REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 144 of 1997

(From Original Conviction and sentence in Cr. Case No.17 54 of1996 of the Principal Magistrate's Court at Malindi - J.R.Karanja, Esq., PM)

KENNEDY KAVAI ABDALA.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From Original Conviction and sentence in Cr. Case No.17 54 of1996 of the Principal Magistrate's Court at Malindi - J.R.Karanja, Esq., PM)

JUDGMENT

The Appellant appeals against conviction and sentence ofdeath passed against him on 24-4-97 by Principal MagistrateJ.R. Karanja when he convicted the appellant on 4 counts ofrobbery with violence contrary to S.296(2) of the Penal Code.The story against the accused was provided by 7 witnesses.The first prosecution witness an Italian Del Mote Oscar was atourist who had arrived in Kenya on 17-12-96. He lived atMagungu Village, Malindi where on 18-12-96 at about 8.30 p.m.he together with his friends PW.3 Velentini Graziano, PW.4,Valentini Fransesco, PW.5, Willien Riccardo Andreanni. Theywere having supper at a verandah of the house, when suddenlythere emerged about 6 intruders one carrying a gun, otherswith rungus and pangas. The first Prosecution witness was robbed of money, passports, air ticket, wrist watch, a bag,gold neck-lace, credit card and identification documents.There was light in the verandah and he was able to recognisethe appellant as the robber who was carrying the gun. Afterthe robbery the gangsters ran away. PW.3 reiterated what PW.lhad said. He was robbed of 4 million Italian Liras, telephonecard, credit card, passports, car keys etc. PW.3 was able torecognise the appellant as the one who was carrying the gun.He said there was enough light. PW.4 was robbed of money, andradio cassette. She also confirmed there was adequate lightbut she was unable to recognise anyone. PW.5 lost 54 millionItalian liras, and he also confirmed the presence of adequatelight. PW.6 the watchman who fled after seeing the robberscome into the compound was also able to identify theappellant.

On 24-12-96 several identification parades were conductedby PW.7 I.P. Malaki Olewe in which PW.3, PW.l, PW.4, and PW.6all positively identified the appellant as one of the robbers.The appellant and the officer conducting the parade signed theidentification parade form saying they were correctlyconducted.

Earlier on the Appellant had been arrested on 21-12-96 ona tip off at a bar in Malindi while in possession of money anda big bag which contained things including Ex.2, three airtickets, 3 driving licences and 4 ID cards which belonged to PW.l. He also had 100,000 liras and KShs.7,940. Theappellant also led PW.2 and other police colleagues to a bushwhere he brought out a gun Ex.1 which was identified. The gunbelonged to the police and had been stolen from policeofficers who were escorting the accused from

Malindi Court tothe Prison on 3-12-96. PW. 3 identified Ex. 1 the bag andreclaimed it. The appellant chose to say nothing in hisdefence.

The learned Principal Magistrate considered this evidenceand found that the appellant was guilty of the concurrent actsof robberies committed against the complainants as one of therobbers and convicted him accordingly.

The appellant appealed against this conviction on 4grounds in his amended ground of appeal in which he attackedidentification. He argued that the witnesses apart from PW.6were all tourists who had not only seen him before and theywere too surprised to notice properly the face of the robbersas they were too scared. PW.4 and PW.6, the watchman admittedthat they feared for their lives and they ran away. He arguedthat the nature of the light was not described and thedistance it was shining in relation to the accused. He quotedthe decision of Munyao v. R. Court of Appeal Criminal AppealNo.63 of 1987 and Tererau Rungushi v. R. 19 EACA 259 sayingthat witnesses who identified him did not mention him to thepolice when they reported the robbery. He attacked theidentification parade saying witnesses had a chance to talk together and that the standing orders were flouted as thepolice officer did not explain the standing orders to theappellant nor was there another person brought as appellant'switness. He admitted being found with 2 air tickets but hesaid he had only those and did not know where the third onehad come from. As for the finding of the G3 Rifle theappellant said he was not cautioned by the Police PW.2. Hesaid there was no evidence that he was found with the gun orthat it was a stolen gun.

The State Counsel, Mr. Ng'eno supported the convictionand sentence. He said the appellant was identified positively6 days after the robbery and PW.l, 3, 4 and 6 were able toidentify him at the identification parade which was correctlycarried out to the satisfaction of the appellant who signed,and that there was sufficient light at the verandah. Then hewas found with items stolen from the tourists barely 5 daysafter they were robbed which he said the appellant knew wherethe gun was and led the police to the place where it washidden. Mr. Ng'eno said it must have been the gun that wasused at the robbery. He submitted that the authorities quotedwere not relevant.

We have considered the evidence in this case and webelieve that the appellant was properly identified. The 3prosecution witnesses who identified him said there wasadequate light on the verandah and this evidence was notshaken in anyway. In fact all the verandah witnesses admitted to the adequacy of the light existing there. Then there is the evidence of identification parade. PW.7 carried out the parades for each identifying witness and there is no reason to show that there was anything wrong with the parade. We believe that these independent identifications are cogent enough to support conviction. Then there is evidence of stolen items found with accused which he even admitted like saying that he was found in possession of two airline tickets and not three yet he never gave any explanation at his trial how he came into possession of the two he admitted having if not the three. It is - Law

"Where a person is found in possession ofarticles recently stolen and there is noreasonable explanation there is apresumption of fact that he is either thethief or a receiver, and as to whatconstitutes "Recent"

Kenny's outline of Criminal law 15th Edn. pp 392 said -

"No general rule can be given for theperiod within which the presumption canoperate will vary according to the natureof the article stolen."

The Court of Appeal in KANTILAL JIVRAJ V. R. [1961] EA. 6said-

"Everything must depend on thecircumstances of each case. Factors suchas the nature of the thing stolen whetherit be a kind that readily passes fromhand to hand - "

In the present case he was found with things that witnesses were robbed of he admitted to two air tickets, there were the passport and identification papers belonging to PW.l. These

6were personal things to PW.l. They could not be exchangedeasily for money, unless perhaps negotiated

in certain terms.The time of 5 days was recent. There was nothing to suggestthat he was a receiver, or that he was engaged in a trade orprofession or activity that would cause him to be accustomedto receiving such items. The only reasonable inference wasthat he was the thief who stole them by force or the robber.

We hold that even on the principle of recent possession,the appellant would still be convicted on that evidence.

The last point raised by the appellant was with regard tohis leading the police to the place where the gun was found.He said he did not have it in his possession and that he wasnot warned by the police by being cautioned. The learnedPrincipal Magistrate found as a fact that the appellant ledthe police to the bush where the G3 Rifle was found and thiswas not challenged. Appellant only argues that he should havebeen cautioned. The magistrate also found that the gun wasthe one used in the robbery and that he was in possession. Heused this evidence as circumstantial evidence of appellant'sguilt.

As to possession, S.2 of the Penal Code describespossession widely -

(a) "To be in possession" or "havepossession" includes not onlyhaving in one's own personalpossession, but also knowingly having anything in the actualpossession or custody of anyother person, or havinganything in any place (whetherbelonging to or occupied by oneself or not) for the use orbenefit of any other person" In our judgment he was legally in possession of the gun. If as the learned magistrate found that appellant knew where the gun was hidden and led the police to the place then the discovery is governed by S.31 of the Evidence Act Cap. 80.

That section reads-

"Notwithstanding the provisions ofSections 26, 28 and 29 when any fact isdeposed as discovered in consequence ofinformation received from a personaccused of any offence so much of suchinformation whether it amounts to aconfession or not, as relates distinctlyto the fact thereby discovered may beproved"

The information was that appellant took PW.2 and other colleagues of PW.2 presumably police officers to a bush where they recovered a gun. As far as we can say this is all that could be taken from this evidence. It could not be held that the gun was the one used in robbery neither did the appellant say so. We think that in so far as it was not confession the need for caution did not arise. We also think that in so far as it was admissible evidence the Court was entitled to look at it and bestow any weight it considered appropriate reaching a conviction.

There has arisen critical discourse on the scope and meaning, of S.31 of the Evidence Act and the point being mentioned by appellant as for need for caution may be based on that discourse for we would follow the view expressed here by Sheridan J in R. v. Mwacharu wa Charu [1923]9 EALR 98 where he said -

"The Section means that the fact thatwhile information leading to a discoverymay when looked upon as a whole amount toa confession of guilt nevertheless suchpart of it as leads . to the act ofdiscovery may be given in evidence so faras it proves corroborative circumstances the finding of the article is a guarantee that the part of the confessionreferring to its discovery is not false,although there may be a possibility thatevidence of a statement might befabricated for the purpose of connectingthe prisoner with the discovery.However, that may be the words of thesection are sufficiently clear to allowof evidence of such a statement beinggiven and it is a matter for the Court tosift whether in all the circumstances ofthe case the evidence is true or false.In short it is a matter of weight notadmissibility"

We do not think the learned magistrate based any undue weight on this part of the evidence such that even if it was not there it would affect the conviction.

All in all we are satisfied that the appellant together with other people robbed the complainants and although the learned magistrate did not mention it S.21 of the Penal Code applied. They carried offensive weapons, they were several Persons so S.296 (2) was amply proved. The learned Magistrate reached

proper verdict and correctly convicted the accused.

We dismiss this appeal and confirm the conviction andsentence imposed by the learned Principal Magistrate.

Appeal in 14 days.Delivered this 16th Day of February, 1998.

A.I HAYANGA

P.N. WAKI

JUDGE