



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 683 OF 1997

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL

CASE NO. 63 OF 1996 OF THE SP MAGISTRATE'S COURT AT

KIAMBU)

HERSI HALAKE & 2 OTHERS.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

J U D G M E N T

These appeals are consolidated. The three appellants were originally charged with three offences. In count one, they faced a charge robbery with violence c/s 296(2) of the Penal Code; in count two they were charged with the offence of possessing a firearm without a firearm certificate c/s 4(2) (a) of the Firearms Act Cap. 114 Laws of Kenya and in count three they faced the charge of possessing ammunition without a firearm certificate c/s 4(2) (a) of the Firearms Act aforesaid. They denied the charges

. After a full trial, they were convicted of the said offences on the first count they were sentenced to death while on the second and third counts they were sentenced to four years imprisonment on each of the two counts and sentences ordered to run concurrently. Being aggrieved by the said convictions, they appealed.

The robbery charge alleged that the appellants, jointly with others not before court, being armed with pistols robbed Benson Nganga Gachoka of his motor vehicle Reg. NO. KVQ 391 Toyota Hilux pick up valued at kshs. 450,000/- and at or immediately before or after the time of such robbery used actual violence to the said Benson Nganga Gachoka.

Gachoka had been hired by two people, not among these appellants, to drive them to Nazareth Hospital where the wife of one of them had delivered. On the way, they found three men beside the road and Gachoka was told by one of the two people in the motor vehicle to stop. On stopping, the three men approached and told him to get out of the car and leave the ignition key in the motor vehicle. Just then the man who sat next to him pointed a pistol at him and told him to obey what he was told. Another man who stood at the door and who had ordered him to leave the motor vehicle also had a gun. A fierce shooting followed and when it stopped, Gachoka was told to leave the pickup and found the three appellants lying on the ground being guarded.

One of the two people who had hired him managed to escape while the other who had a pistol was shot dead and the pistol recovered. It had five rounds of ammunition and these were produced in court.

It was the prosecution case that the three appellants were arrested at the scene. The evidence by the police officers who accosted the suspects said as much. This was however disputed by the two appellants who said they were arrested from their houses while the third appellant was arrested when he went to visit the other two appellants. The two appellants who said they were arrested at their homes called evidence to corroborate their assertions.

One aspect that remains unanswered in this case is, if two people were alleged to have had guns, and one of the guns was recovered from the dead suspect, if the other suspect who was said to have had a gun was among the appellants who was arrested at the scene, where did the alleged gun go?? The absence of an answer to that question puts into doubt the allegations by the prosecution witnesses that the appellants were arrested at the scene. This also enhances their contentions in respect of their arrests.

Further to the foregoing, one of the suspects told the investigating officer that he worked as a watchman at kentemere club. This was not investigated. It is right to draw an adverse inference that if this were to be the case it would have worked against the prosecution case.

About the charges preferred, the evidence if true, supported the charge of attempted robbery which is specifically provided for under the Penal Code section 297 thereof. However, as the evidence could not connect the appellants with that offence either. The issue does not arise.

The charge of possession of the firearm and ammunition could only be proved by the prosecution against all the appellants by establishing that they knew the dead suspect had the same, that there was a common intention and that the same were at their disposal just as they were to the deceased. This was not proved.

We hold in our judgment that the three charges against all the three appellants were not proved beyond any reasonable doubt. The convictions were unsafe. They cannot therefore stand.

Accordingly these appeals are allowed, convictions quashed and sentences set aside. We order that, unless the appellants are otherwise lawfully held each should be released forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of July, 2002

MBOGHOLI MSAGHA

JUDGE

G.MBITO

JUDGE