



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 108 OF 2011

(BEING AN APPEAL FROM THE DECISION OF HON. T NZYOKI (SRM) DATED 18/7/2011 IN CRIMINAL CASE NO 196 OF 2010 (LODWAR)

ERUPE LOKUTAN.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars were that **on the 4th day of April, 2010 at Lopur village in Katilu location in Turkana south district within Rift Valley Province jointly with another not before court being armed with a dangerous weapon namely AK 47 rifle serial BO4928 robbed DAVID EKWEEL one sheep valued at Kshs. 1500 and at the time of such robbery threatened to use actual violence on the said David Ekweel.**
2. The second count was being **in possession of a firearm contrary to Section 4(2) (a) as read with Section 4 (3) (a) of the Firearms Act No. 114 Laws of Kenya**. The particulars were that **on the 4th day of April, 2010 at Lopur village in Katilu division of Turkana South District within Rift Valley Province was found being in possession of one AK 47 rifle serial NO. BO4928 without a firearm certificate.**
3. The Appellant was convicted and sentence to suffer death. His appeal to this court was dismissed and he moved to the Court of Appeal which ordered that the appeal be heard afresh. The parties have since filed their rival submissions which the court has perused as well as the proceedings.
4. It would be necessary to summarise the proceedings at the trial court before looking at the grounds of appeal raised by the Appellant.
5. **PW1 DAVID EKWEEL** testified that he was asleep in his house on the material day when at around 2.00 a.m he heard screams from his son and as he rushed outside he heard warnings from him that there was a person who was following him. He then heard a gunshot and his son was quiet. A person approached him and he shouted at him in the Turkana language.
6. The person then attacked him and they wrestled together as he tried to get the gun from him. Police Officers arrived and he ordered him to drop the gun. They arrested him and they found one of his sheep had been killed. They took him to the AP Post and later to Kainuk police station. He discovered that the person arrested was the appellant whom he knew.
7. **PW2 AUGUSTINE EKAMAIS** the son to pw1 testified that he was asleep near the goat's enclosure when he woke up and found the door open and there were people there. They noticed him and they took off. He called his father and one of them shot in the air but he continued screaming. He was shocked after the shot and he did not pursue him. Later he was arrested by his father.
8. **PW3 CORP. JAMES KEMEI** testified that they were on a night patrol that time when they heard some gunshots about 150 metres away. They rushed to the scene with his colleague and they found two people wrestling over a gun. They arrested the appellant and took him away together with the gun and the carcass of the sheep. They escorted him to Katilu Police Patrol base where he was handed over to the officers.
9. **PW4 SP. LAWRENCE NTHIWA** from the firearms laboratory headquarters in Nairobi produced the ballistic report which found that the gun which was recovered from the appellant during his arrest was in a working condition. He produced the report on behalf of his colleague one Alex Mwandawiro.
10. **PW5 PC NYAMWEYA LEONARD** from Kainuk police station carried out the investigation upon the Appellant being brought to the station. He recorded witness statements and preferred charges against the Appellant. He also had the firearm examined by the ballistic expert in Nairobi and he produced the same in court.

11. When placed on his defence the appellant gave unsworn evidence denying the charge. He explained how he was arrested on the 5th April 2010 when he took his mother to seek medical assistance at Katilu after she injured herself with a jembe. He went on to state that he was rescued by the chief from the mob who were baying for his blood. He said that he had a grudge with the Complainant over a shamba. He did not call any witness.

ANALYSIS AND DETERMINATION

12. The primary duty of this court is to analyse the evidence as presented and come up with afresh conclusion noting that it did not have the benefit of seeing the witnesses and their demeanour unlike the trial court. See **OKENO V.REP. 1972. E.A .32.**

13. The substance of the grounds raised by the Appellant in his appeal are general assault on the entire decision by the trial court which according to him reached a verdict based on weak and unsubstantiated evidence. He said that the trial court failed to consider the circumstantial evidence and thus went on a different tangent altogether.

14. The ingredients of this kind of offence are well captured by Section 296 of the Penal Code namely ***that the offender must be armed with dangerous weapons, in a company of more than one person and he harms the victim immediately or thereafter.***

15. In this case the production of the AK 47 gun clearly showed that the appellant was armed and dangerous. PW2 said that the attackers shot in the air and he was shocked. PW1 on the other hand struggled with the Appellant till the police on patrol arrived.

16. In this case and contrary to the submission by the Appellant he was arrested at the scene. There was no other explanation why he was at the Complainant's place at that hour of the night. Although his accomplices were not arrested he cannot claim as he said in his unsworn evidence that he was arrested elsewhere.

17. The Appellant at the time of his arrest was wrestling with the Complainant and lucky enough he had run out of the ammunitions. The sheep that was found killed belonged to the complainant and it was found at the scene.

18. In the premises, the findings by the trial court was sound both in law and fact. The Appellants defence was of no probative value as it did not displace the Respondents evidence and at any rate he did not accord the respondent any chance of cross examination.

19. For all intent and purposes this appeal is unmeritorious and the same is hereby dismissed.

20. On the sentencing, based on the ground breaking decision by the Supreme Court of Kenya in the now famous case of **Francis Muruatetu & Another Republic** this court shall proceed to tamper with the same. It is of course appreciated that by the time that decision was rendered the law did not permit the court to exercise any other discretion apart from the penalty prescribed.

21. In the instance case it is noted that the Appellant has been in custody from the time of his arraignment in court that is as from **6th April 2010** which is roughly about 10 years ago. By now he must have learned some valuable lessons not to earn his livelihood through violence. Lucky enough there was no physical injury upon the Complainant nor his son.

22. In this regard this court hereby sets aside the death sentence meted upon the Appellant. The custodial sentence he has served is considered sufficient in the circumstances. He shall however serve a two-year probation period upon his release to be supervised by the relevant probation office.

23. He is otherwise set free unless lawfully held.

Dated, signed and delivered via Whats up in chambers this 7th day of July, 2020.

H. K. CHEMITEI

JUDGE

7/7/2020

In the presence of:

The appellant present as well as Mr Mambili from the Prison Department.

Court Assistant – Silvia

Judgement delivered via Whats up.