



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 32 OF 2020

BETWEEN

EDWARD NJENGA NJUGUNA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the original conviction and sentence of Hon. P. Gichohi, CM dated 8<sup>th</sup> November 2017 in Criminal Case No. 1226 of 2015 at the Magistrates Court at Kiambu)*

JUDGMENT

1. The appellant, **EDWARD NJENGA NJUGUNA**, was charged with the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on the night of 27<sup>th</sup> and 28<sup>th</sup> January 2015 at around 1:30am at Ruaka trading centre within Kiambu County with others not before the court while armed with an AK47 rifle and two pistols robbed **DAVID MWOSE MWALUKO** one motor vehicle registration No. KBN 700M make Mercedes Benz, one Czeska pistol s/no A969615, one mobile phone make Samsung Trend and cash Kshs. 600.00 all valued at Kshs. 1,398,000.00 and at the time of such robbery threatened to use actual violence to the said **DAVID MWOSE MWALUKO**.
2. The appellant was also charged with attempted robbery with violence contrary to **section 295** as read with **section 296(1)** of the *Penal Code*. The particulars of the charge were that on the night of 24<sup>th</sup> April 2015 at about 8:30pm at Karura apartments within Kiambu County with others not before the court while armed with two pistols attempted to rob **RICHARD SANINGO** a motor vehicle registration no. KBQ 029F Toyota Noah valued at Ksh. 1.2 M and at such attempted used actual violence to the said **RICHARD SANINGO**.
3. The appellant was further charged with two counts of possession of a firearm contrary to **section 4(2)** as read with **section 3** of the *Firearms Act (Cap 114 Laws of Kenya)*. The particulars of the charge were that on 17<sup>th</sup> May 2015 at about 7:30am at Githima Village in Kiambu County had in his possession a Czeska pistol serial number A969615 and a revolver Smith and Wesson serial number 8D 68907 without holding a firearm certificate in force at the time.
4. He was also charged with possession of ammunition contrary to **section 4 (2)** as read with **section 3(a)** of the *Firearms Act (Cap 114 laws of Kenya)*. The particulars of the charge were that on 17<sup>th</sup> May 2015 at about 7:30am at Githima village in Kambu County had in his possession seven rounds of ammunition without holding a firearm certificate at that time.
5. The Appellant was convicted on all five counts. He was sentenced to death on the first and second count and to serve 5 years' imprisonment on Counts 3, 4 and 5. The court ordered that the sentence on Counts 2, 3, 4 and 5 be held in abeyance.
6. The Appellant appeals against conviction and sentence based on the memorandum of appeal filed on 1<sup>st</sup> July 2020 and written submissions filed on 15<sup>th</sup> September 2020. The main issue raised by the Appellant was that the prosecution did not prove the case beyond reasonable doubt. He contended that the trial magistrate erred by convicting him on a defective charge and that the provisions of **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* were not complied with. He pointed out that he was convicted on the basis of inadequate evidence of identification and a crucial witness did not testify. He urged that his defence was not considered and that the sentence was unconstitutional. The respondent did not file submissions and chose to rely on the record.
7. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic [1972] EA 32*). In order to deal with the grounds of appeal, it is necessary to outline the key evidence that emerged before the trial court.

8. David Mose Mwaluko (PW 1) told the court that around 1:30am on 28<sup>th</sup> January 2015 he had parked his car outside the compound and was walking towards the gate when he was accosted by three men with two pistols and an AK47. The men ordered him to start the vehicle and thereafter he was ordered to lie down at the back seat. In the process, he removed his pistol and wallet and placed them underneath the driver's seat. He told the court that one of the men with a pistol sat at the driver's seat while the one with the AK47 sat at the front passenger seat while the third assailant sat at the back passenger seat and they drove out heading towards Gachie.

9. PW 1 stated that the 3<sup>rd</sup> assailant took Ksh 600/- from his trouser pocket and his Samsung phone from his shirt pocket. PW 1 testified that he lay down facing the front and could see the faces of the assailants seated at the front of the car with assistance from streetlights as they drove around. He told the court that the assailants drove him to a forest where they ordered him out and placed him in the boot of the car. That while in the boot, he heard them ransacking the car. After about 5 minutes, the assailants drove off again. That at some point he heard another car breaking followed by gunshots. The assailants then left the tarmac road and drove on a rough road for roughly 10 minutes before coming to a stop.

10. PW 1 further testified that the court that he was removed from the boot and he was in a maize plantation and people's houses. He stated that at that time there was strong moonlight and he could clearly see his assailants. He stated that the man who was driving ordered him to get into the car and drive off. PW 1 managed to drive back home and asked a neighbour to accompany him to Karuri Police Station where he recorded his statement at about 4:15am. In the morning, he went back to the police station, recorded another statement and surrendered his firearms certificate and a copy of the logbook. In April, PW 1 was called to the police station. He identified his gun which had been recovered by the police. He was further informed that a suspect had been arrested and he participated in an identification parade and was able to pick out the appellant from among 8 other people.

11. Richard Sangingo, PW 4, told the court that on 24<sup>th</sup> April 2015 at around 8:30pm he was parking his car in the compound when a man with a pistol came to the driver's side and ordered him to get out while two other man stood behind the car. PW 4 reached for his gun and shot the assailant in the chest through the window. The assailant shot back while they tried to escape. PW 4 recalled that the assailant he had shot fell down while the others escaped. Later the police came and took evidence at the scene. He informed the police that he could recognize the other assailant. PW 4 further recalled that sometime later he was called to the police station for an identification parade. He went with his wife who had also witnessed the attack from the house window. PW 4 picked out the appellant and recognized him as the person standing behind the car.

12. Alex Ngethe, PW 5, was the watchman where PW 4 lived. He told the court that on 24<sup>th</sup> April 2015 at around 8:00pm he opened the gate for PW 4. As he was closing the gate, two men approached and ordered him to lay down and leave the gate open. That one man was left watching over him while the other man entered in the compound. After a few minutes later he heard two gunshots and the attackers ran away. He stated that one of the attackers fell down a few meters away. PW 5 told the court that he knew the attacker who had been shot as Kimani as they had gone to school together. He further stated that he knew the appellant as he was a tout at the stage at Ruaka and he was the one who stood over him on the day of the attack.

13. PW 4's wife, Faith Yamato Sawani, PW 7, stated that on 24<sup>th</sup> April 2015 at around 8:30pm, PW 4 had informed her that he was approaching the compound. When she heard PW 4 hooting she went to the balcony and saw him enter the compound. She told the court that she saw two men follow the car into the compound and saw one of them go the driver's side and make gestures while the second person stood behind the car facing the balcony. When she saw that the men had guns, she screamed. The man behind the car looked up towards her, she managed to see his face. She lay down and crawled back into the house. She then heard two gunshots. When she went to see what happened she heard that the two attackers had escaped. PW 7 further testified that on 20<sup>th</sup> May 2015, she went to the police station to attend an identification parade where recognised the appellant as the person who stood behind the car.

14. The Investigating Officer, PC Robert Ocholla, PW 6, testified that on 17<sup>th</sup> May 2015 they received a tip from an informer that a suspect by the name Edward Njenga Njuguna had been involved in incidents of robbery with violence. At around 7:30am, together with other police officers including PC Pius Odeke, PW 8, he proceeded to the appellant's homestead where he was living with his parents. At the homestead, the police identified themselves and informed the appellant that they were searching for two pistols. Although he initially denied that he had the pistols, the appellant took some of the officers to where he had hidden the guns. The officers recovered two pistols and 7 bullets which had been wrapped in a shirt and polythene bag which he produced in court. They also prepared an inventory which the appellant signed. PW 6 informed the court that after the appellant was picked by three witnesses at the identification parades.

15. Chief Inspector Aggrey Magomele, PW 9, testified that Chief Inspector Titus Wanjala was the one who conducted the parade but he had been transferred to Kisumu and had unfortunately become critically sick. PW 9 informed the court that he was familiar with CI Wanjala's handwriting and signature having worked with him for over 8 months. He produced the identification parade forms which indicated that the appellant was picked out by the three different witnesses by touching. Inspector Reuben Kiptum Bett, PW 3, a ballistics expert produced the ballistic report for the guns that were recovered from the appellant. The report indicated that the guns were in good working order and that they were capable of being shot.

16. When the appellant was put on his defence, he denied the charge. In his sworn defence, he stated that he was arrested on 17<sup>th</sup> May 2015 at about 7:30am when about 10 armed officers went to their house. That the police officers asked for their identification cards and informed him that they had been sent to search his house. The appellant stated that the police officers never recovered anything from the house but they arrested him. He told the court that at the police station three identification parades were conducted and that PW1, PW4 and PW7 all identified him. That afterwards he was charged with the current charges which he did not understand.

17. The first issue for consideration is whether the charge was valid. The charge sheet as framed in Count II referred to section **296(1)** which the appellant relates to the offence of robbery instead of **section 297(2)**. **Section 134** of the **Criminal Procedure Code** dealing with the framing of charges states that, "Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." [Emphasis mine]

18. The charge as framed is lucid, it discloses the offence which the appellant was charged and it one of attempted robbery with violence contrary to section 297(2) of the Penal Code. It meets the terms of section 134 of the Penal Code. I do not think that the typographical error to the specific section was fatal to the charge and the appellant was not thereby prejudiced nor was a failure of justice occasioned. Such an error is curable under section 382 of the Criminal Procedure Code which provides;

*382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

19. The appellant submitted that the prosecution failed to prove the elements of the offence of robbery with violence. The offence of robbery with violence under section 296(2) of the Penal Code is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see **Dima Denge Dima & Others v Republic** NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, **Oluoch v Republic** [1985] KLR 549 and **Ganzi & 2 Others v Republic** [2005] 1 KLR 52). Section 296(2) is an aggravated form of robbery which is defined in section 295 of the Penal Code which provides that, “any person who steals anything, and at, or immediately before or immediately after the time of stealing, uses or threatens to use actual violence to any person or to any property in order to steal.”

20. The offence of attempted robbery under section 297(1) of the Penal Code is proved when any person with intent to steal anything, at immediately before or immediately after the time of the assault, uses, threatens to use actual force on any person or property in order to obtain the thing intended to be stolen or to prevent or overcome any resistance to it being stolen. Under section 297(2) of the Penal Code, the offence becomes attempted robbery with violence when the attempt is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person.

21. In this case the elements of robbery with violence and attempted were satisfied in several ways. First, the appellant was part of the gang. Second, PW 1, PW 4, PW 5 and PW 7 testified that members of the gang were armed with guns and threatened him with violence causing him to run away. Thirdly, PW 1 had his gun, money and telephone stolen while the gang attempted to rob PW4 of his motor vehicle. I am therefore find and hold that the prosecution proved the elements of the offence of robbery with violence under section 296(2) and attempted robbery with violence under section 297 (2) of the Penal Code.

22. The conviction of the appellant rested his identification and upon the doctrine of recent possession. The trial magistrate found that as regards Count I in respect of PW 1, the case rested on the identification of a single witness as the other witness PW 2 could not identify the assailant. Further, PW 1 firearm was recovered in possession of the appellant. Count II in respect of PW 4 rested on identification by PW 4, PW 5 and PW 7.

23. In reaching its decision, the trial court accepted the principles guiding the court in dealing with identification of suspects in difficult circumstances in **Abdallah Bin Wendoh and Another v Regina** [1953] 20 EACA 166 and **R v Turnbull** [1976] 2 All ER 549. Our courts have emphasised that unless handled with care, evidence of visual identification can occasion a miscarriage of justice. In **Wamunga v Republic** [1989] KLR 424 the Court of Appeal warned that;

*[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.*

24. In the present case both incidents happened at night, however, PW 1, PW 4, PW 5 and PW 7 were all able to identify the appellant. PW 1 stated that he was able to properly observe his attackers when they approached him outside the gate, as there were security lights on the perimeter and observed that he had a gap on the teeth.

25. PW 4 stated that he was able to observe the appellant who was standing behind his motor vehicle at the time of the incident the parking lot in the compound was well lit as they had demanded for the light intensity to be increased after previous attacks. This was corroborated by PW7 who stated that she was able to see the attackers as the parking lot was well lit and that the appellant was facing her direction.

26. The Officer who conducted the identification parade was not called as a witness. However, from the record the appellant did not object to their production by the investigating officer. I have considered the manner in which the identification parade was carried out by PW 7 and I find that he scrupulously adhered to the Force Standing Orders and the standards laid down in **Rex v Mwangi s/o Manaa** [1936] 3 EACA 29 amongst other cases. Some of the relevant instructions contained in the Force Standing Orders are as follows;

1. The Accused person is always informed that he may have an Advocates or friend present when the parade takes place.

2. The officer in charge of the case, although he may be present, does not carry out the identification parade.

3. The witness does not see the accused before the parade.

4. The accused is place among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.

5. The accused is allowed to take any position he chooses, and he is allowed to change his position after each identifying witness has left, if he do desires.

6. ....

7. ....

8. ....

9. ....

10. The witness is to touch the person he identifies.

11. At the termination of the parade or during the parade the accused is to be asked if he is satisfied that the parade is being conducted in a fair manner and a note is to be made of his reply.

12. ....

27. PW 9 produced the identification parade forms which indicated that the appellant did not want his witness present. The forms also indicated that appellant accepted different position in the line-up and that PW 1, PW4 and PW7 all identified the appellant by touching him. The appellant signed the identification parade form after stating that he was satisfied with the manner in which it was carried out.

28. Additionally, the appellant was convicted on the basis of the doctrine of recent possession. In *Hassan v Republic* [2005] 2 KLR 11, the Court of Appeal explained as follows:

*Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver.*

29. The evidence is clear that appellant was found in possession of PW 1's firearm, four months after the incident. A firearm is a unique item that is not easily disposed of was therefore recovered from the appellant within a reasonable time after the robbery. Moreover, the appellant did not give any explanation or reason for his possession of PW 1's firearm.

30. The appellant's defence was a mere denial. His defence was centred around his arrest and the identification parade. His assertion that that the guns were never recovered at his homestead is rebutted by the evidence of PW 6 who produced the inventory which was duly signed by appellant. I accordingly affirm the conviction on all counts.

31. As regards the sentence, the appellant was sentenced to death on Counts 1 and 2 as required by **section 296(2)** and **section 297(2)** of the **Penal Code**. However, the mandatory death penalty was declared unconstitutional (see *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR and *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR). Considering the facts of the case, I allow quash the sentence of death.

32. The appellant was first offender but the circumstances were that he committed a series of offence in the company of other person with the use of firearms. I therefore sentence the appellant to 20 years' imprisonment on Counts 1 and 10 years' imprisonment on Count 2.

33. In conclusion, I affirm the appellant's conviction on all the counts. I allow the appeal only to the extent that I quash the death sentence and substitute with a sentence of 20 years' imprisonment on Count 1 and 10 years' imprisonment on Count 2. The sentences shall run concurrently with the sentences on Count 3, 4 and 5 which had been placed in abeyance. As the appellant was in pre-trial custody, the sentence shall run from the date of arraignment, that is, **22<sup>nd</sup> May 2015**.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 9<sup>th</sup> day of MARCH 2021.**

**M. KASANGO**

**JUDGE**

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.