



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.130 OF 2013

(An Appeal arising out of the conviction and sentence of L. MBUGUA - SRM

delivered on 25th July 2013 in Nairobi CM. CR. Case No.440 of 2012)

JEFFERSON MUTHEE NGANGA...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Jefferson Muthee Nganga, was charged with the offence of **Robbery with Violence**, contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 22nd March 2012 at about 11.30 p.m. at Muthaiga drift, along Thika – Nairobi highway within Nairobi County, the Appellant, jointly with others not before court and while armed with offensive weapons, namely simis and rungun robbed P.C. Silas Koech Kiptoo of a Ceska pistol Serial Number KE-KP F-2280 loaded with fifteen (15) rounds of 9mm calibre ammunitions valued at Kshs.180,000/-, a certificate of appointment valued at Kshs.300/-, National Identity Card valued at Kshs.70/-, one Nokia phone Make C-3 valued at Kshs.7,200/-, Co-operative Bank ATM Card valued at Kshs.300/- and cash Kshs.2,500/- all valued at Kshs.190,270/- and immediately after the time of such robbery, used actual violence on the said Silas Koech Kiptoo. In the alternative, the Appellant was charged with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the 26th March 2012 at Malaa Village in Machakos County, the Appellant, otherwise than in the course of stealing, dishonestly retained a firearm make Ceska pistol Serial Number KE-KP F2280 loaded with two rounds of 9mm calibre ammunitions knowing or having reason to believe them to be stolen.

In Count 2, the Appellant was charged with the offence of **preparation to commit a felony**, contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence were that on the 26th March 2012 at Malaa Village in Machakos County, the Appellant, while armed with a dangerous weapon, namely a Ceska pistol Serial Number KE-KP F-2280 loaded with two (2) rounds of 9mm calibre ammunition in circumstances that indicated that he was so armed with intent to commit a felony, namely robbery with violence.

In Count 3, the Appellant was charged with the offence of **being in possession of a firearm without a firearm certificate** contrary to **Section 4(2)(3)** of the **Firearms Act, Cap 114 Laws of Kenya**. The particulars of the offence were that on 26th March 2012 at Malla Village in Machakos County, the Appellant was unlawfully found in possession of a firearm namely Ceska pistol Serial Number KE-KP F-2280 without a firearm certificate.

In Count 4, the Appellant was charged with the offence of **being in possession of ammunition without a firearm certificate**, contrary to **Section 4(2)(3)** of the **Firearms Act, Cap.114**. The particulars of the offence were that on the 26th March 2012 at Malla Village in Machakos County, the Appellant was unlawfully found in possession of two (2) rounds of 9mm calibre ammunition, without holding a firearm certificate.

In Count 5, the Appellant was charged with the offence of **being in possession of public stores** contrary to **Section 324(3)** as read with **Section 36** of the **Penal Code**. The particulars of the offence were that on 26th March 2012 at Malaa Village in Machakos County, the Appellant had in his possession public stores, namely a firearm, make Ceska pistol Serial Number KE-KP F-2280 loaded with two (2) rounds of 9mm calibre ammunition, the property of a disciplined force namely the Kenya Police Service, such property being reasonably suspected of having been stolen or unlawfully obtained.

In Count 6, the Appellant was charged with **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars

of the offence were that on 26th March 2012 at Malla Village in Machakos County, the Appellant, while armed with a dangerous weapon namely a Ceska pistol Serial Number KE-KP F-2280 loaded with fifteen (15) rounds of 9mm calibre ammunition, attempted to rob John Mwinzi Kilonzo of one mobile phone make Nokia Model 1110 valued at Kshs.2,500/- and immediately after the time of assault wounded the said John Mwinzi Kilonzo.

In Count 7, the Appellant was charged with **unlawfully wounding** contrary to **Section 237(a)** of the **Penal Code**. The particulars of the offence were that on 26th March 2012 at Malla Village in Machakos County, the Appellant unlawfully wounded John Mwinzi Kilonzo.

In Count 8, the Appellant was charged with **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on 26th March 2012 at Malla Village in Machakos County, the Appellant, while armed with a dangerous weapon namely a Ceska pistol Serial Number KE-KP F-2280 loaded with fifteen (15) rounds of 9mm calibre ammunition attempted to rob Mercy Nthambi Mulwa of a Nokia phone valued at Kshs.8,000/-, one handbag valued at Kshs.2,500/- and cash Kshs.2,000/- all of total value of Kshs.12,500/- and immediately before or immediately after the time of the robbery, used personal violence on the said Mercy Nthambi Mulwa.

In Count 9, the Appellant was charged with **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on 26th March 2012 at Malaa Village in Machakos County, the Appellant, while armed with a dangerous weapon namely a Ceska pistol Serial Number KE-KP F-2280 loaded with fifteen (15) rounds of 9mm calibre ammunition, attempted to rob Damaris Wayua Musee of one mobile phone make Nokia model C-3 valued at Kshs.12,000/- and immediately before or immediately after the time of the assault used personal violence on the said Damaris Wayua Musee.

In Count 10, the Appellant was charged with **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on 26th March 2012 at Malaa Village in Machakos County, the Appellant, while armed with a dangerous weapon namely a Ceska pistol Serial Number KE-KP F-2280 loaded with fifteen (15) rounds of 9mm calibre ammunition, attempted to rob Tina Mwikali Musee of one mobile phone make Samsung valued at Kshs.7,000/- and immediately before or immediately after the time of such robbery used personal violence on the said Tina Mwikali Musee.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted in respect of Counts 1, 2, 3, 4, 5, 6, 7, 9 and 10 but was acquitted in respect of Count 8. For Counts 1 and 6, the Appellant was sentenced to serve life imprisonment in respect of each count. For Count 2, he was sentenced to serve one (1) year. For Counts 3, 4, 5 and 7, he was to serve four (4) years imprisonment in respect of each count. For Counts 9 and 10, the Appellant was to serve fourteen (14) years imprisonment in respect of each count. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence which according to him was insufficient. He faulted the trial court for relying on the evidence of identification of a single witness which, in his view, was made under unclear circumstances. He was aggrieved that the trial court had failed to consider the totality of the evidence adduced which according to him was a litany of contradictory and incredible evidence. He took issue with the manner in which he was arrested and further faulted the trial court for not according him a fair trial. In the premises therefore, he urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant appeared in person while Ms. Aluda appeared for the State. The Appellant presented his written submissions to the court in support of the appeal. He further made oral submissions urging the court to allow the appeal. In his submissions, the Appellant stated that the trial court had been hostile to him. This, he explained, was because the trial court cancelled his bond and refused to disqualify itself from the case. He submitted that he asked the court to recall two witnesses but was denied the chance to do so. He further submitted that the evidence of PW5, the arresting officer, was uncorroborated and should not have been relied on. He further submitted that his defence was not overruled and the trial court simply imagined his guilt. In the premises therefore, he urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

Ms. Aluda, learned counsel for the State opposed the appeal. She submitted that the prosecution was able to prove that the Appellant was the one who had committed the offences stated herein. She stated that the prosecution relied on the evidence of recent possession and recognition. She further submitted that the Appellant was arrested while in possession of the gun that had been stolen from PW1 four days earlier. She stated that the Appellant was arrested by PW5 during the day, after an alarm was raised when he attacked PW2, PW6 and PW7 using the gun stolen from PW1. Regarding the disqualification of the trial court, learned counsel submitted that the Appellant had made several attempts to defeat justice and that was one such attempt. She stated that the Appellant shot PW2 mainly because he had recognized him during the commission of the offence. Finally, she submitted that the evidence adduced was tangible, consistent and corroborative and was never shaken on cross-examination. In the premises therefore, she urged the court to dismiss the appeal as the conviction of the Appellant was safe.

In a rejoinder, the Appellant finally submitted that PW2 told neither the police nor the court how he recognized him and yet he should have done so.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial magistrate's court, so as to arrive at its own independent determination of whether or not to uphold the conviction of the Appellant. (See **Okeno –vs- Republic [1972] EA 32**). In doing so, the court is mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanor of the witnesses. (See **Soki –vs- Republic [2004] 2KLR 21**). In the present appeal, the issue for determination by this court is whether the prosecution established a case for this court to convict the Appellant of the offences stated herein to the required standard of proof beyond any reasonable doubt.

The facts of this case are as follows: PW1 Silas Koech Kiptoo, the complainant, was at the material time a Police Constable working with the Kenya Police Service and stationed at Central Police Station. He was issued with A Ceska pistol Serial Number KE KP F-2280 and fifteen

(15) rounds of 9mm calibre ammunition on 21st March 2012 at 6.00 p.m. as he reported on duty. On 22nd March 2012 at 11.30 p.m. in the night, PW1 was attacked by an unknown number of people while walking home from work. He testified that he was hit on the head by what he thought was a metal rod and he subsequently fell down. He then removed his pistol in retaliation but one of the attackers saw it and warned the rest of them that PW1 was armed. He testified that another person stepped on his arm and took the gun away from him before stabbing him with sharp objects. He was overpowered and left unconscious at the scene. He regained consciousness after 2 hours and discovered that along with the gun, he had lost his mobile phone, ATM Card, National Identity Card, Police certificate of appointment and Kshs.2, 500/- in cash. He woke up bleeding, walked to his house and alerted his wife who raised alarm. PW1 was then taken to Muthaiga Police Station by his neighbour, a police driver, where he reported the matter and was thereafter taken to Kenyatta National Hospital for treatment.

On 26th March 2012 at 4.00 p.m., about 4 days after the incident, PW2 John Mwingi Kilonzo was walking home at Malaa when he met three (3) women namely: Damaris, Wayua (PW6), Tina Mwikali (PW7) and another Mercy Ntuambi who offered to engage him to undertake construction work near the area. PW7 had a farm she had bought in the area and on that day, she had asked PW6 and Mercy Ntuambi, her friends, to accompany her to go see the farm. While there, as she was looking for a farmhand, she met PW2 and offered him the job she needed done. PW2 told the court that as PW7 was taking him around the farm, the Appellant appeared out of nowhere and ordered all four of them to give him their phones, a demand they all complied with. According to PW2, the Appellant was dressed in a cap that exposed his eyes only. He was armed with a gun. The Appellant then realized that PW2 had recognized him prompting him to shoot PW2 on the chest once. PW2 told the court that the women he was with then raised alarm and alerted members of the public who in turn alerted the police.

PW5, PC Kennedy Abango, was informed by members of the public about the ongoing robbery and the gunshots heard. He immediately went to the scene of the crime accompanied by two of his colleagues and found the Appellant still holding the gun and PW2 on the ground bleeding from the chest. PW5 and his colleagues were in uniform and were fully armed, so when they asked the Appellant to drop his weapon, he promptly complied. They then apprehended the Appellant and picked up the gun together with two live ammunitions and one used cartridge. PW5 told the court that they interviewed PW2 at the scene whereupon he identified the Appellant as the one who had shot him. PW5 then escorted the Appellant to Kangundo Police Station while one of his colleagues escorted PW2 to the hospital to receive treatment.

At the station, PW5 handed over the suspect and the recovered items to the DCIO for further investigations. PW9, PC Joseph Mucheru, an officer attached to the Flying Squad, was assigned to investigate the case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the offences stated herein.

When the Appellant was put on his defence, he denied committing the offence. He told the court that although he was in the area when the shots were fired, he could not tell where the gunshots had emanated from. He testified that he saw people fleeing and he did so too but in the melee, he was seized by boda boda people and taken to the police station. He stated that at the police station he was asked to pay money but he and his relatives had none and thus he was brought to court and charged.

Upon re-evaluating the facts of this case, it is clear to the court that for the prosecution to prove its case on the offences stated herein, it was required to establish that the Appellant, while armed with a dangerous weapon robbed the complainants and at the time of the commission of the offence, used actual violence on the complainants.

The prosecution basically relied on two pieces of evidence to secure the conviction of the Appellant. The first piece was the evidence of identification. PW2 told the court that it was the Appellant who had shot him in the chest. He testified that even though the Appellant wore a cap that exposed his eyes only, he was able to recognize the Appellant as they lived close to each other. In addition to this, the attack happened during the day at around 4.00 p.m. When the police officers arrived at the scene, they found the Appellant still holding the gun. PW5 told the court that when they arrived at the scene, they interrogated PW2, who identified the Appellant as the one who had shot him. Further, the evidence of identification of PW6 and PW7 corroborated that of PW2. PW6 told the court that she saw the Appellant's face at very close range during the ordeal and when she saw him again at the police station, wearing the same white pair of shorts as he had during the ordeal, she was able to recognize him. The evidence of PW7 further incriminates the Appellant. She told the court that the Appellant was **"a man she could not forget"**. She testified that when the man had attacked them, there was a brief period of about three or so minutes when she was face to face with the Appellant. She saw him very well. Therefore, the Appellant's claims that he had been improperly convicted on the evidence of a single identifying witness are unfounded. The evidence of identification adduced by the prosecution witnesses was cogent, corroborated, consistent and reliable. In light of the foregoing, this court therefore finds, with confidence, that indeed the Appellant had been positively identified by PW2, PW6 and PW7 as the man who had violently robbed them.

The second piece of evidence was through the application of the doctrine of recent possession. The prosecution was able to establish to the required standard of proof beyond any reasonable doubt that indeed the Appellant had been found in possession of the stolen Ceska pistol belonging to PW1. The evidence of PW1, PW4 and PW5 was particularly damning. PW5 testified that he and his colleagues recovered the Ceska pistol Serial Number KE KP F-2280 **marked Exhibit 2(a)** together with two (2) rounds of 9mm calibre ammunitions and a spent cartridge from the Appellant. In addition to this, PW3 Corporal Edward Kariuki, testified that he was the one in-charge of Armory at Central Police Station and part of his responsibility was to issue guns to officers when reporting for duty. He told the court that he was the one who had issued PW1 with the Ceska pistol Serial Number KE KP F-2280 which was before the court marked as **Exhibit 2(a)**. He adduced as evidence, the police arms movement register that indicated in detail how the Ceska pistol in question had moved and how it had been reported stolen.

Further to this, PW4 Chief Inspector Ammanzel Langat, a Certified Firearm Examiner at the CID Headquarters, told the court that he carried out a comparative examination using a microscope on the exhibits recovered from the Appellant. From his examination, he conclusively formed the opinion that the spent cartridge, marked as **Exhibit 2(c)(iii)**, was fired from the Ceska pistol marked as **Exhibit 2(a)**. The prosecution was able to provide watertight evidence which connected the Appellant to the attack meted out on PW1. The Appellant did not give an explanation of how he came to be in possession of the pistol which had been robbed from PW1 four (4) days earlier.

It is the view of this court that the trial court correctly applied the doctrine of recent possession to convict the Appellant. This court therefore holds that the circumstances under which the Appellant was found in possession of the stolen Ceska pistol proved that he was the one who

had committed the offences stated herein.

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the offences stated herein. His culpability was established to the required standard of proof beyond any reasonable doubt. His appeal on conviction therefore lacks merit and is hereby dismissed.

As regards sentence, **Section 296(2)** of the **Penal Code** provides for a sentence of death for any person convicted of the offence of robbery with violence. The trial court sentenced the Appellant to serve life imprisonment. That sentence was legal. Appeal against sentence is equally dismissed.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2018

L. KIMARU

JUDGE