REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 424 OF 2001

FROM ORIGINAL CONVICTION AND SENTENCE INC RIMINAL CASE NO. 286 OF 1999 OF THE CHIEF MAGISTRATE'S COURT AT NAIROBI

DOMNIC ABSOLOM MWANGI……...…….APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The appellant **DOMNIC ABSOLOM MWANGI** was convicted on four counts, as follows:

(1) **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to section 297 (2) of the Penal Code, for which he was then sentenced to death.

(2) **UNLAWFUL WOUNDING** contrary to section 237 of the Penal Code for which he was imprisoned for 3 years.

(3) **POSSESSION OF A FIREARM WITHOUT A VALID CERTIFICATE**, contrary to section 4(2) of the Firearm Act, for which he was jailed for 7 years.

(4) **POSSESSION OF AMMUNITION WITHOUT A FIREARM CERTIFICATE** contrary to section 4(1) of the **FIREARM ACT**, for which he was jailed for 7 years.

his appeal against both conviction and sentence, the appellant raised four (4) grounds, which can be summarized as follows:

(a) The learned trial Magistrate erred in convicting the appellant on evidence that was inconsistent and not corroborated.

(b) The evidence before the trial court was insufficient to found conviction, as the vehicle in issue was not adduced and so also some essential witnesses.

(c) The appellant was a victim of circumstances, having been arrested for reasons totally unrelated to the offences he was charged with.

(d) The appellant's defence was not given due consideration.

In order to get a better understanding of the grounds of appeal, it is necessary that the basic facts be set out, herein.

PW1 was the owner of a factory for making clothes. His factory is situated along Sheikh Karume Road. On the material day, 25th January 1999, the complainant (PW1) left his factory at about mid-day. He got onto the back seat of his vehicle, a Maruti, whilst his driver got onto the driver's seat. Their next destination was to have been the school where PW1's children were to be picked up.

However, before the vehicle went far, it was blocked by another vehicle, from which some people emerged and confronted PW1 and his driver. The commotion was noticed by some policemen who were on foot patrol. All the said policemen were in civilian clothing. They confronted the thugs, and one of the policeman was shot in the stomach. The thug who shot the policeman was then overpowered and arrested. He is said to be the appellant. Arising from those facts, the appellant was charged, as the gun he had, still had some bullets.

One issue which is very significant in this matter is that the appellant went through two trials. On the first occasion the presiding Magistrate was the Senior Resident Magistrate, Mr. R.K. Mwangi. After 4 prosecution witnesses had testified, the appellant objected to the trial continuing before that court, on the grounds that the learned trial Magistrate was unfair. The appellant then applied to the High court for the case to be transferred to another court. However, before that application was dealt with by the High Court, Mr. R.K. Mwangi retired. Thereafter the trial started anew before the Senior Principal Magistrate Mr. Injene Indeche.

We say that the foregoing fact is significant because it resulted in two sets of evidence on the part of 4, out of the 6 prosecution witnesses. A perusal of record of the proceedings leaves one wondering whether the witnesses were talking about the same incident. For instance, in the first trial, the complainant is on record as saying that the offence was committed at 12 midnight. However, in the subsequent trial, the offence was committed at 12.00 noon.

Whilst PW1 testified (in the first trial) that he sat at the rear seat, PW2 PC Francis Nyambigira saw the witness (PW1) sitting on the front seat.

PC Henry Kyale was PW4 at the first trial, and PW1 at the second trial. He first testified that the City Council lorry which they used to ferry the appellant to the police station had hawkers who had been arrested. But, at the 2nd trial, the same witness testified that the City Council lorry did not have any hawkers.

Also at the first trial, the witnesses basically testified that the appellant was arrested inside the vehicle belonging to PW1. But at the 2nd trial, the witnesses talked about an arrest being effected after a chase.

We have brought out these inconsistencies because we believe that they give rise to a very clear picture of uncertainty regarding the facts of the case. Whether or not the witnesses did give consistent stories at the second trial, questions would still linger as to whether or not their said stories should be believed, in the light of the fact that on a previous occasion they had said something different.

In our considered opinion, the changes in the stories by the prosecution witnesses indicates that the said witnesses cannot be regarded as reliable. That alone, to our mind was sufficient reason to allow the appeal herein.

Secondly, the vehicle which the appellant (and his colleagues) were accused of attempting to steal from the complainant was not adduced in evidence. In the circumstances, we hold the view that the charge of attempted robbery with violence cannot be deemed to have been proved beyond any reasonable doubt, when the subject matter was neither produced before the trial court nor its absence explained to the court.

It is also noteworthy that the appellant (and his colleagues) did not utter any words to the complainant. The learned trial magistrate made an express finding to that effect. In those circumstances, wherein;

> **"the people who confronted the second prosecution witness did not utter anything to suggest that they wanted to rob anyone,"**

the only logical conclusion that the court ought to have arrived at was that the prosecution had failed to prove count 1. We say so because even if it were true that the thugs did actually force the complainant's car to stop and then boarded it, it cannot be presumed, without more, that they wanted to rob him of the vehicle. It is conceivable that the thugs may have wanted to rob the complainant of something that he may have been carrying either in the vehicle or on his person. Another possibility is that the appellant (and his colleagues) may have been mercenaries assigned to dispatch the complainant to the **"next world."** A chilling thought, yes, but possible nonetheless.

We therefore hold that from the evidence on record, it was not right for the prosecution or the trial court to conclude that the thugs wanted to rob the complainant of his vehicle. To properly arrive at such a conclusion, the court ought to have proof of evidence which leads inescapably to the said conclusion. If the evidence on record leaves room for more than one conclusion to be derived therefrom, the prosecution would have failed to discharge the burden which requires that the offence be proved beyond any reasonable doubt.

CORROBORATION

The appellant has submitted that the evidence of the police officers, PW1, PW3, PW4, PW5 and PW6 was not corroborated. To his mind, corroboration would have necessitated having testimony from **"Independent witnesses."**

In that regard, the appellant expressed the view that the police officers were not independent witnesses, by virtue of the fact that they were police officers.

To our minds, the understanding of the appellant is not correct. Independence does not have anything to do with the nature of someone's job or official capacity. Thus the fact that a witness was a police officer would not, by itself mean that he could not be deemed to be an independent witness. In our considered view, the independence or otherwise of a witness would be determined by the fact that he had no connection or relationship with the complainants or witnesses in any particular incident. Thus, in this case, the police officers could be deemed to be independent witnesses in relation to the offences in counts 1, 3, and 4. However, as the said officers hailed from the same force and police station as their colleague who was shot and injured, the officers could not be deemed to be independent witnesses in relation to count II, of unlawful wounding, of their colleague.

Secondly, corroboration itself does not require only independent witnesses. Even though a witness could be related or connected to the complainant or other witnesses, he or she could still give evidence which would corroborate the evidence of the said complainant. In effect, the test as to whether or not evidence had been corroborated did not rest upon the independence or otherwise of the witness.

In our view, the independence of a witness went more to the issue of the weight to be attached to the evidence, rather than to corroboration per se.

By now, it should be clear that the appeal is nonetheless successful, on the grounds that the prosecution witnesses have given us reasons to doubt their credibility, because of the different stories they have given during the two trials. Accordingly, we now quash the conviction and set aside the sentences. The appellant is to be set at liberty unless he is otherwise lawfully held in custody.

Dated at Nairobi this 19th day of October 2004

J. LESIIT

JUDGE

FRED A. OCHIENG

AG. JUDGE

Delivered in the presence of

Appellant in person

For the State

Mr. Muya/Odero – court clerk