



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 153, 154 & 155 OF 1997

(From original Judgment in Nyeri CRIMINAL Case No. 3674/95 heard by Mr. Muga Apondi, CM)

PAUL NDERITU WAMBUGU)

PAUL KIMINGI WAKANENE)..... APPELLANTS

FRANCIS WANJOHI WAKANENE)

VERSUS

REPUBLIC.....RESSPONDENT

29/7/98

Coram: Mwera Juma J J

L. Mwai Adv. for appellants

M. Mwangi - Learned State Counsel for Republic

3 appellants in court

Gikaria Njiru c/clerks Eng/Swah.

JUDGEMENT

The appellants before us are Paul Nderitu Wambugu (NYI CR. A No. 153/97) Paul Kimingi Wakanene (NYI CR.A. 154/97) and Francis Wanjohi Wakanene (NYI CR.A. 155/97). They were Accused 1, 2 and 3 in NYI CM CR.C. No. 3674/95 wherein they were charged as follows.

In count 1, under S. 296 (2) Penal Code it was alleged that on 5.8.95 at Bomas of Kenya Nairobi, jointly armed with a dangerous weapon namely a pistol they robbed Barnabas Leting motor vehicle reg. No. KAE 5424 TOYOTA CARINA valued shs. 500,000/- and immediately before or after the time of such robbery used personal violence to the said Barnabas Leting.

In count 2 again under S. 296(2) Penal Code the charge was that at Ruiru on Mweiga-Nyahururu Road, Nyeri, jointly with others not before court and being armed with dangerous weapon namely AK 47 firearm and a shotgun robbed Patrick Mwenda Gikandi of a motor vehicle reg. No. KA 043 A Mitsubishi Canter worth shs. 1,7m, 500 cartons of chipsoy oil valued at shs. 300,000/-, one radio cassette INTERNATIONAL valued at shs. 2,000/- all to the total value of shs. 2.2m and immediately before or

immediately after the time of such robbery used personal violence on Patrick Mwenda. Then there followed 3 counts of possession of firearms - guns and ammunition. Count 3 under S. 4(1) Firearms Act (Cap.114) was to the effect that the 3 accused on 1.9.95 at Ndaragwa, Nyandarua jointly were found in possession of one AK 47 S/No. 83 XN1183 and one shotgun S/No. 13818 without a valid firearm certificate in force issued by a firearm licensing officer.

Count 4 was to the effect that on the same day and place the 3 were found in possession of 4 shortgun ammunition and 4 rounds of calibre 0.458 and 4 calibre 0.375 ammunition without a valid firearms licence.

There was count 4 again for possession of ammunition on 3.9.95 against the 2 appellants here. That at Nyahururu without a valid firearm licence, they had one 0.38 round of ammunition.

Then there followed alternative charges. The first such count read that contrary to S.322 (2) Penal Code the accused in the court below on 9.1.95 at Ndaragwa, Nyandarua jointly otherwise than in the course of stealing dishonestly handled 496 cartons of chipso cooking fat valued at shs. 296,000/- the property of Suresh Shah knowing or having reasons to believe them to be stolen or unlawfully obtained. This was alternative to count 2. The second handling charge again alternative to count 2 regarding the same day and place was against Paul Nderitu alone, appellant 1, in that he dishonestly retained the Mitsubishi Canter with one carton of chipso cooking fat worth shs. 600/- knowing or having reason to believe that they were stolen. There was a further alternative count to count 2 and this time against Paul Kimingi, appellant 2, in that on 3.9.95 at Nyahururu he dishonestly retained ignition keys to the said Mitsubishi Canter c/s 322(2) Penal Code.

The last alternative charge to count 1 was against all the appellants in that on 3.9.95 at Nyahururu c/s 322 (2) Penal Code they were found in possession of the TOYOTA CARINA which was stolen. And that was quite a charge sheet.

The appellants pleaded not guilty to all the charges set out above on 29.9.95. Their trial opened on 7.11.95 before the Senior Principal Magistrate. After 10 prosecution witnesses, the appellants who were represented testified in defence. On 4.6.97 the learned trial magistrate delivered his judgment finding the appellants guilty on the main charges. On the robbery charges each appellant was given the mandatory death sentence while on the possession of firearms whoever was concerned in whichever of the 3 counts got 5 years.

On 17.6.97 on behalf of these appellants Miss Mwai lodged petitions of appeal - 5 grounds for Peter Nderitu and 4 for each of Paul Kimingi and Francis Wanjohi. The appeals came for hearing before us on 29.7.98. Mr. M. Mwangi the learned state counsel appeared for the State. The 3 appellants were present. The 3 appeals were consolidated and heard together. Miss Mwai chose to present her arguments first on each of the 2 robbery counts and then the three on possession of firearms together. She submitted that under count 1, there was no proof of violence against Barnabas (P.W.3) from the time his Carina was robbed at Ngong Hills hotel to the time the robbers threw him out and drove off. That he did not identify his assailants, that night and he could not describe them well enough for their tracing. He only found them in court. The case of JOSEPH TOROKE VS R CR.APP. No. 204/87 (CA) NAI was cited to us. Judgment in this case was delivered on 24.5.90 but it is no longer good law on elements to be proved under S.296(2) Penal Code in the light of JOHANA NDUNGU V R CR.A. 116/95 (CA) MBA which came out on 20.11.96. The learned state counsel had a contrary view. He said that Barnabas (P.W.3) was robbed of his motor vehicle by 3 or so people whom he had gone to pick as fares. He talked with them from Ngong Hills Hotel to the point he was stopped and a metal piece was pushed into his ribs. He was thrown off. There need not have been actual violence but that P.W.3 was threatened with shooting.

We have gone over the evidence adduced and later considered by the learned trial magistrate's judgment. Beginning with Count 1 we agree that P.W.3 could not identify his 2 fares who later robbed him of the Toyota Carina. It was at night and even if the two passengers canvassed with P.W.3 on the way he could not describe them. We also note that a metal bit was thrust in his ribs with a threat to shoot. They did not injure P.W.3, though, but they stole his motor vehicle. Nonetheless in our view the 2 appellants stole this

motor vehicle. They were two. S. 296(2) Penal Code speaks of being in company of one or more people. Then these appellants drove the Toyota Carina to Nyahururu into the ambush laid by Cpl. Langat. When they got out of it to meet their co-accused No.3, LP. Mithamo arrested them. So it was on proper evidence that Paul Nderitu and Paul Kimingi were found guilty on Count 1.

Moving to count 2, Miss Mwai had more or less similar arguments. She told us that the offence was not proved because conditions to identify the robbers in that charge were poor. That the identification parades were flawed in the way they were conducted. We heard that the motorist in that count Patrick Mwenda (P.W.4) was blocked in his Canter containing cooking oil and it was robbed from him in an operation that took 2-4 minutes. That even P.W.5 Robert Gitau who was with P.W.4 was said to have been blind folded. Again we went over the lower court record and the learned trial magistrate's judgement. We came to the conclusion that his analysis and end result in convicting these 3 appellants was sound. Both P.W.4 and 5 were positive in this 10 a.m. incident that they saw and identified all the 3 appellants. They both told the lower court that while appellant 1, Paul Nderitu had a shotgun, Francis Wanjohi, appellant 3 had nothing while Paul Kimingi held an AK 47. Then both P.W.4 and 5 identified Paul and Francis (appellant 1 and 3) on identification parades.

The turn boy Gitau P.W.5 told the learned trial magistrate: "I identified the accused 3 though he was not armed. The accused 1 had a long gun which was partly made of timber. The shotgun (MFI7) was being carried by the accused 1 while the AK 47 rifle (MFI 8) was being carried by the accused 2. I can still recall what transpired since that was the first time to see such an incident in my life..... This chipсы cooking oil

resembles the ones (sic) that we were carrying."

We were satisfied that this identification was positive particularly that P.W.4 & 5 also identified appellants 1 and 3 on parades. We have perused the identification parade reports (Exh. 27, 27). They appear in order along with the evidence of witnesses who conducted the parades. In any case was it not Paul Nderitu (appellant 1) who led police to a house at Ongata Rongai where the correct reg. number plates of the Canter were found? He had the keys to the house. He also led police to a house where the chipсы cooking fat was recovered. Miss Mwai endeavoured to convince us that no violence was used on P.W.4 and 5. But there were threats to kill them if they talked. They were pushed about and even thrust in the Toyota Carina boot. To us this was any other form of violence envisaged in S. 296(2) Penal Code.

In sum the conviction on Count 2 was sound. All appellants were properly found guilty of robbing P.W.4 of the Canter.

We now move to counts 3, 4 and 5 on possession of firearms. It is not in doubt that the arms as specified in the charges were certified to be firearms in the context of the Firearms Act. None of those charged in each count produced or even claimed that he/they had valid firearms certificates issued by a firearm licensing officer. However starting with count 5, the presence of a 0.38 bullet in the Toyota, we heard that this was discovered at a police station after Paul Nderitu and Paul Kimingi had been arrested at a bar in Nyahururu town. That a search ought to have been conducted rightaway at that spot rather than doing it later at the police station. Although we were not of that opinion, Miss Mwai's view was that this round of ammunition was planted in the motor vehicle to fix the 2 appellants. We could not see why but anyway we allow the appeals of these 2 appellants on count V. Conviction is quashed and sentences of 5 years set aside.

Going back to count 3: The appellants denied possession of the AK 47 and the shotgun on 1.9.95 at Nyahururu. Again we look at the record in the lower court as we are required/entitled to do. We are of the mind that the 3 appellants were properly convicted. When Paul Nderitu and Paul Kimingi accosted P.W.4 and 5 in the Canter and they robbed them of it the former had the shotgun while the latter had the AK 47. When LP. Mithamo (P.W.10) arrested Francis Wanjohi at Nyahururu on 1.9.95 he volunteered to take the officer to the place where the cooking fat was. It was at a house which looked abandoned but Wanjohi unlocked the padlock on the door. Inside the cooking fat was found - 496 cartons. Then P.W.10 saw a hole in the wall. He put his hand in and out came a bag full of the 2 guns, ammunition and lots of other

firearms paraphernalia. Now to us this all ties in with the charge. All 3 appellants are linked to it. It was proved and all appeals about it are hereby dismissed.

We now conclude with count 4 - possession of ammunition. It was laid as a separate charge and that is what the Firearms Act provides for. Having concluded that the appellants were in possession of the shotgun and AK 47 whose rounds of ammunition were found in a house where Francis Wanjohi led P.W.10 to recover the guns, it is an irresistible conclusion that the trio not only possessed the guns jointly but that they also were in possession of rounds of ammunition capable of

being fired from those guns. We similarly dismiss the 3 appeals against this charge. In conclusion this is our determination:

Count 1: Paul Nderitu and Paul Kimingi: Their appeals against this count are dismissed

Count 2: The appeals of all 3 appellants against the lower court finding here are dismissed.

Count 3: Similarly all 3 appeals are dismissed.

Count 4: All the 3 appeals are dismissed. The lower court conviction and sentences remain undisturbed.

Count 5: Appeals of Paul Nderitu and Paul Kimingi are allowed.

Right of Appeal explained Judgement accordingly delivered on 27th October, 1998

J.W. MWERA J

J.V.O. JUMA