REPUBLIC OF KENYA

Waweru v Republic

High Court, at Nairobi August 14, 1985 Schofield J

Criminal Appeal No 1723, 1724 & 1725 of 1984

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

Advocates

Appellants absent, unrepresented, and not wishing to be present

Miss W Ngugi, for respondent

August 14, 1985, Schofield J delivered the following Judgment.

Jackson Waweru (1st appellant), Francis Njoroge (2nd appellant) and Nelson Mwaniki (3rd appellant) were three of four accused charged with and convicted of preparation to commit a felony, contrary to section 308(2) of the Penal Code.

There were two witnesses called for prosecution. Wilson Ndeda testified that he was at home at Sattelite, Riruta, at 8.30 pm on the August 15, 1984, when a gang of six or more men burst into the house and robbed he and his wife. Two of the men were carrying guns and after a scuffle, when the witness realized they were not the police officers they claimed to be, the gang made off and the witness heard a vehicle start. The witness slammed the door on one of the guns which broke.

At about 10.00 pm the same night, Police Constable Joram Muriithi was on patrol with three other officers. In Wanyee road they saw a stationary vehicle beside the road with no lights on. They saw three men get out of the vehicle and the police officers got into the vehicle and found the third appellant in the driver's seat and an air gun in a sack next to him The third appellant said he had been hired to drive from town to Wanyee road. The police officers interrogated the other three men among whom were the 1st and 2nd appellants and they said the owners of the gun had escaped.

All three appellants and their co-accused gave unsworn evidence which corresponded. They said that the 3rd appellant was the driver of a matatu which the 1st and 2nd appellants and their co-accused rode in as paying passengers. They alighted from it and the police seized upon them. They denied knowledge of the gun.

The convictions are unsafe. Firstly, the charge is defective. Omitted from the particulars of the offence was the essential ingredient that the appellants were not at their place of abode. As rightly, and fairly, pointed out by the learned state counsel it appears that the drafter of the charge confused subsection (1) with section (2) of section 308 of the Penal Code. Secondly, the evidence of the 1st witness, Wilson Ndeda, appears to have no relation to the offence with which the appellants are charged save to prejudice the mind of the court. Although the witness said the gun found in the vehicle driven by the 3rd appellant was identical to one of those used in the robbery, he could not identify any of the robbers and obviously the prosecution knew there was insufficient evidence to connect the appellants and their co-accused with that robbery, although there was a great deal of suspicion against them. The learned magistrate did not address his mind to the inadmissible and prejudicial nature of the 1st witness's evidence: although he did not expressly use that evidence to support his findings, he did not expressly reject it either. Thirdly, there were four police officers on police patrol and only one testified. Should not the prosecutor have called all four officers or at very least explained their absence? Lastly, regarding the 1st and 2nd appellants and the co-accused, it seems to be suggested that they stood outside the vehicle waiting for the police to finish with the 3rd appellant, the driver, and made no endeavour to get away. These are the actions of innocent

men.

The convictions are quashed and the sentences are set aside. The appellants are to be released unless held for any other lawful cause.

In the exercise of my reversionary powers I make the same order in respect of the 4th accused in the lower court, Samuel Kamau.