



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO 1433 OF 2000

KENNEDY NGUGI KINYORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1468 OF 2000

**(From Original Conviction and Sentence in Criminal Case no.2031 of 1998
of the Chief Magistrate's Court at Nairobi)**

GEORGE ODUOR OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 83 OF 2000

**(From Original Conviction and Sentence in Criminal Case No.2031 of 1998
of the Chief Magistrate's Court at Nairobi)**

FRANCIS NGIGE KIBIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 1434 OF 2000

**(From Original Conviction and Sentence in Criminal Case No. 2031 of 1998
of the Chief Magistrate's Court at Nairobi)**

ALLAN KIMARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

These appeals are consolidated. The appellants Kennedy Ngugi Kinyoro alias Mwaii Allan Kimari Kinyanjui, Francis Ngugi Kibia alias Josee and George Oduor Otieno alias Onyii were charged jointly and severally with a total of seven counts. In count one, Kinyoro, Kinyanjui and Kibia were jointly charged with the offence of attempted robbery c/s 297 (2) of The Penal Code. It was alleged in the particulars of the charge that, on 13th March, 1998 at Runda Estate Nairobi, jointly with others not before court while armed with dangerous weapons namely AK 47 rifles and pistols, they attempted to rob Dr. Gehard Stohr of his motor vehicle LandRover discovery Reg. On KAJ 338T valued at Kshs. 4 million, and at or immediately before or after the time of such robbery they fatally wounded the said Dr. Gehard Stohr. In count Two, Kinyoro, Kibia and Otieno were charged with the offence of possession of firearms without firearms certificates c/s 4(2) (a) of The Firearms act, cap 114 Laws of Kenya. In count three, the three faced a charge of being in possession of ammunitions without firearm certificate c/s 4(2) (a) of the same Act.

The particulars in count two and three aforesaid were that, on 29th August, 1998 at Eastleigh area, Nairobi they were found in possession of three(3) AK 47 rifles and 43 rounds of 7.62mm caliber ammunitions. Count four related to the appellant George Oduor Otieno alias Onyii. He was charged that he was found in possession of a firearm without a firearm certificate C/s 4(2) (a) of the same act. It was alleged in the particulars that on 1st September, 1998 at Umoja One Estate, Nairobi he had in his possession one Star pistol without a firearm certificate. Count five also related to the same accused Otieno. It alleged he was in possession of ammunition without a firearm certificate. The particulars were that he had in his possession 9 rounds of ammunition 9 mm caliber, 9 rounds of .762mm caliber ammunition and one expended cartridge of .45mm. it is not clear why the sixth and seventh counts were preferred at all because they relate to the same person George Oduor Otieno, and the particulars thereof are covered in count five herein.

Be that as it may, the appellants having denied the charges a full trial followed whereupon the learned trial magistrate convicted the appellants, as follows: accused one and two in count one and sentenced to the mandatory sentence of death, in counts two and three accused one and three were convicted and sentenced to 10 years imprisonment with hard labour on each count. Sentences were ordered to run concurrently. We note that this note on sentence is silent on one who had been convicted alongside accused three. The fourth accused was convicted of count four, five and six. He was sentenced to 10 years imprisonment with hard labour and ordered to serve sentences concurrently. We also wish to note in passing that the provisions that prescribe sentence for firearm offences do not provide for hard labour that the learned trial magistrate imposed. The appellants being aggrieved by the said convictions and sentences they appealed. All the appellants filed written submissions which we have on record. The learned counsel also made his reply which we also have. As the first appellate court, it is our duty to go through the entire record, re-evaluate the evidence and come to independent conclusions. This we have done.

The starting point is that, the prosecution has a duty to prove the case against the accused beyond any reasonable doubt and the burden of proof never shifts. If there is any reasonable doubt whatsoever the same should be accorded to the accused persons. On 13th March, 1998, the late Dr. Gehard Stohr and his wife were leaving a friend's house at Runda estate at about 11.30p.m. they were accosted by a group of people who were armed with guns. In the process Dr. Gehard Stohr who was behind the wheel was shot in the head and died. His wife escaped unhurt. The assailants took off in a white car. Both the wife of Dr. Stohr and the watchman at their friend's residence did not identify any of the assailants. The scene was visited by the police who recovered two spent cartridges from the scene. About six months later, acting on information, the police arrested two suspects, accused one and three in the original charge. They were found in a car in which three Ak 47 rifles and 43 rounds of ammunition were recovered. Investigations

and interrogations led to the arrest of the other coaccused two and four where another firearm make star pistol and several rounds of ammunition were recovered from the house of the original fourth accused.

Statements under inquiry were recorded from the suspects along with video coverage of the confessions relating to the scene. The recovered spent cartridges, firearms and ammunition were forwarded to a ballistic expert who found that there was a connection between the spent cartridges recovered at the scene in Runda and the firearms found in the car that accused one and three had. The charges were then preferred against all there appellants. It is clear from the judgment of the learned trial magistrate, that the convictions were founded on the recovery of the firearm s the report of the ballistic expert and the confessions allegedly made by the appellants. At the hearing of these appeals, the learned counsel for the Republic conceded the appeals for reasons that he gave. The firearms recovered from the car were never dusted for finger prints. Accused one is then said to have taken the police to the house of accused two where nothing was recovered after a search. The statements by the accused were retracted and torture was alleged.

Dr. Kamau treated the appellants and Inspector James Muraguri also admitted seeing the injuries which were alleged to have been inflicted by the police. The evidence against the second accused was his own statement and that of his co-accused which implicated him. It is on record that the learned trial magistrate admitted the statement of accused two but disallowed that of accused one. She says this was a mistake, that is, to have disallowed that statement. That notwithstanding, she used the said statement in her judgment. The video confessions were also admitted in evidence. They were taken about 6 months after the alleged attempted robbery. Some parts were not audible and their voluntariness was not resolved. That made their admissibility doubtful.

There was a very serious lapse in the investigations. The first accused denied the ownership of the car in which the firearms were recovered. He said he was a carwasher. The police did not wait for the owner if any, to turn up for his car, and no efforts were made to establish the ownership of the car. It would have taken a matter minutes to go to the registrar of motor vehicles to establish this. The report by the ballistic expert linked the firearms to the spent cartridges recovered from the scene but the ownership of the motor vehicle being in doubt this was not conclusive proof of that link as related to the accused persons. In any case, as we have observed, at the scene, the assailants were never identified. The police also never made any inventory of the recoveries from the car and no explanation has been offered for that omission. The finding of the firearms in the car did not prove possession in law in view of what we have observed above in connection with the ownership of the car.

There was evidence that the fourth accused led the police to the house of accused three, where a firearm was recovered under a bed. However, the police did not establish the house belonged to the third accused, indeed he had said the house belonged to a friend. There were four occupants who included women. No relationships were established. The firearm was not dusted for fingerprints and again no inventory was made. The landlord of the fourth accused was not called to confirm tenancy. In fact PW8 said they broke into the house. An innocent life in the name of Dr. Gehard Stohr was lost in the attempted robbery. However, the police should not have left anything to chance. All aspects of the case, we regret to observe, were not investigated. There were too many loose ends that created doubt in all the charges raise against the appellants. And so, notwithstanding the seriousness of the offences, these doubts must be given to the appellants. In that regard, we agree with the learned counsel for the Republic that, the convictions were unsafe.

Accordingly these appeals are allowed, convictions quashed n sentences set aside. All the appellants herein shall be set free forthwith unless otherwise lawfully held. Orders accordingly.

Dated and delivered at Nairobi this 4th day of July 2002.

MBOGHOLI MSAGHA

JUDGE

G MBITO

JUDGE