesses, PW1, 2 and 5 to identify any of the attackers given that the only available lighting at the scene was a kerosene lamp. He also submitted that due to the sudden attack on the witnesses by persons armed with dangerous weapons, i.e. guns, they were not in a frame of mind to identify anybody.

MISS OTIENO, learned counsel for the State on the issue of identification submitted that, that was a non-issue since the Appellant was apprehended at the scene of the crime.

We have re-evaluated the evidence adduced before the trial court. In brief the facts of the Prosecution case was that at 7.00 p.m. on the material day, the Appellant knocked at the door of the house of the Complainant, PW1 and his brothers PW2 and 5. The Complainant opened the door and the Appellant entered. The Appellant just engaged PW1, PW2 and 5 in a discussion enquiring whether the three brothers knew him before. Then when he confirmed that they did not know him, two other accomplices joined him both armed with pistols. They identified themselves to their victims as Police officers and demanded money from them. They took 2000/- in cash, a calculator and a watch from the Complainant. They ordered the three to lie down under the bed. The Complainant and PW5 obeyed but PW2 remained. He followed the trio and apprehended the Appellant with help of members of public before PW1 and 5 also joined to assist. PW1 then went and called the Police. He took PW3 PC Ndegwa and two other officers to the scene. They re-arrested the Appellant and recovered a pistol and one round of ammunition from PW2. PW2 said that after they had apprehended the Appellant, he removed the pistol from the Appellant's socks. The pistol was exhibit 1. The ammo was removed from the pistol by PW2 and was exhibit 2.

On the issue of identification, the learned trial magistrate was satisfied that the Appellant was properly identified as one of three men who robbed the Complainant and in the process injured PW2. He was satisfied that the Appellant was not a victim of mistaken identity but that it was proved he was one of the offenders. In addition, the learned trial magistrate concluded that the Appellant was apprehended at the scene of the crime by one of the witnesses soon after the offence was committed and that he was one of the offenders.

On our part after re-evaluating the evidence adduced, we are satisfied that the Prosecution did prove a nexus between the persons who robbed them and the Appellant. We considered the identification of the Appellant by the three witnesses quite safe. First we considered that the Appellant had first entered the Complainant's house alone and had engaged them in a conversation before his accomplices joined him to commit the offence. We find that PW1 had ample opportunity to see and observe the Appellant's appearance for the added reason that the Appellant's direct question to him and to PW2 and 5 was whether either of them knew him before. Further, we are satisfied from the evidence of PW2 that he followed the three robbers and apprehended the Appellant, while his accomplices escaped. The fact that PW2 followed the robbers out of the house and did not loose sight of them before apprehending the Appellant gives assurance to his evidence that indeed there was no chance of a mistaken identity.

Learned trial magistrate, who had the opportunity of examining the demeanor of the witnesses and the Appellant as they testified before him during the trial made the following observation: -

> *"From their demeanor which I noted (referring to PW1, 2 and 5) I saw nothing to doubt their credibility of those eye witnesses. They did not lose (sic) sight of the accused whom they saw enter that house, rob them but who was immediately followed outside and arrested soon after the incident."*

We have on our part no reason to disagree with the learned trial magistrate's finding as to the demeanor and credibility of the three key witnesses. We do agree with the learned trial magistrate's finding that the Appellant was arrested soon after the offence was committed. That PW2, who was the first to arrest him had not lost sight of him from inside the house where the offence was committed, to outside where he apprehended him. We do find that from the evidence on the record and the circumstances of this case that

the evidence of identification was watertight and that there was no possibility of mistaken identity. The test of identification we have applied is that even though the conditions of lighting at the scene may not have been bright, considering its source was a lantern, however, given evidence of the Complainant that the Appellant and his accomplices took 15 minutes with them, and further considering that the Appellant was arrested at the scene by PW2 who never lost sight of him at any time, the evidence of identification was safe to infer that it was correct without any possibility of mistake of error. See REPUBLIC vs. TURNBULL & OTHERS (1976) 3 All E.R. 549, REPUBLIC vs. ERIA SEBWATO 1960 E.A. 1974.

The Appellant also submitted that the Prosecution evidence was contradictory. We have considered this aspect of his Appeal. We noted inconsistency in the evidence of PW1, 2 and 5. Whereas PW1 the Complainant in count 1 said that the Appellant just entered the houses and questioned them before his two accomplices joined him, PW2 and 5 said that the Appellant entered first, followed immediately by two others. In our view, the inconsistency does not taint these three witnesses demeanor or raise any doubts as to their credibility. The inconsistency is not material and does not in our view go to the substance of the charge. We do not consider the inconsistency of any importance neither do we find that it caused any prejudice to the Appellant.

The Appellant also submitted that their was inconsistency in the Prosecution case about the recovery of the pistol. We do not find this submission merited. PW1 who reported to the police and took PW3 back to the scene was not aware of any recovered pistol. PW2 is the one who said he recovered it. From the evidence adduced, he recovered it after PW1 left to call police and before PW3 came to the scene. So by PW3 saying the report by PW1 did not refer to any recovered pistol is no contradiction in the evidence of the prosecution. We dismiss that submission has having no basis at all.

The Appellant submitted that the charge facing him was defective in the sense that the evidence adduced did not support the charge. He submitted that the Complainant's evidence was, he was robbed of cash 2000/-, a calculator and watch. That the charge read that the Complainant only lost cash. He also submitted that the charge read that actual violence was used against the Complainant while in fact it was PW2 who was injured and a P3 form produced by PW8 in proof of same.

We notice that the learned trial magistrate did consider these factors and concluded that the offence had been proved on the grounds that the Appellant was in company of two others and that they were armed with dangerous weapons. We do agree with the learned trial magistrate. The offence of Robbery with violence is proved in any of the following circumstances: -

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

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

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person. (See OLUOCH vs. REPUBLIC 1985 KLR 549

In our considered view, the offence charged was proved to the required standard.

On the Appellants defence it was his contention that it was rejected for no cogent reason. MISS OTIENO submitted that the trial magistrate's decision to discredit the Appellant's defence was right on grounds that it was untruthful.

We have considered the learned trial magistrate reasoning on this aspect taking into account that unlike we, the learned trial magistrate had the opportunity of testing the demeanor of these who appeared before him. We find that his decision to reject the Appellant's defence was exercised judiciously, fairly and upon the correct principles. We find no basis upon which we can fault or differ with the trial court.

On the other two counts of POSSESSING A FIREARM AND AMMUNITION WITHOUT A FIREARMS CERTIFICATE, it was the Appellant's submission that the pistol was certified to be

incapable of discharging any ammunition and so was not a weapon as defined by the law. PW7, the firearms examiner told the court in his evidence that the firearm was in poor condition and was incapable of being fired in that state. However, his evidence was quite clear that even though the firearm could not be fired in its current state, it could be adopted for firing and was a firearm within the meaning of the Firearms Act. Section 2 of the Act defines 'Firearm' as

> *"'Firearm' means a lethal barreled weapon of any description from which any short bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile …"*

From this description a weapon is not a firearm only when capable of discharging a shot, bullet or other missile but also when it can be adopted for such use. The firearms expert said that the weapon found on the Appellant could be adopted to fire shots, bullets or missiles. It therefore follows that the Prosecution proved the charge and that the Appellant's submission on that point has no substance.

Upon considering this Appeal, we are of the view that the same has no merit. Consequently we uphold the conviction entered against the Appellant on all three counts.

On the sentence, we confirm the sentence in court I. In counts 2 and 3 no sentences were imposed which is an error on the part of the trial court. Having considered the circumstances of this offence we shall sentence the Appellant to 5 years imprisonment on each count, with the prison terms running concurrently. The prison terms are suspended in light of the sentence in count I.

The upshot of this Appeal is that, subject to sentence imposed in counts 2 and 3, the Appeal is dismissed in its entirety.

Dated at Nairobi this 28th day of September 2004.

LESIIT

JUDGE

OCHIENG

Ag.JUDGE

Read, signed and delivered in the presence of;

LESIIT	OCHIENG'
JUDGE	Ag. JUDGE