



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 423 of 2002

**(From Original Conviction and Sentence in Criminal Case No. 277 of 2002 of the
Chief Magistrate's Court at Mombasa L. Achode, Principal Magistrate)**

WASHINGTON ODONGO ODEYO APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant, Washington Odongo Odeyo, was tried and convicted of the offences of robbery with violence contrary to section 296(2) of the Penal Code, unlawful possession of a firearm without a firearm certificate contrary to section 4(2)(a) of the Firearms Act and unlawful possession of ammunition without a firearm certificate contrary to section 4(2)(a) of the Firearms Act. On count 1 he was sentenced to death and on count 2 and 3 he was sentenced to 10 years imprisonment on each count and the sentences were ordered to run concurrently but they were suspended until after the appeal on the first count. He has appealed against the convictions and sentences and listed 7 grounds of appeal which can be paraphrased as follows:-

- 1. That the learned trial magistrate erred in basing the conviction of the Appellant on the identification of P.W.1, P.W.2 and P.W.3 when the conditions for a favourable identification were poor.**
- 2. That the learned trial magistrate erred in convicting the Appellant on a retracted confession obtained under torture and recorded at the police station contrary to section 25A of the Evidence Act.**
- 3. That there was no evidence upon which his conviction on the offences of being in unlawful possession of a firearm and ammunition was based.**
- 4. That the learned trial magistrate erred in convicting the Appellant on defective charges contrary to section 137(iv)(f) of the Criminal Procedure Code.**
- 5. That the learned trial magistrate failed to consider the defence case.**
- 6. That contrary to sections 85(2) and 88(1) of the Criminal Procedure Code the trial magistrate erred in allowing Cpl Mwamburi an unqualified police officer to appear for the prosecution during the mentions of the case.**

7. That the Appellant's trial was a nullity the case having been investigated by a police constable.

The learned State Counsel conceded the appeal on the grounds that the attack having been sudden and at night and P.W.2 and 3 having remained in the car the Appellant was not properly identified. The other ground was that the Kenya Air Force Officers who arrested the appellant having not been called there was no positive proof that the Appellant was in possession of the firearm and ammunition

The Appellant filed written submissions and at the hearing of the appeal decided not to add anything. In the submissions the Appellant argued that the robbery was at night and it was sudden. The robber having had a gun that must have so frightened P.W.2 and 3 that they were not able to observe him properly. As for P.W.1, he argued that he concentrated on wrestling with the robber and was not able to observe his face. He also argued that the Kenya Air Force Officers who arrested him and handed him over to the police having not been called the chain of evidence connecting him with the robbery or being in possession of the firearm and ammunition was broken and his convictions should therefore not be allowed to stand. The Appellant also disputed the evidence of P.W.5 who searched him and found him with the complainant's watch and wallet which had Sh. 1,500/=.

As regards the statement under inquiry the Appellant submitted that the same was inadmissible for the reasons that it was obtained under duress there being evidence that the Appellant had injuries proving his complaint of torture, that it was recorded at the police station and not in court contrary to section 25A of the Evidence Act and that the trial magistrate read it during the trial within a trial before ruling on its admissibility.

On ground 5 the Appellant submitted that the particulars of the charge having not stated the time when the offence was committed as required by Section 137(iv)(f) of the Criminal Procedure Code the charges were incurably defective.

The Appellant finally argued that the case having been investigated by P.C. Chebet and Corporal Mwamburi having appeared for the prosecution during the mentions on 30/4/2002, 7/5/2002 and 21/5/2002 that was in contravention of section 85(2) of the Criminal Procedure Code and his trial was therefore a nullity.

We have carefully considered the lower court record, especially in the light of the concession by the learned State Counsel.

The complainant P.W.1 testified that on the material date at about 9.00 p.m. he stopped at Kengeleni junction to drop his passengers, P.W.2 and P.W.3. Before they could alight he suddenly saw a man at his window pointing at his head. At first he thought the man wanted a lift but he realized that he had a gun. He ordered him to surrender everything he had otherwise he would shoot him. When he hesitated the man hit him with the gun above his right eye. The man then took the witness's watch and put it in his pocket and demanded for the witness's wallet. The witness then suddenly swung the driver's door open hitting the man's knees and causing him to stagger backwards. He jumped out and grabbed the man's hand which had the gun. As they struggled the gun fell and they both dashed for it. The Appellant picked it and pointing it at the witness he demanded his wallet. He gave him the wallet and as the appellant turned to go away the witness jumped at him shouting "mwizi" "mwizi" ("thief" "thief"). He wrestled him to the ground and as they rolled on the road a Kenya Air Force bus came there and stopped, and the Kenya Air Force Officers went to the witness's rescue. They arrested the Appellant and took him to Makupa Police Station. P.W.1 followed in his car.

At Makupa Police Station, in the presence of P.W.1, the Appellant was searched and P.W.1's watch and wallet containing Sh. 1,500/= were recovered from him. P.W.1 was firm that there were no other people at the scene and that he never lost sight of the Appellant until the Kenya Air Force Officers took him into their bus.

The evidence of P.W.1 was amply corroborated by that of P.W.2 and P.W.3 with the latter adding that Kengeleni junction is well lit with street lights and that with the Kenya Air Force bus head lights beaming

on P.W.1 and the Appellant as they struggled she was able to see the Appellant well. P.W.3 was also firm that there was no possibility of another person being arrested by mistake.

Cpl. Mutuma Mberia, P.W.5, also testified that when the Kenya Air Force Officers handed the Appellant with a gun and 3 rounds of ammunition to him at Makupa Police Station, P.W.1 who had travelled in his vehicle was also there. He searched the Appellant and recovered from the right hand pocket of his trousers P.W.1's watch and wallet containing Sh. 1,500/=. This witness later handed over the Appellant and the exhibits to P.C. Paul Chebet of CID Urban who took over the investigations.

We have ourselves carefully re-evaluated the evidence in this appeal. P.W.1, P.W.2, and P.W.3 were firm that there were no other people at the scene of robbery. They all denied the Appellant's allegation that he was arrested because he intervened to save a person who was being beaten by the Kenya Air Force Officers and who managed to escape. The three witnesses followed the Kenya Air Force Officers to Makupa Police Station and as they handed the Appellant and the gun with 3 rounds of ammunition to P.W.5 they were there. Other than during the Appellant's ride from the scene to Makupa Police Station in the Kenya Air Force bus, which they followed in P.W.1's car, the witnesses never lost sight of the Appellant. It is to be remembered that P.W.1 wrestled with the Appellant until the Kenya Air Force Officers arrested him. We are therefore satisfied that the question of any mistaken identification of the Appellant does not arise.

The failure by the prosecution to call any of the Kenya Air Force Officers, in our view, does not affect the case. As we have already said P.W.1, P.W.2 and P.W.3 followed the Kenya Air Force bus and as the Appellant was handed over with the gun and ammunition to P.W.5 at Makupa Police Station they were there. Besides, that the Appellant was immediately searched and found in possession of P.W.1's wallet with Sh. 1,500/= and watch. Like the trial magistrate we also believe the evidence of those three witnesses as well as that of P.W.5.

The ground relating to the admissibility of the statement under inquiry has no substance. We find nothing wrong in the trial magistrate reading it before writing the ruling on the trial within a trial. Even if we are wrong in this we are satisfied that the error, if any, is curable by section 382 of the Criminal Procedure Code and did not cause any prejudice to the Appellant or failure of justice. The injuries suffered by the Appellant were sustained at the scene of robbery as he struggled with P.W.1 and during his arrest. When he was handed to P.W.7 he took him to hospital and made no secret about that. The statement was made and used in evidence before the July 2003 amendment. It was therefore properly admitted.

The evidence of P.W.6 and P.W.7 in conjunction with that of P.W.1, P.W.2, P.W.3 and P.W.5 proved the charges of being in possession of the firearm and the three rounds of ammunition.

Ground 4 of Appeal is that the charges were defective for failure to state the time when the offence was committed. That omission in our view does not cause any failure of justice. The first three prosecution witnesses stated that the robbery took place at about 9.00 p.m. The Appellant himself in his testimony placed the time at around 8.30 p.m. That ground therefore also fails.

That leaves us with the ground that the case was investigated and partly prosecuted by police officers below the required rank. This ground has also no substance. We know of no provision disqualifying police constables from investigating any cases. As regards the prosecution of the case, section 85(2) of the Criminal Procedure Code requires public prosecutors to be Advocates of the High Court or police officers of the rank of Assistant Inspector of Police or above. True, Cpl. Mwamburi who is below that rank appeared thrice for the prosecution during the mentions of the case. As this court has held previously appearing during the mentions of the case is not prosecuting the case and that is not fatal and that ground of appeal also fails.

As a whole after a careful re-evaluation of the evidence we disagree with learned State Counsel and hold that there was sufficient and credible evidence against the Appellant and he was properly convicted on all the three counts. Consequently we dismiss this appeal in its entirety.

DATED and delivered this 14th day of December 2004.

J. KHAMINWA

JUDGE

D.K. MARAGA

AG. JUDGE