



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.96 OF 2018

*(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga - CM*

*delivered on 22<sup>nd</sup> September 2017 in Makadara CMC CR. Case No.170 of 2015)*

LYDIA WAMAITHA WAMBUI *Alias* SHIKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Lydia Wamaitha Wambui was charged in the first count with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the nights of 1<sup>st</sup> and 2<sup>nd</sup> January 2015 at Tears Bar in Pipeline Estate within Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons, namely pistol stole cash Ksh.8,000/- and 24 pieces of guarana beer all valued at Ksh.11,200/-, the property of Mary Munyao (the complainant) and at the time of such robbery threatened to use actual violence to the said Mary Munyao.

The Appellant was charged in the second count with the offence of **being in possession of ammunition without a firearm certificate** contrary to **Section 4(2) (a)** of the **Firearm Act**. The particulars of the offence were that on the nights of 1<sup>st</sup> and 2<sup>nd</sup> January 2015 at Tears Bar in Pipeline Estate within Nairobi County, the Appellant was found being in possession of one round of 9mm of ammunition without a firearm certificate. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charges. After full trial, she was convicted as charged on the first count and sentenced to death. She was acquitted of the charge in the second count. The Appellant was aggrieved by her conviction and sentence. She has filed an appeal to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She faulted the trial court for convicting her yet the prosecution failed to prove the charges against her to the required standard of proof beyond any reasonable doubt. She was aggrieved that her conviction was based on a defective charge sheet. She was of the view that the trial court failed to consider her defence in arriving at its decision.

During hearing of the appeal, the Appellant presented to court written submissions in support of her appeal. She urged the court to allow her appeal. Ms. Nyauncho for the State opposed the appeal. She submitted that the Appellant while in the company of another robbed the complainant at gun point. The Appellant was at the bar on the material day. A man walked in. He was armed with a pistol. He ordered everyone to lie down and proceeded to rob the complainant. He went to where the Appellant was seated. He asked her to fire the gun to confirm it was real. The Appellant fired into the ceiling. Learned State Counsel stated that the Appellant knew her accomplice. Even though she only fired the gun, she aided her accomplice in carrying out the robbery. She asserted that the prosecution relied on **Section 20** of the **Penal Code**. It was her view that the Appellant was guilty, although as an accessory. With regards to the sentence, Learned State Counsel was of the opinion that the court ought to reduce the same to fifteen (15) years imprisonment. In the premises therefore, she urged this court to dismiss the appeal on conviction.

The facts of the case according to the prosecution are as follows: The complainant owned a bar. On the material night, she was at work at the said bar. At about 8.00 p.m., the Appellant entered the bar in company of two other women. They joined some men seated at a table in the bar. After sometime, the man and the Appellant's lady friends left the bar. She was left seated alone at a corner. By this time, there were only two other customers at the bar. Her waiter (PW4) was also at the bar. At about 11.00 p.m., a man entered the bar. He raised his t-shirt. The complainant noticed that he had a gun tucked on his waist. He took out the gun. He ordered them to surrender their phones and money. The complainant surrendered her phone and cash Ksh.8,000/-. The man complained that the money was not enough. He took the money and placed it on a table. He thereafter went and joined the Appellant at her table. She was seated alone at the said table. He placed his gun on the

table. He told the complainant that he was going to shoot her with the said gun to prove that it was a real gun. He ordered the complainant to move to the counter.

The man asked the Appellant to test the gun. The complainant suddenly heard the sound of a gunshot. She turned around and saw the Appellant holding the gun. The complainant asked the Appellant if she wanted to kill her. The Appellant replied that she was only testing the gun. The man approached the counter. He destroyed several cans of beer. He then ordered the complainant to serve everyone a drink. He took his gun and the complainant's money. He ordered the two customers who were at the bar to leave. He left immediately thereafter. The complainant was left at the bar with the Appellant and one of her waiters (PW4). She locked the bar to ensure the Appellant did not leave. In the morning, the complainant's husband, PW2, came to the bar accompanied by three police officers. They proceeded to the police station and recorded their statements. On 13<sup>th</sup> January 2015, the complainant was asked to go to the police station to identify the man who robbed her at the bar. The complainant stated that she did not know the relationship between the Appellant and the said man.

When the Appellant was put to her defence, she stated that on the material day she went to the bar. She left the bar at 9.30 p.m. The next morning, the complainant called her. The Appellant went to see her. The complainant inquired about a man named Joseph. She scrolled through the Appellant's phone and threw it away. She told the Appellant that she would teach her a lesson. The Appellant stated that the complainant and her husband framed her of the present offence. She denied being involved in the robbery.

This being a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make any comments with regard to the demeanour of the said witnesses. (See **Njoroge vs Republic [1987] KLR 19**). In the present appeal, the issue for determination is whether the prosecution proved its case on the charges brought against the Appellant of **robbery with violence contrary to Section 296(2)** of the Penal Code to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification and immediate arrest of the Appellant to secure the conviction of the Appellant. This was a case of identification by recognition. The complainant and PW4 knew the Appellant. She was a frequent customer at the bar. They knew her as 'Shiko'. PW4 also stated that the Appellant was his neighbour. The robbery took place at the complainant's bar. PW4 stated that the electricity lights were switched on at the time. The bar was therefore well lit to facilitate positive identification. On the material night, at about 11.00 p.m., the Appellant and two other people were the only customers remaining at the bar. The complainant and her waiter (PW4) were also at the bar. An armed man entered the bar. He ordered the complainant to surrender her phone and money. The complainant gave him Ksh.8,000/-. He complained that the money was not enough. He approached the Appellant who was seated alone at her table. He asked her to test the gun to confirm it was real. The Appellant fired the gun. The man then left the bar with the complainant's money. The Appellant was left at the bar. The complainant locked her at the bar. The police arrested her the following morning. This court is of the view that circumstances favoring positive identification were present in this case. The Appellant was positively identified by PW1 and PW4 and placed on the scene of crime. She was arrested shortly after at the scene of the robbery. Her identification was therefore safe.

In convicting the Appellant, the trial court held that the Appellant's act of firing the gun amounted to aiding and abetting the man in robbing the complainant. **Section 20 of the Penal Code** provides as follows with regard to principal offenders:

**1. "When an offence has been committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say;**

**(a) Every person who actually does the act or makes the omission which constitutes the offence;**

**(b) Every person who actually does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**

**(c) Every person who aids or abets another person in committing the offence;**

**(d) Any person who counsels or procures any other person to commit the offence; and in the last mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.**

**2. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.**

**3. Any person who procures another to do an act or omit to do any act of such a nature that if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or made the omission and he may be charged with doing the act or making the omission."**

The evidence of PW1 that the Appellant fired the gun during the robbery was corroborated by PW4. PW7 stated that after his investigations, he discovered that the man who robbed the complainant was known to the Appellant. He stated that the said man was the Appellant's boyfriend. He recovered photos from the Appellant's house where the Appellant appeared with the said man. The same were produced in evidence. From the facts of the case, the Appellant was not coerced by the man to fire the gun. She fired the gun on her own free will. In fact, when the complainant asked the Appellant if she wanted to kill her, the Appellant casually replied that she was only testing the gun. In **the case of Shadrack Kinyanjui Mugo & Another v Republic [1995] eKLR**, the Court of Appeal held thus:

**"It does therefore appear to us that although to constitute an aider and abettor some active steps must be taken by word, or action with**

*the intent to instigate the principle or principals, the question of what amounts to encouraging is one of fact in each case.*“

**By her action of firing the gun, the Appellant instilled fear among those who were at the bar. Her actions encouraged and assisted in commission of the crime. Aiding and abetting** is defined in **Black’s Law Dictionary** to mean *“assisting or facilitating the commission of a crime, or to promote its accomplishment”*. **The motive for committing a criminal offence is normally irrelevant as provided under Section 9(3) of the Penal Code.** The Appellant’s defence that she left the bar at 9.30pm was displaced by PW1 and PW4 who placed her at the scene of crime when the robbery was committed. PW also testified that he arrested the Appellant at the complainant’s bar the following morning. **The circumstances surrounding the Appellant’s involvement are sufficient to uphold a conviction for aiding and abetting commission of the robbery. She was therefore a principal offender in the present offence.**

The aggravated offence of robbery as described under **Section 296(2)** of the **Penal Code** occurs when there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See *Oluoch v Republic [1985] KLR 549*). In the present appeal, the Appellant fired a gun. The same is considered an offensive and dangerous weapon. **The defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting her with the offence.** From the above analysis of the evidence, this court is of the view that the prosecution has established its case on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to required standard of proof beyond any reasonable doubt. The upshot of the above reasons is that the Appellant’s appeal on conviction lacks merit and is hereby dismissed.

With regards to the sentence, following the recent decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic [2017] eKLR*, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, the Appellant’s role was limited to firing the gun. Luckily, no one was injured. This court has considered the Appellant’s mitigation. The Appellant is remorseful. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted by an order of this court sentencing the Appellant to serve five (5) years imprisonment with effect from the date of this judgment. This court has taken into account the period that the Appellant was in pre-trial custody and the period she has been in prison since her conviction. It is so ordered.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF APRIL 2019**

**L. KIMARU**

**JUDGE**