REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 64 OF 2000

JOHN KARIUKI MURERA …….. APPELLANT

VERSUS

REPUBLIC ……
RESPONDENT

CRIMINAL APPEAL NO. 66 OF 2000

MICHAEL MUGENDI NJIRU …… APPELLANT

VERSUS

REPUBLIC ……
RESPONDENT

JUDGMENT

The two appeals herein were consolidated for hearing. The Appellants were jointly with four other persons charged in the Senior Resident Magistrate's court at Runyenjes Criminal Case No. 30 of 1999 where they faced five counts each alleging robbery with violence contrary to section 296(2) of the Penal Code and one count alleging possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(2) (b) of the Firearms Act (Cap 114 Laws of Kenya).

One of the six accused persons died leaving five before the trial proceeded. All the five accused persons were acquitted on counts one, two, three and four under section 210 of the Criminal Procedure Code.

The Appellants who were the only ones charged with robbery in count five and possession of firearm in count six were not acquitted in the two counts and were put on their defence in those two counts.

In the end, each one of them was convicted and sentenced on each count.

On count five each Appellant was sentenced to suffer death while on count six each Appellant was sentenced to two years imprisonment. That was on 1st September 2000.

The allegation in count five was that on the 5th day of January 1999 at Ugweri Village in Runyenjes Division, Embu District, the two Appellants jointly being armed with a Ceska Pistol robbed Johnson Ngari Ngugi Kshs.1700/- using personal violence.

In count six, the allegation was that on 5th January 1999 at Ugweri village of Runyenjes Division in

Embu District the two Appellants jointly were found in possession of a Ceska Pistol serial number F. 2338 without a firearm certificate in force at the time.

The Complainant in count five was Johnson Ngari Ngugi who gave evidence as PW 3. The Complainant, a Research Officer working at the Embu Office of KARI was going to Embu for work in the morning around 7.30 am when he gave a lift to two men who had stopped him on the way asking him for a lift. He was from his home at Kanyuambora.

After giving them a lift for about 1½ Km the two men ordered PW 3 to stop, threatening him with a gun as all the three people were in the driver's cabin. A struggle ensured as PW 3 tried to take possession of the gun, a pistol, before he was overpowered, pulled out of the driver's cabin and deposited at the back of the vehicle. A gun shot had gone off during the struggle.

As the two men now in the driver's cabin were starting the vehicle, PW 3 jumped off and was being left lying on the side of the road when the two men noticed him and reversed the vehicle to go back to where PW 3 was.

They got out of the vehicle and went where PW 3 was. PW 3 told the court they ransacked him and took Kshs.1700/- from him, but PW 4 who was watching the unfolding events from a distance says PW 3 gave the two men something he did not know.

Thereafter the two men went back to the vehicle but found the vehicle had got stuck at a place they could not manage to drive out.Looking behind, they saw PW 3 trying to run away. The two men fired a gun. PW 3 afraid lay down on his back. The two men went back to him again. He pleaded with them not to shoot him. They forced him to go back to the vehicle to drive it. They carried him to the driver's cabin.

As they were still standing outside the vehicle to see whether PW 3 could manage to remove the vehicle from where it had stuck, he got that opportunity to drive off at a high speed leaving them at the scene as they tried to run after the vehicle shooting at it without success.

Meanwhile PW 4 James Kariuki Nyaga and other members of the public were watching having been attracted by gun shots and commotion in which PW 3 had been sometimes screaming.

PW 4, PW 5, Samwel Kamau Mungai and PW 6 Paul Njeru Muthee and other members of the public now confronted the two men who went on shooting their gun to scare away members of the public who somehow came to know that the gun the two men had was not loaded with any ammunition. They chased the two men along foot paths, through gardens and thickets until they arrested the two men at a swampy thicket, and recovered the pistol from them. They tied their hands with ropes and took them to the Chief's Camp from where the police re-arrested the two men.

The pistol Ceska S/No F. 2338 was found to have been issued to a police officer PW 8 P.C. Francis Kamau Apolo who claimed it had been stolen or robbed from him in Kiambu on 21st December 1998.

The two men who were Accused 1 and Accused 3 before the trial magistrate are the Appellants before us. In their defence they said that they were just walking along the way when they were confronted by members of the public who arrested them and beat them up because they were strangers in the area where they were arrested. They denied having committed the offences against them.

On the whole, although PW 3 had run away and does not seem to have been made to identify the Appellants after their arrest until they were in the dock, PW 4, PW 5 and PW 6 and other members of the public who confronted the Appellant from the scene where the Appellants had attacked PW 3 up to the arrest of the Appellants ensured the continuity of the identification of the Appellants.

On count six therefore, the Appellants could have been properly convicted as there was sufficient evidence to show that the Appellants were found in possession of a pistol belonging to the police and therefore could not have had a certificate for it as they were civilians. They were jointly in possession as

they jointly used it that morning to rob PW 3 and scare away members of the public who wanted to arrested them. The Appellants have served the two year imprisonment imposed upon them.

However the problem with count six is that it was brought under section 4(1) as read with section 4(2) (b) of the Firearm Act.Section 4(1) prohibits possession of a firearm or ammunition without a firearm certificate in force at the time. Sub section (2) (b) of the same section states:-

"(2) If any person

(a) ……

(b) fails to comply with any condition subject to which a firearm certificate is held by him,

he shall, subject to the Act, be guilty of an offence."

Clearly sub section (2) (b) applies to a person to whom a firearm certificate has been issued but has only failed to comply with the condition subject to which he holds that firearm certificate. That is not the position with respect to the Appellants to whom no firearm certificate, had been issued and therefore the issue of complying or failure to comply with any condition relevant in a firearm certificate issued to the Appellants did not arise. Since the charge included that paragraph of subsection (2) of section 4, that charge in count six was defective and the Appellants should not have been convicted under that paragraph (b) of subsection (2) as the learned trial magistrate did. The prosecution should have amended count six to replace paragraph (b) of subsection (2) with the appropriate provisions. That was not done and the trial ended with that fatal defect persisting.

On that technicality therefore an otherwise simple and straight forward case in count six fails.

On count five while there was what could be considered good evidence, the learned trial magistrate erred when she felt she could convict under section 297(2) of the Penal Code.

This is because the item alleged robbed in count five was Kshs.1700/-. If that charge was to turn to be attempted robbery, which is not a less serious offence than robbery with violence under section 296(2) of the Penal Code in terms of the sentence, the attempted robbery had also to concern the sum of Kshs.1700/-. The motor vehicle Registration NO. KZK 439 Nissan Sahara should not have come in as that had not been mentioned as the item robbed in the charge in count five.

Moreover, section 180 of the Criminal Procedure Code is intended to be used where the attempt charge is of a less serious offence than the main offence from which the attempt charge has come. With regard to the charge of robbery with violence under section 296(2) of the Penal Code, the Legislature intentionally made its attempt charge to be equally serious as the robbery with violence itself. That is why both section 296(2) and section 297(2) have the death penalty. The two offences being equally serious, it means section 180 of the Criminal Procedure Code is not applicable and the court therefore has no power to interchange the charges the way the learned trial magistrate did in this matter. It was up to the prosecution, after seeing the evidence, to amend the charge from section 296(2) to section 297(2). The prosecution having taken no such a step up to the end, the court had no power on its own motion to change the charge from section 296(2) to section 297(2) of the Penal Code.

On count five therefore, the learned State Counsel Mr. Obuo properly conceded the appeal but he appears to have forgotten that there was count six on which the Appellants were also convicted and sentenced.

From the foregoing, we allow the appeal of each appellant on the charge of robbery contrary to section 296(2) of the Penal Code in count five, quash the conviction and set aside the sentence.

Likewise, we allow each Appellant's appeal against his conviction and sentence with respect to count six alleging possession of a firearm without a firearm certificate. We quash the conviction of each

Appellant and set aside his sentence.

Each Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 27th day of November 2003.

J.M. KHAMONI

JUDGE

H.M. OKWENGU

JUDGE