



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 277 OF 2001

BERNARD AKUSIMBA KEYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Bernard Okisimba Keya was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code and two other counts, one of being in possession of a firearm without a Firearms Certificate and of being in possession of firearm ammunitions without a Firearms Certificate. He was convicted in all the counts but discharged with respect to the last two counts.

The particulars of the first count were that on 16th August, 2000 at Nakuru Township, in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pangas, bolted rungas and swords, robbed one Police Constable Joseph Musya a revolver serial number 112895 with six rounds of ammunitions and a wallet with Kshs.1000/- all valued at Kshs.41,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said police officer.

The particulars of the second count were that on the 16th day of August 2000 at Nakuru Township, in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pangas, bolted rungas and swords, robbed one R K O of her heavy cardigan, wrist watch make Quartz and cash Kshs.500/- all valued at Kshs.2400/- and at or immediately before or immediately after the time of such robbery used personal violence to the said R K O.

Th appellant was convicted and sentenced to death and being aggrieved by the said conviction and sentence, he preferred this appeal. His main grounds were to do with the manner in which he was identified, saying that the circumstances were not suitable for positive identification. He also raised issues regarding the alleged recovery of the pistol which he was said to have robbed from one of the complainants. The prosecution case can be summarised as follows:-

On 16/8/2000 at about 9.00 p.m., PW2, R W O was going to a butchery when she met her boyfriend, PW3. They went to a nearby bar and took some sodas and ate the meat which she had bought. They left the bar at about 11.00 p.m. Near Mombasa butchery, they met with four people and one of them ordered PW2 to stop and another one hit her with an iron bar and she fell down. PW3 was also assaulted. Her sweater and watch were taken and the robbers took off. She said that the appellant was the one who took her sweater and had an iron bar. She further stated that there was sufficient electric light from Mombasa butchery which was only about four steps away. The matter was reported at Central Police Station and

later on, PW2 identified 3 of her assailants, including the appellant.

PW3, Police Constable Joseph Muasya testified that he had been issued with a revolver serial number 112895 and had been assigned duties at Gido Plaza.

On the material day, as he was walking home with a friend near Mombasa butchery, they were stopped by some people who had runaguns and knives and they attacked them. The people took his wallet which had Kshs.1000/- as well as the said gun which had six rounds of ammunition. He was hit on the mouth and bled profusely and was taken to hospital. On 5/9/2000 he learnt that some people had been arrested and the gun recovered and he identified the said gun as the one that he had been robbed of. He later identified three of his attackers in an identification parade that was conducted by PW1. The revolver had five rounds of ammunition at the time of its recovery. He said that there was sufficient light from Mombasa butchery that enabled him to identify the appellant with whom they had struggled for about 10 minutes.

PW4, Sergeant Odhiambo Peter confirmed that he had issued the said revolver to PW3 on the day of the robbery and later that same day at about midnight, PW3 went to Kaptembwa Police Post and reported that he had been attacked and robbed of the gun. PW5, Police Constable Harman Kariuki told the court that on 5/9/2000 at about 8.00 p.m. together with other police officers got a tip off that there was a person who was suspected of having a gun. They went to Rhonda Estate and found the appellant and a young girl. They identified themselves and proceeded to search the house. They found a sack which contained a panga, a saw, two sweaters, one big scissors, a gun serial number 112895, 5 rounds of ammunition and one spent cartridge. The police then arrested the appellant and the young girl and took them to Kaptembwa Police Post. The gun was taken to the ballistic experts for examination and later a report was given by PW9 which confirmed that the said firearm and the rounds of ammunition were genuine and the spent cartridge was fired from the same gun. The report was produced as P.Exh.10 and it shows the gun serial number as 112895 but in the typed proceedings it appears as 11289S which we believed is a simple typographical error.

In his unsworn defence, the appellant said that he was a hawker and on 4/9/2001 he returned home at about 6.00 p.m. and went to bed at about 7.30 p.m. His door was then knocked by police officers who asked him to identify himself. He said he was arrested and taken to Central Police Station where he stayed for 12 days. While he was there, he claimed, he was beaten up and forced to sign some statements which were on 6 pages. The following day he was taken to an identification parade and he claimed that the people who were in the parade were not similar to him. He claimed that he knew nothing about the offences which he faced.

We are aware of our obligation as the first appellate court that we should subject the evidence tendered in the trial court to a fresh and exhaustive examination and having weighed any conflicting evidence draw our own conclusions. The Court of Appeal for East Africa states so in OKENO VS REPUBLIC (1972) E.A. 32. The appellant was identified by the two complainants, PW2 and PW3. They both stated that there was sufficient electric light from a butchery known as "Mombasa Butchery". PW2 said that they were only four steps away from that butchery. The complainants were able to pick out the appellant without any difficulties during the identification parade that was mounted on 14/9/2001. PW3 said that he struggled with the appellant for about 10 minutes and had sufficient time to observe him. In our view the circumstances were favourable for positive identification in terms of the guidelines as were set out in R VS TURNBULL [1976] 3 ALL ER 549.

Regarding the recovery of the gun and the rounds of ammunition that were stolen from PW3 and found in the appellant's house, the appellant said nothing about it. The prosecution led clear and detailed evidence as to how the items were recovered. The gun was confirmed to have been the same that had been issued to PW3.

The robbery took place on 16/8/2000 and the said items were recovered on 5/9/2000, about 20 days thereafter. The appellant did not give any explanation at all regarding his possession of the same. Under the doctrine of possession of recently stolen property, the appellant was in law duty bound to offer a reasonable explanation as to how the said items came to be in his house, otherwise than as the thief or

guilty receiver. The Court of Appeal applied that doctrine in SAMUEL MUNENE MATU VS REPUBLIC Criminal Appeal No. 108 of 2003 at Nyeri (unreported) where some stolen goods were recovered from the house of an appellant about three weeks after a robbery. To sustain a conviction under this doctrine, it must be proved that the property was stolen from the owner and must be identifiable as belonging to the owner (or the special owner for that matter) and the accused person must be found in possession of the said property soon after it left the possession of the owner. The time that is taken into account in determining that an accused person has been found in possession of recently stolen property depends on the circumstances of each case. In this particular case, a period of 20 days in our view was reasonable to raise the presumption that the appellant took part in the robbery and particularly so since the appellant did not offer any explanation that would have rebutted the presumption.

In our view, the appellant was properly convicted and sentenced and we see no basis of interfering with the judgment of the trial court. The appeal is therefore dismissed and the conviction and sentence as pronounced by the trial court is hereby confirmed. DATED at Nakuru this 17th day of December, 2004.

D. MUSINGA

JUDGE

17/12/2003

L. KIMARU

JUDGE

17/12/2004