



No.33

REPUBLIC OF KEN YA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 116 OF 2008

BETWEEN

SEGENGE MWITAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment OF Hon. Mr. Soita, Pm sitting at Kisii in

criminal case No.1363 of 2006 dated 20th March,2007)

JUDGMENT

1. This appeal arises from the judgment of the PM, Hon. Mr. S.M.S. Soita in Kisii CM's Criminal Case Number 1363 of 2006 dated 20th March, 2007.

2. The appellant, Segenge Mwita was the second accused person in the case in which he and his two co-accused, **George Otieno Ojijo (1st accused)** and **Ayub Owuor Adede (3rd Accused)** were charged with one count of attempted robbery and one count of being in possession of a firearm.

3.In the first count, the appellant and his two co-accused were charged with attempted robbery with violence contrary to **section 297 (2) of the Penal Code**. The particulars of the offence were that on the 3rd day of November 2005 at Migori Township in Migori District within Nyanza Province, jointly while

armed with a dangerous weapon, namely homemade gun, attempted to rob **George Omondi Angila** unknown amount of money and at or immediately after such attempt used personal violence to the said George Omondi Angila.

4. In the second count the 3rd accused in the lower court was charged with being in possession of a firearm without a Firearms Certificate contrary to **section 4 (2) (a)** of the **Firearms Act**.

5. The appellant and his co-accused denied the charges, leading to a hearing of the case by Hon. Mr. Soita. The facts of this case are apparent from the evidence of the complainant George Omondi Angila who testified as PW1.

6. On the 3rd November 2005 at about 11.50 p.m., PW1 was going home after close of business when he was confronted by 3 persons who were well known to him. The 3 flashed a torch at him and thinking that they were police officers, PW1 went towards them only for the torch to be flashed directly in his face; while being ordered to raise his hands which he did. He was knocked down and while on the ground, a pistol was pointed at him as demands for money were made. When PW1 acted as if he wanted to remove some money, the 3 persons took off.

7. A little while later, about 10 metres from where PW1 had been knocked down, he met police officers who gave chase. The person who had the gun ran into a verandah which led to a dead end, but he was shot 3 times in the chest by the police. He was then arrested, handcuffed and escorted to Migori police station. While at the police station that person gave information which led to the arrest of the other 2 people who were with him. PW1 accompanied the police to Dary Estate from where one of the other two men whom PW1 had seen wearing red clothes was arrested. The second suspect was also handcuffed and together with the first suspect, the police and PW1, they went to Oruba Estate from where the 3rd person was arrested. All the 3 were taken back to Migori police station and charged with the various offences.

8. In his evidence, PW1 stated that there was electric light in the area where he was attacked. PW1 denied a suggestion by the appellant that he had sent the appellant to buy the pistol for him and that PW1 set the police upon him. PW1 confirmed that all the 3 persons were known to him.

9. PW2 was Number 79235 Police Constable Bernard Chemonges, who was attached to Migori police station at the material time. He testified that on 3rd November 2005 at about 11.30 p.m., he was on patrol together with P.C. Ndungu when they noticed a person running towards them from near Junction Bar. After that person reported that he had been accosted by 2 persons who were armed with a pistol, PW2 and PC Ndungu gave chase. PW2 pursued the person who was armed and was all the time threatening to shoot PW2. PW2 shot the revolver he had in the air. The second person turned direction and ran into a verandah which blocked him. He whipped his pistol and pointed it at PW2 and when he refused to drop the pistol, PW2 fired again and that is when he surrendered. He was escorted to Migori police station and later helped in the arrest of his co-accused. It was the appellant who had the pistol and it was him who led the police to arrest his 2 co-accused. PW2 also stated that with the help of the appellant herein, the police, led by police constable Simiyu (PW3), the appellant's co-accused were arrested in their house from which they recovered some firearms. Throughout those raids and searches, the complainant was in the company of the police and the appellant.

10. PW3 was Number 53280 Police Constable Simon Simiyu. He stated that on the night of 3rd and 4th November 2005, he was summoned to the police station at Migori where he worked at the CID office. At the station he found the appellant who had been shot in the chest. It was the appellant who led PC Simiyu and other officers to arrest the appellant's co-accused from their hideouts. The pistol allegedly recovered

from the appellant was produced as **P. Exhibit 1**.

11. At the close of the prosecution case, the appellant and his first co-accused were put on their defence. The appellant chose to give sworn testimony in which he stated that on 10th October, 2005, his grandmother sent him to prepare the land and as he was doing so, he chanced upon a firearm. That he showed the firearm to George Ojijo (1st accused in the court below) and together they decided to sell the firearm for Kshs.3,500/=. That on 3rd November 2005, they agreed to meet with PW1 but before he could hand the firearm over to PW1, he was stopped by police officers who later shot him in the chest, arrested him and took him to Migori police station. He then assisted the police in apprehending the other suspects. He was then charged with possessing a firearm to which he pleaded guilty and was sentenced to 8 years imprisonment.

12. After carefully considering the evidence on record, the learned trial magistrate found that the appellant who was arrested in possession of a firearm, had committed the offence of attempted robbery, convicted him and sentenced him to death. The appellant's co-accused was acquitted under **section 215** of the **Criminal Procedure Code** for lack of sufficient evidence.

13. Being aggrieved by both the conviction and sentence, the appellant has appealed to this court. The petition of appeal, filed on 9th July, 2008 has 6 homemade grounds of appeal. In brief, the appellant's complaint against the judgment of the trial court is that there was no corroboration of the evidence adduced by PW2. That he was not properly and positively identified. That the trial court failed to consider his defence of alibi. That there was no expert evidence to support the allegation that the appellant was found in possession of the firearm.

14. At the hearing of the appeal, we heard submissions from the appellant as well as well as from the Senior Principal State Counsel, Mr. Mutuku. The appellant put in written submissions which we have read and considered.

15. In response to the appellant's submissions, counsel for the Respondent submitted that the evidence connecting the appellant to the offence was clear and water tight, that when the police pursued the appellant after PW1 made the report about the attempted robbery they did not lose sight of the appellant until he was shot thrice in the chest and wounded. He was arrested after being wounded and on him was found a home made gun. Counsel submitted that throughout the chase, PW2 never lost sight of the appellant until the appellant was shot in the chest, fell down and was arrested.

16. In response, the appellant stated that all the evidence against him was lies. He also stated that the complainant, PW1 was a friend of the appellant's boss, George Otieno Ojijo, the 1st accused in the lower court and who was acquitted of the robbery charge but jailed for being in possession of a firearm.

18. It is our duty as the first appellate court to reconsider and evaluate all the evidence afresh. See **Okeno –vs- Republic [1972] EA 32** and **Patrick & another –vs- Republic [2005] 2 KLR 162**. We have reconsidered and evaluated the evidence afresh. It is not disputed that the appellant was arrested on the night of 3rd November 2005 at about 11.30 p.m. It is also not in dispute that the appellant was found in possession of a firearm at the time of his arrest. The appellant admitted as much in his own defence statement but stated that his mission not to steal but to sell the firearm.

18. After reconsidering and evaluating the evidence, we are satisfied that the appellant was one of the three persons who accosted the complainant and demanded money from him. However, before the complainant removed the money the three persons ran off only to fall in the hands of the police who were

nearby. The police chased the appellant without ever losing sight of him until he entered a dead end corridor. From there he threatened to shoot PW2, but PW2 shot the appellant thrice in the chest, flooring him and forcing him into surrender.

19. We therefore have no doubts in our minds that it was the appellant and two others charged with him who attempted to rob the complainant. We are also satisfied as was the trial court that the appellant was in the company of 2 other people when they tried to rob the complainant, PW1. We are also satisfied that despite the absence of an identification parade, PW2 was not mistaken about the identity of the appellant nor was the complainant. Both the complainant and PW2 knew the appellant before so that an identification parade would have been useless in the circumstances. In any event, the appellant was accosted by the police hardly 10 metres away from where the attack on PW1 took place. The appellant was chased and never went out of the sight of PW2 until he was arrested.

20. In the premises, it is our considered view that the prosecution proved beyond any reasonable doubt all the ingredients of the offence of attempted robbery under **section 297 (2)** of the **Penal Code**. The appellant was armed with a dangerous weapon to wit a homemade gun and threatened to use personal violence on PW1.

21. We therefore conclude that the findings of the trial court were well founded and there is no reason why we should interfere with the same. Accordingly, the appellant's appeal is found to be without merit. The same is dismissed in its entirety. The judgment and sentence of the lower court are confirmed.

31. It is so ordered.

Dated and delivered at Kisii this 07th day of March, 2011.

ASIKE-MAKHANDIA

RUTH NEKOYE SITATI

JUDGE.

JUDGE.

07/03/2011

Coram: Ruth Nekoye Sitati, J.

(reading on behalf of this court and Makhandia, J.)

c/c – Bibu

Mr. Mutai (present) for Respondent

Appellant (present in person)

Language: English, Interpretation – Kiswahili

Court: Judgment read and delivered today in open court.

RUTH NEKOYE SITATI

JUDGE.