



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 164 OF 2016

NYAMAI WAMBUA alias JUNIOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Msa

CM CR. Case No. 614 of 2014 (Hon. J. NANG'EA CM)

delivered on 1/12/14)

J U D G M E N T

1. Nyamai Wambua alias Junior (“the Appellant”) was, together with others, charged with the offence of attempted robbery with violence contrary to *section 389 as read with section 297 (2) of the Penal Code*. It was alleged that on 17/3/2014 at Jomvu Gas Station in Changamwe District within Mombasa County, jointly with others not before court, while armed with dangerous weapon namely Beretta pistol s/n N087441Z, the appellant and others attempted to rob one Mohamed Hafiz off (sic) his money, and immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said Mohamed Hafiz.

2. He also faced three other counts the second of which was, having suspected stolen property contrary to *section 323 of the Penal Code*. It was alleged that on the 17/3/2014, along Kwale/Diani Road having been detained by No. 83581 PC Kennedy Odhiambo in exercise of powers conferred by *section 26 of the Criminal Procedure Code*, the appellant had in possession of a motor vehicle registration number KBP 086Z, Toyota Wish station wagon black in colour reasonably suspected to be stolen or unlawfully obtained.

3. The two other counts were, being in possession of a firearm and ammunitions contrary to *section 89(1) of the Penal Code*. It was alleged that on the said 17/3/2014 at Jomvu Gas Station in Changamwe District within Mombasa County without reasonable cause, the appellant had in his possession firearm, namely Beretta Pistol Serial Number 87441Z and 14 rounds of 9mm ammunition in circumstances which raised reasonable presumption that they were intended to be used in a manner prejudicial to public order.

4. The appellant and his co-accused denied the charges and after trial, the appellant was found guilty and convicted of counts 1, 3 and 4. He was sentenced to 5 years imprisonment in respect of count 1 and 8 years in respect of counts 3 and 4, respectively. The sentences were to run concurrently. He has now appealed to this court against both conviction and sentence.

5. This being a first appellate court, the court is enjoined to re-appraise and evaluate the evidence afresh and come to its own independent findings and conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.

6. The prosecution case was that on the material day at about 8 am, **PW1** was in his office at Jomvu Gas petrol station when he saw two strangers storm his office. One of them was armed while the second was not. He shot dead the armed stranger while the unarmed one escaped with a getaway motor vehicle reg. no. KBP 086Z. **PW2**, a cleaner at the petrol station confirmed witnessing the incident but could not identify any of the attackers.

7. On 18/3/2014 at about 8 am, **PW3** received a call from one of his patients requesting that **PW3** go to his home and treat someone. **PW3** asked **PW4**, who was a qualified nurse to accompany him to the house of the caller. **PW4** treated the patient on the said date and on 19/3/2014 and 21/3/2014, respectively. When **PW4** went to treat the patient on 21/3/2014, the police came and arrested them. **PW3 and PW4** identified the patient as the appellant and the caller as the 4th accused before the trial court.

8. **PW5 SP. Lawrence Ndiwa**, a ballistic expert examined the beretta and gloke guns. He also examined 14 live bullets, one broken bullet and 14 spent cartridges. He confirmed that the beretta gun could successfully fire the bullets sent to him.

9. **PW7** recovered the getaway motor vehicle in Kwale while **PW6** produced the photographs of the same. **PW8** a government analyst analyzed blood samples submitted to him. The blood was from the getaway vehicle, a bullet and one of the suspects. They all marched.

10. **PW9 PC James Mwisa** investigated the case. On the material day, he was at the Changamwe Police Station when they received a report of a robbery with violence at the Jomvu petrol station. He rushed there with other officers. They found one suspect had been shot dead. They played a CCTV that was in the subject building. He identified the appellant as one of the two strangers who had accosted **PW1** in his office. He charged the appellant's co-accused because the appellant had mentioned them.

11. In his defence, the appellant told the court that he was a businessman dealing in clothes. That while at Kongowea market to get bags for his customer on the 17/3/2014, two people accosted him and robbed him of his cash, nokia phone and other items. During the attack, he was injured on his right hand with a sharp object. Since he did not have money for treatment, he went to his cousin who called **PW3 and PW4** who treated him at his cousin's home. He denied having been shot at.

12. In his amended petition of appeal, the appellant set out 5 grounds of appeal which can be summarized as follows; **that the case was not proved as he was not properly identified; that the court had misapplied the provisions of section 111 of the Evidence Act; that the trial court erred in convicting him on circumstantial evidence and that his defence was not considered.**

13. The parties filed their respective submissions which the court has carefully considered.

14. The appellant submitted that he was not identified at the scene. That **PW1** did not have the opportunity to identify him. That his was only dock identification which was worthless. He relied on the case of **Njoroge v. Republic [1998] KLR 19** in support of the submission that such identification was not sufficient. The prosecution supported that contention and stated that the said identification was but worthless.

15. I agree with both the appellant and prosecution that the identification of the appellant by **PW1** was dock identification. However, it is clear that the trial court clearly warned itself of that fact. It observed that the identification of the appellant by **PW1**, without an identification parade being held was not credible on its own without being corroborated by other material evidence. The trial court found that the finding of the appellant in his co-accused's house with gun wounds corroborated the evidence of **PW1**.

16. It should be recalled that **PW1** states that he saw the fleeing suspect holding his hand that was bloodied. **PW4**, a qualified nurse, treated the appellant the day after the incident in the house of the appellant's co-accused within Chaani not very far from the scene of the incident. He stated firmly that the injuries were gunshot wounds. He explained that he made that opinion because it had an entry and exit. That piece of evidence was not challenged in cross-examination.

17. **PW4 and PW8** told the court that the appellant introduced himself to the two as Junior and Kang'ethe, respectively. The question that arises is, why was the appellant fearing to give his correct name? He only gave his correct name when he was attended at the Mulolongo Clinic on the 21/3/2014.

19. To this Court's mind, although the dock identification of the appellant by **PW1** was insufficient, the corroborative evidence of **PW3, PW4 and PW7** positively placed the appellant at the scene.

20. The next ground was that the court misapplied **section 111 of the Evidence Act** and wrongly convicted him on insufficient circumstantial evidence. In **Abanga alias Onyango v. Republic CR. A No. 32 of 1990 (UR)**, the Court of Appeal held:

"It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively; should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else".

21. As already stated, the evidence of **PW3, PW4 and PW7** corroborated that of **PW1** that the appellant was one of those at the scene. The appellant's defence was that he was attacked and stabbed at Kongowea which is in North Coast. He never sought treatment or first aid anywhere there, he crossed the Island of Mombasa with injuries and went all the way to Chaani to seek first aid in the house of his cousin. To this court's mind, that is not plausible. With stab wounds, any reasonable person would have been expected to seek medical attention within a reasonable distance from the scene of the incident.

22. To this court's mind, the trial court considered the defence and quite rightly dismissed the same.

23. As regards sentence, the same is lawful and in accordance with the law.

24. Accordingly, the court is satisfied that the appeal lacks merit and the same is dismissed.

DATED and DELIVERED at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE