

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO. 302 OF 2002

(From the Original Conviction and Sentence in Criminal Case No. 2337 of 2001 by the Principal Magistrate's Court at Mombasa – L. Achode – P.M.)

JOSEPH KARIUKI NJIRU APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

JOSEPH KARIUKI NJIRU was charged and Convicted on a charge of Being in possession of a Firearm Contrary to Section 89(1) of the Penal Code on Count II while under Count III he was charged and Convicted for Being in Possession of Ammunition Contrary to Section 4(2) of the Firearms Act and was Sentenced to serve 7 years imprisonment on both Counts but acquitted on a main charge of Robbery with Violence Contrary to Section 296(2) of the Penal Code.

He has challenged the Conviction for the reasons that the evidence of PW2 and PW3 who are police officers was not corroborated by independent evidence of a member of the public who assisted in his arrest. He further submitted that the trial court favoured the prosecution in that PW2 and PW3 described the Pistol they recovered as a CESKA Serial number X82354 while the Ballistic expert who testified as PW5 described the Pistol handed over to him for testing as TOKALEV Serial number X82354. And lastly he attacked the Failure by the Court to order for the production of the O.B. report No. 51 of the 21.6.01 as a miscarriage of Justice as he wanted to confirm whether the Pistol recovered from him was described. The State Counsel on behalf of the Respondent supported both conviction and sentence and submitted that the evidence by PW2 and PW3 was in itself adequate and save to arrive at a conviction as the two were only involved in the arrest. She however did concede to the production of the O.B. report No.51 dated 21.6.01 at this stage and the same was produced to the satisfaction of the Appellant.

The brief evidence before the trial Court was that on 21.6.01 at around 12.30 p.m. CHAGANLAL SHAH (PW1) was alone at his shop along Moi Avenue, Mombasa when he saw a lone man enter. He walked towards a curving and asked PW1 what the prize was and without notice suddenly stuck a gun on PW1's head from the back and asked him to walk to the back of the shop. There he asked for money and took Kshs.3,000/= from witness's pockets and ordered him to lay down. The assailant stepped on the back of his head and asked him for more money. At that point and PW1 heard voices of people talking outside his shop and saw the assailant walk out of the shop and a crowd of people which had gathered started to chase after him.

PW2, PC. **Michael Kimeu** of Urban Police was on guard Duties in the company of PW3, PC **Rhoya Mwanaubu** at the Middle East Bank situated along Digo Road, Mombasa when they heard gun shots went out to check when they saw a man running towards them holding a gun and a crowd of members of the Public in hot pursuit shouting thief! thief! and pelting him with stones. The two Police officers then positioned themselves along his pathway and ordered him to drop the gun. The person complied, was arrested by the two and handed over to PC. **James Kimatu** from the central police who then charged him and forwarded the Pistol, one round of ammunition and one magazine to the Ballistic expert PW5. On examining the exhibits PW5 concluded the Pistol and ammunition were alive and described the Pistol as TOKALEV in make bearing Serial Number X82354. PW2 and PW3 in their evidence did state that although they were not Gun experts the gun they recovered from the suspect was a CESKA in make and gave the same Serial number X82354. The appellant was the person arrested by PW2 and PW3 and

handed over to the PW4 who said at time of his arrest the Appellant had suffered injuries afflicted upon him by members of the public and was treated at Coast General Hospital. PW2 and PW3 corroborated this evidence when they said the appellant was being chased by a crowd of about 100 people and the two witnesses had a heard time shielding him from the irate mob that wanted to lynch him.

The appellant gave a sworn defence and said that at the material time he was at his place of business by the shop corridors along Digo Road near the Middle East Bank when he saw someone drop a gun near his feet and that person jumped into a matatu. The police men guarding the bank (PW2 and PW3) took the gun and a few minutes later C.I.D. officers arrived and asked him and others to accompany them to the police station to help in the investigations. He says they beat him up and broke his leg and then took him to hospital.

In her judgement, the learned magistrate examined all the issues raised by the appellant which are similar to those he raised at the hearing of the Appeal and arrived at the conclusion that the evidence of PW2 and PW3 was credible and therefore did not require any corroborating evidence by a member of the Public to arrive at a conviction.

I have on my part evaluated the evidence and find that the evidence of PW1 Corroborates that of PW2 and PW3 that the Appellant was being chased by a crowd of People. PW2 and PW3 were on guard duties at a different premises and at a different street all together when they heard gun shots and on checking to find out where they came from they saw a person running towards them holding a gun and a crowd of people estimated at 100 in hot pursuit pelting him with stones and shouting thief! thief. The two officers then intercepted the culprit and ordered him to drop the gun and arrested him. The person they arrested was the appellant and recovered from him a d gun ammunition and a magazine. The arrest of the appellant was therefore immediately after the act of robbery. As for the name of the gun, PW2 and PW3 described it as a CESKA but PW3 said the name had rubbed off. They gave the serial number as the same one given by the Ballistic expert. Having admitted the gun to them looked like a Ceska and that they were not experts in guns, I am inclined to agree with the State Counsel that the difference in names is of no consequence and does not amount to a miscarriage of Justice as the Serial numbers tally. The O.B. report No.51 dated 21.6.01 which was produced at the request of the appellant describes the gun as, a CESKA serial No. X82354 which corroborates the evidence of PW2 and PW3.

The evidence as adduced I find was adequate to warrant a conviction and the trial magistrate was right in rejecting his defence. The Conviction is therefore upheld.

On sentence, the maximum provided for is a minimum of 7 years on each count and that is what the court meted out. This was after due consideration of the Appellant's Health status which he has once again brought up. He has been confirmed as being HIV positive. However the court has taken into consideration the nature and seriousness of the offences committed and the fact that there are others like him who have been diagnosed as H.I.V. Positive and are serving prison terms and there are medical facilities put in place by the Government at the prisons. I therefore find no reason to interfere with the Sentence and consequently the appeal is dismissed.

Dated and Delivered at Mombasa this 29th day of August, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE