



**REPUBLIC OF KENYA**

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

**CORAM: R. MWONGO, J.**

**CRIMINAL APPEAL NO. 63 OF 2015**

**ALEX MAINA NJOKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the conviction and sentence dated 24<sup>th</sup> April, 2015 of Hon. M. K. Mutegi, SRM, in Engineer CMCR No. 546 of 2013)*

**JUDGMENT**

1. The appellant, Alex Maina Njoki was charged in Criminal Case No. 546 of 2013 with the offence of attempted robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. He was convicted for robbery with violence and sentenced to death on 24<sup>th</sup> April, 2015.

2. Aggrieved, the appellant filed a petition of appeal challenging both conviction and sentence. His amended appeal upon which his submissions were founded, has the following grounds:

*i. That the learned trial magistrate erred in law and fact by failing to find that the charge as drawn was fatally defective.*

*ii. That the learned trial magistrate erred in law and fact by failing to appreciate that a toy pistol is not a dangerous and offence weapon since it is not a gazetted firearm.*

*iii. That the sentence imposed was harsh and excessive. The trial court imposed a mandatory sentence which has since been declared unconstitutional by recent developments in the law.*

3. From the above grounds the issues for determination are:

- a) Whether the Charge Sheet was defective.
- b) Whether the toy pistol is a dangerous and offensive weapon.
- c) Whether the sentence was harsh and excessive.

I will deal with these through examination of the evidence.

4. The facts of the case are that on 14<sup>th</sup> September, 2013 at about 10.00pm the appellant entered Blue Line Bar in Weru Trading Centre, Nyandarua. He was masked and had a homemade pistol and a grill wire, or which. He found Jane Njeri Kanyiri (PW1) and Anna Wanjiku Mwangi (PW2), the barmaids, inside. They were just about to close the bar and switch off the lights. He demanded money and their phones. Jane said she did not have them, and he hit her twice with the pistol.

5. The appellant then ransacked PW1, pushed her out of the counter, ordered her to lie on the floor and beat her with the whip. She screamed, and the more she did so, the more viciously he beat her.

6. The appellant simultaneously turned to Anna who he had also ordered to lie down after demanding money and her phone. When she hesitated he hit her once with the whip and she lay down. As their ordeal unfolded, the watchman Maina Njora (PW3) came into the bar.

7. PW3 testified that he is employed as a watchman at the Blue Line Bar. At the material time he was in his living quarters at 10.30pm when he heard a commotion. He immediately went there, pushed open the door and saw a man in a mask. The man ordered him to remove his money and phone and to lie down. He drew a pistol and touched PW3's head with it. PW3 got down on the floor.

8. The assailant then called PW1 to remove all the money. She gave him the keys to the store and told him to remove money from there. In the process, they started struggling and the gun fell. Immediately, PW3 grabbed the assailant assisted by PW1 and PW2 and constrained him against the counter as they screamed for help. Members of public came in and assaulted the appellant. Thereafter, Administration Police Officers were called from Weru who arrested him. According to PW2 the ordeal took about thirty minutes.

9. PW4 was Dr. Maingi from Engineer Hospital. He produced the P3 form for PW1 Njeri. She had been examined by his colleague Joseph Kamau who found she had inflammation of the upper back, swollen and painful left upper forearm, pain and swelling in the left foot. He classified the injuries as harm, and stated that they were inflicted by a blunt object. He was not cross-examined.

10. PW5 APC Dennis Ogaro from Weru Administration Police Post stated that he was at the Post on 14<sup>th</sup> September, 2013 at 10.30pm when he heard screams. He and APC Tanui hurried to the scene and found people at Blue Line Bar carrying stones. A man was on the ground. He had a mask on. He identified him as the appellant in the court room. The man gave his name as Alex Maina Njoki from Kipipiri. They recovered a toy pistol from him together with a string wire. They were produced in court. After about 1 ½ hours the police arrived and took the appellant away.

11. PW6 was PC George Odongo from Kinangop Police Post. He accompanied his OCS, PC Longilo and PC Limuli to the scene in a station vehicle to collect a robbery suspect. It was on 15<sup>th</sup> September, 2013 at about 12.10am. On arrival at Blue Line Bar they found AP Officers guarding the suspect who had been assaulted and was lying on the floor. He had injuries and was wearing a face mask. PW6 removed the mask and escorted the appellant to the car. He returned and collected a spring wire and homemade pistol which he produced as P. Exhibits 2 and 3. He sent the pistol for ballistics examination.

12. The ballistics expert PW7 Inspector Florence Karimi of CID Headquarter testified that she received an exhibit on 9<sup>th</sup> February, 2013 from PC George Odongo of Kinangop Police Station. She examined it and found it was homemade gun made of wood and metallic material. It resembles a conventional gun comprising open chambers, barrel trigger guard, pistol grip and cocking handle. It was not capable of firing any conventional bullet, but is an imitational firearm as defined in the Firearms Act.

13. The appellant's evidence was brief. He said he had gone to meet a girl at Blue Line Bar. He bought some alcohols and the waiter asked him to settle his bill of Kshs 500/=. He gave her Kshs 1,000/= and, instead of giving change, she started asking for more. They began to argue and the watchman intervened. They started to beat him up and took all his money. Then they shouted 'mwizi' 'mwizi'. He did not deny the events as set out by the prosecution witnesses.

#### **Defective Charge Sheet**

14. The appellant asserts that the charge sheet was defective because nowhere did it indicate that he was in the company of others as described in **Section 297 (2)** of the **Penal Code**. The charge sheet reads as follows:

*“Alex Maina Njoki - On the 14<sup>th</sup> day of September 2013 at Blue Line Bar Weru Trading Centre in Nyandarua County, while armed with a dangerous weapon namely a homemade pistol and a grill wire attempted to rob off Jane Njeri Kanyiri a mobile phone and case and immediately before the time of such attempted robber beat the said Jane Njeri Kanyiri.”*

15. **Section 297 (2)** of the **Penal Code** on attempted robbery provides as follows:

*“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”*

16. A clear perusal of the provision shows that the offence is created by an offender armed with a dangerous weapon or instrument. There is then the conjunction “or is in company with one or more other persons.” This clearly means that the offence is complete if the offender is alone, or, in company with another or others. The conjunction ‘or’ is permissive referring to either or another thing. The offence is complete if only one person is involved under **Section 297 (2)** of the **Penal Code**.

17. Accordingly the charge sheet is not defective as the appellant committed the offence alone.

#### **Whether a home made gun is a dangerous weapon**

18. The appellant made reference to **Section 34** of the **Firearms Act** as cited in the case of **Sammy Mwaniki Theuri v Republic [2005] eKLR**. He urges the court to find that the toy pistol alleged to have been used in the commission of the offence cannot qualify to be classified as a dangerous or offensive weapon as stated in the charge sheet.

19. The DPP agrees with the trial court's finding and relied on **Section 34** of the **Firearms Act** and PW7's evidence that the toy pistol resembled a conventional had gun comprising of an open chamber, barrel trigger and trigger guard and therefore was a dangerous weapon. She also stated that the wire was equally a dangerous weapon.

20. **Section 34 (1), (2) and (3)** of the **Firearms Act** provides:

**“(1) If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment of not less than seven, but not exceeding fifteen years, and where any person commits any such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence.**

**(2) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code (Cap. 63).**

**(3) In this section, “imitation firearm” means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not.” (Emphasis added)**

21. **Section 34 (3) of the Firearms Act** describes an imitation firearm as anything which has the appearance of being a firearm. **Section 34 (1) of the Firearms Act** provides that if someone makes or attempts to make any use of a firearm or “*an imitation firearm*” he commits a criminal offence under the Firearm Act. **Section 34 (2) of the Firearms Act** categories an imitation firearm as deemed in law to be a dangerous weapon or instrument for purposes of the Penal Code.

22. Accordingly, the homemade pistol having been described in the evidence of the ballistics expert as “*an imitational firearm as defined under the Firearms Act*” must be deemed as a dangerous weapon. I so find and hold. This ground of appeal also fails.

#### **Sentence**

23. The appellant argued that the sentence meted was mandatory and excessive. He referred the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which it was found that a Judge when faced with a mandatory death sentence must nevertheless exercise his discretion when meting judgment, taking into account the mitigating factors.

24. The State had no objection to a resentence hearing in this matter.

25. The mitigation conducted in the trial court was as follows:

#### **“Mitigation**

**Accused : To speak the truth, I was just a customer. We argued with the bar maid.**

**Court : How old are you?**

**Accused : I am 21 years old**

#### **Sentence**

**Court : Accused person is 21 years old. Having been convicted convicted under Section 215 of the Criminal Procedure Procedure Code for the provisions of Section 297 (2) of of the Penal Code, accused person is hereby sentenced sentenced to death.”**

26. Clearly the trial court did not take into account the several mitigating factors and guidelines for sentencing which afford constitutional protection to an accused person facing a mandatory death sentence. Accordingly, I accept the appellant’s argument and find that the sentence meted did not take into account mitigation in a mitigation hearing.

#### **Disposition**

27. Ultimately, he appeal is dismissed on all grounds in respect of conviction, and the conviction is hereby upheld. The sentence is hereby set aside. The court shall fix a date for re-sentencing after a hearing on mitigation.

#### **Administrative directions**

28. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

29. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

30. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 4TH DAY OF MAY, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Alex Maina Njoki – Appellant in person in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu