



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 54 OF 2001

(ORG SRM's CR. C. NO. 821/02)

JUSTUS MWIKARIA KARIUKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant faced a charge of robbery with violence contrary to section 296 (2) of the Penal Code where it was alleged that on 19th day of March 2001 at around 1.30a.m. at Kathigiri village, Gatimu North Location, Embu District, the Appellant jointly with another not before court robbed Victor Douglas Njeru of Kshs.200/- threatening to use actual violence to him. It was alleged the Appellant with his colleague were armed with petrol.

The Complainant Victor Douglas Njeru who gave evidence as PW 1 saying he suspected his estranged wife was the cause of these robbery problems, told the court that while in his house at night he heard his dogs barking and on checking he saw two people flashing a torch going towards his bedroom window, then kitchen and back to the window where they saw him and as a result he engaged them in a conversation which ended with the complainant giving the two people Kshs.200/- which they reluctantly took through the window as they wanted more money. The complainant was smelling petrol and indeed the two people threatened to pour petrol on his car then in the compound and burn the house. The complainant claimed that those people actually splashed some petrol to his window ordering him to move away from that window. Thereafter they went away.

The complainant went with PW 2 to call the police who accompanied them back to the house. The ground was wet because it had rained and foot marks or shoe marks could be seen on the ground.

According to the evidence of the Complainant and his brother PW 2 Joseph Muchangi therefore, there were shoe marks from the house of the complainant leading up to the house of the Appellant and the shoe marks were traced with the assistance of a police dog which picked the Appellant's scent and subsequently bit the Appellant when the Appellant went outside his house responding to police order.

The Appellant was a local man known to the complainant who said he talked to the two men outside the window of his house and even gave them Kshs.200/-.

It is not clear from the evidence why foot marks or shoe marks or the scent belonging to the second person did not feature in that operation to trace the two robbers. Although the Complainant said he saw the two people he never claimed to have identified or recognised any of the two people. In fact PW 4 Inspector Julius Kalinda to whom the complainant made the report at Embu Police Station told the court

during cross examination by the Appellant:

“The Complainant named a lot of suspects he had in mind and we visited the homes of those people later. Surprisingly the Complainant had not named you.”

The story does not therefore seem to be as straight forward as given by the Complainant and his brother. From the evidence of PW 7 police Constable George Ojiem, for example, the court was told that when tracing the shoe marks it looked like marks of three people.

“We followed other foot marks of two people from the road which led us to a house where we found one boy with a radio which had no permit. We arrested him. We proceeded to track from the point we had noticed a separation. The dog picked scent across the tarmac which led us to the house of where the dog picked on urine at the scene and moved to the door. Our inspector knocked the door. Someone opened the door and the I.P. entered with the dog handler. I had just taken cover behind the house. The door was immediately opened. The man was handcuffed.”

The dog bit the Appellant as he and his arresters were peacefully walking to the police land rover.

Looking closely at the evidence of PW 7, it would appear that when the tracing of foot or shoes marks started from the Complainant's house, they led to the house where a boy was arrested for having a radio without a licence. From that house, the group went back to a tarmac road across which the dog picked up another scent. That was not at the house of the complainant. It was scent which was picked by the dog there that led the dog to the home where the Appellant was. In that home the dog did not go straight to the house of the Appellant as the dog seems to have lost the scent. It wondered around until it went at a latrine where somebody had urinated and it picked the scent of that person. That led the dog to the door of the house of the Appellant which the police Inspector knocked and the Appellant opened and was arrested.

The connection is not as good or as logical as the complainant and his brother and PW 3 P.C. John Gachui, the dog handler, had conveyed it to the court. The three avoid details and completely leave out the boy with the radio and PW 3 even claims that the Appellant was trying to run away when the dog bit him yet it appears that the Appellant was bitten by the dog either because of carelessness by PW 3 or because of PW3's mischief. Otherwise it would be said there was inconsistency in the prosecution's case with regard to how the Appellant was traced and that is fatal to the prosecution's case.

With regard to the shoes exhibits, the prosecution's case was that they took those shoes from the house of the Appellant because the shoes were wet and suspected to have been the ones which had made the shoe marks that were being followed. The Appellant does not agree stating that he had put on those shoes as he dressed up to accompany the police and that the police only took possession of his shoes at the police station when he was put in police cells and thereafter the police decided to use them as exhibits.

PW 7 was the last prosecution witness and he came alone. The first witnesses, PW 1, PW 2, PW 3 and PW 4 had come together PW 4 having been the Inspector in charge of the operation.

On the whole, we find that it was unsafe to convict the Appellant on the evidence which was before the learned trial magistrate in this serious offence where the only sentence is death. We give the Appellant the benefit of doubt.

Accordingly, we do hereby allow the Appellant's appeal, quash his conviction and set aside the sentence imposed upon him.

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

Dated this 19th day of November 2003.

J.M. KHAMONI

JUDGE

H.M. OKWENGU

JUDGE