



REPUBLIC OF KENYA

Kamau v Republic

High Court, at Nairobi August 29, 1985

Owuor J & Schofield J

Criminal Appeal No 1236 of 1984

(Appeal from the Senior Resident Magistrate's Court at Nairobi, J A Mango, Esq)

Advocates

Appellant present and unrepresented

W Nfugi (Miss) (State Counsel) for respondent

August 29, 1985, Owuor J & Schofield J delivered the following Judgment.

Bernard Mwangi Kamau appeals against his conviction by a learned senior resident magistrate Nairobi on 3 counts of robbery with violence, contrary to section 296(2) of the Penal Code and one count of attempted robbery with violence contrary to section 297(2) of the Penal Code and he also appeals against the sentence of death imposed upon each of those convictions.

All 4 charges arise out of an alleged robbery which was perpetrated on the grocery shop of PW 1 Nemchand Kanji Shah between about 6.30 pm and 7.00 pm on the December 17, 1982. According to Mr Shah 4 men burst into his shop, one armed with a machine gun and one with a panga. The man with the gun pointed it at Mr Shah and the other took Kshs 18,700.00 from the counter drawer. The other 2 took 5 cases of whisky and 2 of brandy from the shop.

A customer PW 2 Morris Fred Ochola saw the man with the machine gun who also, it appears, had a panga with which Mr Ochola was hit on the head. Kshs 1,500.00 was removed from his back pocket and his wristwatch was taken.

The robbers wanted to make their escape in either the car of Mr Shah or Mr Ochola because they took their car keys. However, as they came out of the shop PW 4 Inderpal Singh Baari was in a Mercedes Benz motor car near the traffic lights close to the shop. He testified that the appellant shot at him several times, told him to get out of the car and as Mr Baari did so shot him again and got into the car himself. Mr Baari received severe injuries from 4 bullet wounds. When he had recovered on January 14, 1983, he identified the appellant at an identification parade conducted by PW 11 Inspector Kagwanja. The robbers did not make their escape in Mr Baari's car. PW 6 Eliakim Nthiga came on the scene in his Audi motor car and parked behind Mr Baari's Mercedes. He saw a man jump in his path waving a machine gun and when he was threatened with being shot Mr Nthiga jumped out of the car and the man with the machine gun made off. Mr Nthiga identified the appellant in the dock but had not been called to an identification parade. PW 7 Likwasi Eson, the watchman at Mr Shah's shop, saw a person with a gun and hid in the toilets. He could identify no one.

The theft from Mr Shah's shop led to the first charge, and the robbery of Mr Ochola led to the second charge. The attempted theft of Mr Baari's Mercedes led to the third charge and the theft of Mr Nthiga's Audi led to the fourth charge.

Inspector Michael Kagambi testified as PW 9 that he came on the scene at about 7.20 pm the same evening. He searched the surrounding area and collected two expended 9 mm cartridges.

PW 10 P C Njoroge, acting on information, arrested one Mwangi Wahogo at about 8.30 pm on January 7, 1983. Mr Wahogo led the police to the home of the appellant which was searched. Under a mattress a sub-machine gun and 22 rounds of ammunition were recovered. The appellant then led the police to another house where 15 rounds of ammunition were recovered. The machine gun and the 37 rounds of ammunition were sent to a fire arms examiner PW 3 Senior Superintendent Gichuki. He found the gun to be good working order and fired three rounds of ammunition. He examined the tested cartridges and compared them with 5 sets of exhibits and found that these sets of exhibits had been fired from the sub-machine gun.

The appellant testified that during the period covering December 7, 1983 he was mentally ill. He cannot remember the date of his arrest or whether a gun was removed from his house. He cannot remember the identification parade.

The appellant called Mwangi Wahogo to testify that he bought 15 rounds of ammunition on January 1, 1983. He lent his house to Grace Kenya to whom he had given the ammunition wrapped in a milk packet. Grace wanted to take her boyfriend to the house. She did not know he had the gun and the gun had been his from about September, 1982. He had used it in robberies.

The learned magistrate rightly rejected the appellant's plea of insanity. The appellant was represented in the lower court and made no effort to call medical evidence. It was for him to prove on a balance of probabilities that he was insane at the time of the alleged robbery and had failed to do so.

However, the magistrate made two serious misdirection's in his judgment. Firstly, he referred to a statement which the appellant had allegedly given in another criminal case (No 272 of 1983) in which the appellant had admitted, allegedly, that the house was his and that he had possession of the gun. This statement was not tendered in evidence in the instant case and the learned magistrate had no right to consider it. Secondly, the learned magistrate said that the expert's opinion regarding the gun was that the gun found in the appellant's house was most likely the one used in the robbery. No such opinion was expressed. The two spent cartridges found at scene by the investigating officer were never proved to have been examined by the fire arms examiner. There was no chain of evidence between their discovery and any examination by an expert. The most that can be said about the gun was that a similar one to that found in the appellant's house was used in the robbery.

That leaves the court with the identification by Mr Baari which was put to the test at an identification parade and the dock identification by Mr Nthiga which was not put to the test. As rightly pointed out by the learned magistrate this was a serious oversight by the police.

In view of the circumstances of the incident and the time of day and in view of the evidence of the watchman that it was slightly dark we feel it would be unsafe to uphold the convictions of the appellant on the identification evidence of Mr Baari and the dock identification of Mr Nthiga, particularly in view of the serious misdirection's in the learned magistrate's judgment. We feel the convictions are unsafe.

Accordingly we quash all 4 convictions, set aside the sentences imposed upon them and order the appellant's immediate release unless he be held for any other lawful cause.