



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 72 OF 1997**

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL**

**CASE NO. 14475 OF 1995 OF SENIOR PRINCIPAL MAGISTRATE**

**KIBERA**

**JOHN KINYANJUI KABUGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant was charged with three offences. In count one he was charged with attempted robbery c/s 297(2) of the Penal Code. The particulars were that, on 28th September, 1995 along 2nd Parklands Avenue, Nairobi, jointly with others not before court and being armed with a dangerous weapon, namely a pistol, they attempted to rob Mrs Sarla Shah of her car Reg No. KAC 093W Toyota Sprinter saloon valued at Kshs. 1.2million.

Counts two and three related to possession of firearm and ammunition respectively without a firearm certificate. Having denied the offences, a full trial followed after which he was convicted of all the three offences. In count one he was sentenced to death while on counts two and three he was sentenced to serve three years imprisonment, respectively and sentences ordered to run consecutively.

Aggrieved by the said convictions, the appellant filed an appeal. In his petition appeal, the appellant has challenged his conviction on the basis of suspect identification both at the scene of the alleged offence, the scene of his arrest and in court. He has also contended that, the firearm and ammunition actual and constructive possession.

It is true that the complainant did not identify the people who attempted to rob her of her car. However, when she raised an alarm, members of the public and one motorist gave chase and eventually one suspect was arrested.

The offences took place at about 2.00p.m. one of the people who responded to the alarm raised by the complainant was pw2 Edward Kimondia Agesa. He heard hooting and screams from a motor vehicle. He then looked and saw an Asian woman screaming and pointing at a direction where people were running. He joined the chase two of those people managed to escape but one was arrested/apprehended. It is the evidence of this witness that, when this suspect was arrested he was still running and he (the witness) never lost sight of him at all during the chase. He did not find him with anything and was also not able to identify him in court due to lapse of time.

Masika Ngulo worked with Agesa and he too joined in the chase. While chasing the suspects, one of them was knocked by a motor vehicle and a pistol fell down. When this was happening Ngulo was 5 metres away. The man continued to run but was apprehended soon after. He identified that man as the appellant herein.

The man who was driving the motor vehicle that knocked down one of suspects was one Shirehachan G. Shah. His evidence is that he heard people shout “thief” “thief” and saw four people running along mpaka road. He followed. One had a pistol in the left hand and running very fast. He followed this man and tried to hit him with his motor vehicle. At that time he threw away the pistol. The motorist had a whistle which he continued to blow. With the help of members of public the suspect was arrested. He identified the man as the appellant.

The firearm and ammunition were examined and a report submitted in evidence.

The appellant in his defence denied involvement in these offences. He said he was on his way to a bus stage to take means to the town to buy provisions when he met a group of people only to be accused of being one of the suspects

The learned trial magistrate believed the identifying witnesses in that they never lost sight with the appellant. Also, the fact that he was seen with the pistol before he threw it down connected him with the offence. She said:

“It was daylight and the accused was chased and arrested when he threw away the firearm. I find there was on possibility of mistaken identity as pw2 and pw5 never lost sight of the accused who had a pistol during he chase until when he was arrested.”

With respect, we agree with the learned trial magistrate in her conclusion in view of the evidences adduced. This was direct evidence. The appellant was spotted soon after the complainant raised an alarm. He was running alongside others who disappeared. He was seen at close range by both pw3 and pw5. The conclusion was therefore irresistible.

The offences were proved beyond reasonable doubt. This appeal must therefore fail. The same is dismissed.

Order accordingly

Right of appeal explained.

Dated and delivered at Nairobi this 25th day of September, 2002

MBOGHOLI MSAGHA

JUDGE

G. MBITO

JUDGE