



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL APPEAL NO. 74 OF 2016**

**PAUL EKUTO.....1<sup>ST</sup> APPELLANT**

*versus*

**REPUBLIC.....RESPONDENT**

*Consolidated with*

**CRIMINAL APPEAL NO. 65 OF 2016**

**EURIAN ELKAYO.....2<sup>ND</sup> APPELLANT**

*versus*

**REPUBLIC.....RESPONDENT**

*Consolidated with*

**CRIMINAL APPEAL NO. 73 OF 2015**

**EWOI LOSIKE.....3<sup>RD</sup> APPELLANT**

*versus*

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in*

*Maralal Principal Magistrate's Court Criminal Case No. 160 of 2014*

*by Hon. B. S. KHAPOYA Ag. Senior Resident Magistrate on*

*9<sup>th</sup> October 2014).*

**JUDGMENT**

1. On 11<sup>th</sup> November 2012 a number of Administration Police officers (APs), anti-Stock theft unit officers and Police Reservist were on an ill-fated security operation at Baragoi in Samburu County. Forty

two of those officers were killed at Suguta Valley in Baragoi. The three appellants; **PAUL EKTON** (1<sup>st</sup> Appellant), **EURIAN ELKAYO** (2<sup>nd</sup> Appellant), and **EWOI LOSIKE** (3<sup>rd</sup> Appellant) were charged before the Principal Magistrate's court at Maralal with three offences of **robbery with violence, contrary to section 296(2) of the Penal Code (Cap 63)**; three charges of **handling stolen goods contrary to section 322(1)(2) of Cap 63**; and **eight charges of possession of specified firearm contrary to section 4A(1)(a) and Section 4(3)(a) of the Firearm Act (Cap 114)**. All those charges related to the theft of firearm and ammunition of some of the police officers killed in the aforesaid security operation. The trial court, after receiving evidence convicted all the appellants of twelve out of fourteen charges. The 1<sup>st</sup> and 2<sup>nd</sup> appellants were sentenced to suffer death on the first count of robbery with violence, while the sentences on the other counts were held in abeyance. The 3<sup>rd</sup> appellant who was 16 years old, therefore a minor, was sentenced to be held at the president's pleasure.

2. All the appellants have filed their appeals against conviction and sentence. Their appeals were not opposed by the Principal Prosecution Counsel Mr. Tanui.

3. I have considered the submissions by Mr. Robert Ndubi, for all the appellants, and Mr. Tanui for the state. In the following discussion I have taken into account their said submissions.

4. The evidence of prosecution witnesses number 1 to 6 correlated. That evidence was to the effect that on 4<sup>th</sup> April 2014 a combined force of National Police service and Kenya Defence Forces (KDF) personnel were on patrol in armoured lorries at Baragoi. They saw a group of about 30 to 50 young armed Turkana Morans. When these were commanded by the police to stop they all ran away into the bush. The police pursued them and were unable to apprehend those that ran into the bush. The police returned on to the road and on reach from where they started the chase of the morans arrested the three appellants. PW 1 I. P. Oscar Bungus stated in evidence in regard to the arrest of the 3<sup>rd</sup> appellant:-

***"We were joined with National Police Service and KDF using armored personnel Lorries. We were about 30 officers. While on patrol we spotted 30 – 50 heavily armed Turkana young men. They were coming from Lomerok to Bendera. They were like 100 meters away. We intercepted them. They started running away. We challenged them to stop but they didn't stop. We decided to pursue them. They ran way in different directions. When we went back to the road we met the 3<sup>rd</sup> accused (3<sup>rd</sup> Appellant) who he identified himself as Itasia. I arrested him. My colleagues also arrested two other suspects. I escorted him to Baragoi Police Station. We went back to the where we spotted the armed Turkana young men and we collected 4 firearms on the ground dropped by the suspects who ran away. They were 3 AK – 47 firearms and our liai."***

PW 3 Cpl Aaron Kiprotich gave evidence as follows of their chase of Turkana youth and arrest of appellants:-

***"On challenging them to stop and surrender they started running away. It prompted us to chase them. We boarded 3 personnel armoured vehicle. On driving there our suspects run into the bush. We came back to the road and we saw a person who is accused 1, (1<sup>st</sup> appellant). I arrested him and escorted him to Baragoi Police Station. We went back the same area and we managed to collect firearms dropped by the people who run away. It is included as liai (MFI 4) loaded with 20 rounds. All 3 AK rifles – Reference to MFI 3a-c. The record was 46 – 7.62 x 39mm – Reference to MFI 5a. 207 – 62 – x 51 mm – Reference to 5B. We escorted them to the station. We handed over the recovered items. On the scene we also recovered a homemade belt. Reference to MFI 6. It was together with porches. Am the one who arrested the 2<sup>nd</sup> accused (2<sup>nd</sup> appellant) person. He had no rifle at the time of arrest. That is all."***

5. All the prosecution's witnesses who were involved in the joint operation narrated the same evidence: that all the three appellants were arrested by the roadside, when the police officers returned from chasing the Turkana youth.

6. From the above evidence it is clear there was no nexus between the recovery of the firearm and ammunition and the presence of the appellants at the road where they were arrested. Prosecution's evidence leaves doubt whether the appellants were by sheer coincidence on the road where earlier on the 30 to 50 Turkana youth had been spotted. The prosecution's evidence is clear that on spotting the Turkana youth they gave chase into the bush but could not apprehend them. On returning to the road the officers arrested the three appellants, separately. It is no wonder, with that evidence that all the appellants in their defences stated that on being ordered to stop, at the road, by the police officers they stopped. They further stated they were then arrested for offences they were unaware. The 1<sup>st</sup> Appellant said that at the time of his arrest he was headed to his home. The 3<sup>rd</sup> appellant who was a minor said that:

***“I did not know reason of my arrest, I thought I was being taken to school. Instead I was escorted to Maralal Police station.”***

7. On the whole the prosecution's evidence was very unsatisfactory. It failed to meet the standard of proof in a criminal trial. The appellant's conviction on all the twelve charges was unsafe.

8. The appellant's appeals against conviction and sentence succeed. The convictions are hereby quashed and sentences are hereby set aside. **I order PAUL EKTON, EURIAN ELKAYO and EWOI LOSIKE be set free from custody unless they are otherwise lawfully held.**

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JANUARY 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue

1<sup>st</sup> Appellant: Paul Ekton .....

2<sup>nd</sup> Appellant: Eurian Elkayo .....

3<sup>rd</sup> Appellant: Ewoi Losike .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**