



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 115 OF 2012

JOHN KAZINGA MWANZIA.....APPELLANT

VERSUS

REPUBLIC.....STATE COUNSEL

(From the judgment in Garissa Chief Magistrate's Criminal Case No. 166 of 2012 delivered on 19/11/2012 –

Ndung'u H. N. CM)

JUDGMENT

The appellant was charged in the subordinate court with preparation to commit a felony contrary to Section 308 (1) of the Penal Code. The particulars of the offence were that on 28th January 2012 at Bura area in Tana River County within Coast Region jointly with others not before court, were found armed with a dangerous weapon namely G3 rifles in circumstances that indicated that they were so armed to commit a felony namely robbery.

He denied the charge. After a full trial, he was convicted of the offence and sentenced to serve seven (7) years imprisonment. Aggrieved by the decision of the trial court he has now appealed to this court. His grounds of appeal are as follows:-

- 1. THAT the Magistrate wrongly convicted him as he was not arrested in possession of anything incriminating.**
- 2. THAT the prosecution did not prove their case beyond reasonable doubt as required under section 109 of the Evidence Act.**
- 3. THAT he was wrongly convicted as the arresting officer was also the investigating officer.**
- 4. THAT the magistrate failed to note that the prosecution evidence was contradictory in violation of S. 163 of the Evidence Act.**
- 5. THAT he was wrongly convicted as crucial witnesses were not summoned to clear doubts contrary to section 150 of the Criminal Procedure Code.**
- 6. THAT the learned magistrate did not consider his strong defence.**

The appellant also filed written submissions which he relied upon at the hearing of the appeal. His submissions were that the prosecution did not prove the ingredients of the offence charged. That PW1 did not state how he recognized the three people as the ones who were allegedly armed with guns, as the reportee was not called to testify. In any case, the appellant argued, there was no proof that the appellant was one of the people who were armed with G3 rifles and also that the appellant was one of those who

ran away. The appellant further submitted that the main Bura Hola road was a public road, so it was important to distinguish the culprits and other road users. The appellant further submitted that there was inconsistency between the evidence of PW1 and PW2, in that PW1 did not mention the existence of a hut and the maize plantation, but PW2 did so.

The appellant maintained that on the day in question he had taken food to his mother when he was mistakenly arrested and charged. In his opinion, in the area occupied by many farmers, his arrest was based on mistaken identity.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the appellant understood the language used in court, and participated in the trial fully. The charge sheet complied with the requirements of section 134 of the Criminal Procedure Code. Counsel also submitted that the prosecution evidence was overwhelming. The appellant was arrested at the scene and did not deny that fact. Counsel emphasized that there were no contradictions in the prosecution evidence. Counsel submitted further that it was the defence version that was contradictory in the sense that, at one time in his defence the appellant referred to his mother and at another time to his father. On calling of crucial witnesses, counsel submitted that the appellant did not identify the alleged crucial witnesses who were not called by the prosecution to testify. Those were the submissions on both sides.

At the trial, the prosecution called three witnesses. They were all police officers. They were PW1 PC Alex Kuria, PW2 PC Reuben Mwaniki, and PW3 PC John Ouma. The three were on patrol duties on 28/01/2012 in the afternoon in Bura area. They were then informed by the OCS that there was a report that people armed with guns were seen along the Bura Hola road. The three witnesses had a GK land rover. They then proceeded to the area alleged in the report and saw people in a hut. Those people tried to stop the land rover but on realizing that it was police vehicle, they started running away. Two of those people had G3 rifles and fired shots as they ran away. The police gave chase. The appellant who was not armed ran in a different direction and was chased and restrained. He was later charged in court.

When put on his defence, the appellant gave sworn testimony. He stated that he had been mistakenly arrested. That on that afternoon he was called by his mother to send her food. That he was arrested in an area of farms with many farmers. He denied committing the offence. He elected not to call any witnesses.

Faced with the above evidence, the trial court found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced the appellant.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences. **See Okeno vs. Republic (1972)EA 32.**

I have re-evaluated the evidence on record.

With regard to language, in my view the appellant cannot claim not to have understood the language used in court. He cross examined the prosecution witnesses at length. That cross examination in my view, is evidence that he understood the language used in court as well as what the witnesses said against him.

With regard to the charge sheet, I have perused the same. In my view, the charge was properly framed in accordance with the provisions of section 134 of the Criminal Procedure Code (Cap. 75). I also dismiss that complaint.

The appellant has complained about contradiction in the prosecution evidence that is PW1 and PW2. In my view, the difference in the evidence of these two witnesses was merely on matters of detail. There was no contradiction as such. If one talked about the people coming from the hut and the other did not mention the hut, that does not change the fact that the people came to the road. There was also nothing wrong with the arresting officer being the investigating officer. There is no law that prohibits an arresting officer from being an investigating officer.

The appellant has claimed that important or crucial witnesses were not called by the prosecution to testify. He refers to the reportee of the allegation of armed men seen on the road. Indeed, the reportee was not called by the prosecution to testify. PW3 however, explained the reason why that witness was not called to testify. Besides the reportee did not say that he was able to identify any of the criminals. In my view, the failure of the prosecution to call the reportee in the circumstance of the present case could not affect or weaken the prosecution case. All the three police officers who proceeded to the scene and arrested the appellant, actually testified, which in my view was adequate.

Coming to the proof of the charge, I find that the charge was proved by the prosecution beyond any reasonable doubt. The appellant was clearly identified by PW1, PW2 and PW3 in the group of 3 people, two of whom were armed. It was a clear afternoon. He was the one among the three who was not armed. The police chased and, without losing sight of him, arrested him. He was a principal offender. I agree with the learned magistrate that the defence of the appellant was not believable. I will uphold both conviction and sentence.

Consequently, I find that the appeal has no merits. I dismiss the appeal and uphold both conviction and sentence. Right of appeal explained.

Dated and Delivered at Garissa this 3rd day of March, 2015

GEORGE DULU

JUDGE.

In the presence of:-

Appellant in person

Mr. Okemwa for State

Martin Court Clerk