



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**  
**Criminal Appeal 292 of 2001**

*(From original conviction and sentence in Criminal Case No. 898 of 2001 of*

*the Senior Principal Magistrate's court NAIVASHA – M.M. MUYA)*

**KENNEDY MAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The Appellant was charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 28<sup>th</sup> day of April, 2001 at [particulars withheld] Bar Gilgil Township in Nakuru District of the Rift Valley Province jointly with others not before the court while armed with a toy pistol and axes robbed J M of Kshs.3120/- and 10 pilsner beers all of the value of Kshs.3670/- and immediately before or immediately after the time of such robbery used personal violence against the said J M.

On the second count he was charged with attempted robbery with violence contrary to Section 297(2) of the Penal Code. The particulars of the offence were that on the 28<sup>th</sup> day of April, 2000 at [particulars withheld] bar Gilgil Township, Nakuru District within Rift Valley Province, jointly with others not before court while armed with a toy pistol and an axe attempted to rob C N of money and at or immediately before or after the time of such threats used violence against the said C N.

He was convicted on both counts and sentenced to death. He appealed against the conviction and sentence. His main grounds of appeal can be summarised as follows:-

- (i) That the trial magistrate erred both in law and in fact in accepting that the Appellant was properly identified.
- (ii) That the trial magistrate erred in law and in fact in failing to appreciate that the Appellant was not found in possession of anything that could have connected him with the robbery.
- (iii) That there was no sufficient evidence to convict him.

The prosecution case against the Appellant was as follows:-

**PW1 J M**, testified that she was a bar maid at a bar known as bar. On 28.4.2001 at 10.30 p.m. as she was attending to customers, a man whom she did not know before came in as a customer and asked for cigarettes but PW1 was not selling cigarettes. He then ordered for a beer but before she could sell the

beer to him, an accomplice of the Appellant closed the bar and brandished a pistol and ordered PW1 to give out all the money that she had. The Appellant robbed her of Kshs.3,120/-. All through the lights were on and she could clearly see him. The people in the bar were commanded to lie down and the robbers also took some beers from the counter. PW1 and others were taken to the bush where they were guarded by one person as two men went and attacked other bars. When the man who was guarding PW1 and others in the bush left, PW1 went and reported to the police. She said that the Appellant was wearing a green coat and was arrested the same night when he was tracked down by police sniffer dogs.

**PW2, Miriam Wangui** was in the said bar with PW1 and another customer known as Cherop. She said that a man went to the bar and asked for cigarettes and when he was told that they were not available, he ordered for a beer. As he was being served, the Appellant walked in brandishing a pistol and closed the door and asked for money and PW1 gave out some money. The Appellant and two others also stole some beer from the counter and they took the people who were in the bar to the bush. After some time the robbers moved to other bars. PW2 said that the Appellant wore a green jacket but had not known him before. After a report was made to the police, they tracked down the Appellant with the aid of sniffer dogs. PW2 identified the Appellant.

**PW3, Sergeant David Cherop** testified that on 28/4/2001 at about 11.30 p.m. just after he had closed his bar he heard somebody calling saying that he wanted to buy cigarettes. The watchman opened but he was confronted by a man with a pistol and another one with an axe. The one who had the axe told PW3 to lie down. PW3 realised that it was a toy pistol and he confronted the man who had it. The Appellant was the one who had an axe and he tried to attack the witness but when he resisted the robbers took off. Thereafter PW3 made a report to the police who arrested the

Appellant the same night and PW3 identified him. He also said that the Appellant wore a green coat.

**PW4, Rachel Wangui Njenga** testified that on 28/4/2001 she was at bar where she was working as a waiter. At 11.20 p.m. they were taking stock when she heard a window being knocked and the watchman went to check. There was a man asking for cigarettes. The watchman was confronted by men armed with an axe and a pistol. The men wanted to attack PW3 but he resisted and the robbers took off. She identified the Appellant as the one who had the axe at the material time. She said that the Appellant was wearing a green coat and a nylon sweater, checked trousers and safari boots.

PW5 was the watchman and he corroborated the evidence of PW3 and PW4.

**PW6, Police Constable Marau** was a dog handler. After he received the information regarding the robbery, the bar maids took the police to the scene where the robbers left their scent. The police dog led them to a place where they found several men in a vehicle. The Appellant came out of the vehicle and was chased and arrested but the other suspects escaped. The police also shot him on the knees. The Appellant was identified as the one who had an axe at the scene.

The Appellant, in his unsworn defence said that he was a cook at a hotel in Gilgil but did not name the hotel. He further stated that on 28/4/2001 he left work at midnight and as he was heading home, he met three men who ordered him to sit down and give out all that he had he gave out his identity card and money. He was then whipped by the three men who said they were policemen. The Appellant then said he ran away but was later stopped by two men who had torches but he refused to stop and continued running. He then heard the sound of gun shots and when he checked behind he saw a dog chasing him. Police then arrested him and asked him where he had come from and he replied that he was coming from work but the police insisted that he was a robber. The Appellant said that he was taken to a certain bar but was not identified and was later taken to Nakuru Hospital for treatment. The Appellant did not call any witness.

Having subjected the evidence that was tendered in the trial court to a fresh and exhaustive scrutiny as required, see *OKENO VS R. [1972] E.A. 32*, we are of the considered view that as far as identification was concerned, the Appellant was properly identified by all the witnesses. At the time when the offences were committed, the scenes were well lit as to enable the witnesses identify the Appellant appropriately.

Even PW3 was able, because of the sufficiency of the light, to clearly see that what the robbers had was a fake pistol. The robbery as well as the attempted robbery took place between 10.30 p.m. and 11.30 p.m. and the Appellant, according to his evidence, was arrested at around mid night, after a fairly short span of time from the time when the offences were committed and the memories of the witnesses must have been still fresh. We are of the view that the identification was free from any possibility of mistaken identity and complies with the guidelines set out in ***R VS TURNBULL[1976] 3 ALL ER 549.***

All the witnesses described how the Appellant was dressed and particularly they mentioned the green jacket and that is what the Appellant had a short while after the offences were committed.

The Appellant's defence was also not plausible at all. If truly he was working in any hotel in Gilgil town as he alleged, he should have named it and stated the people he was working with and called them as defence witnesses. He never did so.

We are convinced that the Appellant was properly convicted and sentenced and we see no basis of interfering with the judgment of the trial court and we consequently dismiss the appeal in its entirety and reaffirm the conviction and sentence handed down by the trial court.

DATED at Nakuru this 16<sup>th</sup> day of December, 2004.

**D. MUSINGA**

JUDGE

16/12/2004

**L. KIMARU**

JUDGE

16/12/2004