REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

APPELLATE SIDE

CRIMINAL APPEAL NO 319 OF 1983

(From original conviction and sentence in Criminal case No 231 of 1983 of the Resident magistrate's court at Nairobi: G N Osango, Esq.)

MESHACK BAGUA……APPELLANT

(Original Accused No 1)

AND

REPUBLIC…….RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 320 OF 1983

(From original conviction and sentence in criminal case No. 231 of 1983 of the Resident Magistrate's court at Nairobi: G N Osongo, Esq.)

NATHAN LUSENO …….APPELLANT

(Original Accused No 2)

AND

REPUBLIC……..RESPONDENT

CORAM: Abdullah J

A H Khamati for Appellant Miss L G Mbarire (State Counsel) for Respondent

JUDGMENT

The two appellants Meshack Bagua and Nathan Luseno were charged jointly with another not in Court of

robbery, contrary to section 296(1) of the Penal Code (cap 63) on the main 1st count. On the second count the 1st accused is charged of being in possession of a firearm without a firearm certificate, contrary to section 4(1) of the Firearm Act (cap….), and finally, the 1st accused contrary to section 322(2) of the Penal code (cap 63). Both accused persons pleaded not guilty to all counts.

When the hearing of this appeal which had now been consolidated opened before us on 10th July 1984, Miss Mbarire the State Counsel appearing for the State, told us that she did not support the conviction in respect of the second appellant Nathan Luseno, but supported the conviction in respect of the 1st appellant, Meshack Bagua.

We therefore proceeded to allow the appeal against him quashed the coviction and set aside the sentence imposed on him. We also ordered him immediate release. The hearing then went on in respect of the 1st appellant only. Briefly, the evidence adduced against him was that on the evening of the 25th January 1983, the complainant in this case, A P Maingi Kesei, P W 5 , was on guard duties within the compound of P W 1, Mr Francis Mwangi Njuguna, the Permanent Secretary, Ministry of Agriculture. This was in Karen, off Langata Road. That at about 7 p.m. the complainant decided to lock the gate. As he bent down to do so the appellant and another hit him with something which he suspected was a stone. However, the complainant retracted that statement and said in his evidence at page 14 “I did not see the person properly because there was a bush around.” Again at page 15 of his evidence the complainant said, “I could not identify the people properly.”

Because of this evidence by the complainant as regards his assailants, the learned state counsel told the court later in her address that the prosecution was not relying on evidence of identification of the assailants by the complainant. Anyway, the complainant stated that he had a pistol on him. He identified it in court during the hearing. It was No S/No 36724, and had a magazine with 13 rounds of ammunition. The complainant fell down as he was hit and he was unable to talk because of the injury he sustained on the head and hand. He was temporarily unconscious and, as he regained consciousnessl he realized that he had been robbed of his gun.

A P constable Mwangi P W 4, was the first to reach the gate where the complainant was. He had heard some noise, and, though he fell down and hurt himself whilst running to the gate, nevertheless he reached the gate. He was injured and was UNABLE TO WALK. At this juncture, P W 1, the Permanent Secretary himself drove to the gate from the house and found A P Mwangi standing on the road. P W 1 also noticed someone lying on the ground, “writhing in agony”, and groaning. A P Mwangi reported what had happened, as a result of which P W 1 ordered that the complainant be taken to his house, and he telephoned Karen Police Station to report the incident, as a result of which Chief Inspector John Kipkorir (P W 2) arrived at his compound. According to P W 2, he found the complainant lying near the gate to the main compound. He got a report of what had happened from P W 4 A P Mwangi, as a result of which he started investigations. That particular night he made no arrests and also recovered no exhibits. The following day, however, he received some information as a result of which he went to see one Solomon, P W 3, a shamba boy who lives in this same locality. Solomon confirmed in his evidence that on 25/1/83 the appellant and 2 others came to visit him, and finally left his house at 6 p.m He gave them money Kshs 20 for bus fare. Solomon was being questioned about his visitors show him where the 3 men lived. Solomon directed P W 4 to the 1st appellant’s place of work, along Muringa Road in Kilimani. The appellant was arrested. P W 2 cautioned him verbally and questioned him verbally about the time they left Langata. P W 2 then took him round in a vehicle and questioned him further about the pistol. He also questioned him about his place of residence which appellant said was in Kawangware.

I quote from page 7 line 8 of the proceedings:- “Before we left Muringa Road he agreed that he had the pistol in his place of work, that is the workshop. I took him to the workshop and he showed me this carton (MF13) I searched the carton and found this pistol wrapped in this paper (MF 1) it had no magazine which contained 13 rounds of ammunition …..” It was on the above evidence that the learned Resident Magistrate found the appellant guilty on the 1st main count of robbery, contrary to section 296(1) of the Penal Code, and convicted him accordingly, and sentenced him to 8 years imprisonment plus 5 strokes of the can, plus a mandatory 5 years police supervision order. The appellant has now appealed against conviction only. Mr Khamati who argued the appeal on behalf of the appellant submitted mainly that

evidence of P W 2 was “suspect” evidence and the court cannot rely on it, in absence of independent corroboration, which must relate to the recovery of the pistol, and not merely that appellant was seen in the neighborhood where the offence was allegedly committed that the burden placed on prosecution was even higher because the appellant had denied in his defence in court.

The learned state counsel on the other hand submitted that evidence against the appellant was overwhelming as he was seen in the neighborhood where offence was committed, and also, he had P W 2 to the place where the gun was recovered from. In www.kenyalawreports.or.ke our judgment, we considered the provisions of section 31 of the Evidence Act (Cap 801) which reads:-

“Notwithstanding the provisions of sections 26, 28 and 29 of this Act, when any fact is disposed to as discovered in consequence of information received from a person accused of whether it accounts to a confession or not, as relates distinctly to the fact thereby discovered, nay be proved.”

We have also considered the fact that gun in question was recovered less than 12 hours from the time it was first discovered missing and that the information leading to its recovery came from the appellant, that is what P W 2 stated. About this witness, the learned Magistrate who saw him give evidence in court said at page 29 of the judgment, “Even the evidence of the arresting officer had not been challenged and shaken by cross examination so it is my view that the arresting officer’s evidence requires no corroboration.”

We respectfully agree with the view of the trial Magistrate, as we believe that this witness told the truth in court. Further, about the recovery of the gun the learned Magistrate said at page 31 in line one at the top “Although there could be many people working at the place where the pistol was recovered, the gun could not be in possession of any one else apart from the 1st accused (new appellant) who showed the arresting officer the gun…” Still, further down the same page of the judgment from line 17, it reads:- “Secondly, it would be impossible for the police to have planted the gun on the 1st accused for no reason at all. Evidence has been adduced by P W 3 that the arresting officer cam back with the pistol and the witness never saw the officer go in with the pistol”

These passages from the judgment showed that the learned magistrate ruled out the possibility of the gun having been found with anybody else, but the appellant, and also that the pistol was not planted on appellant by P W 2. We also consider that it would have been desirable for the other police officers who were with P W 2 at the time of recovery of the gun to give evidence. But as we have already pointed out, we believe the evidence of P W 2, and again, failure of such police officers to give evidence had not www.kenyalawreports.or.ke affected the evidence of P W 2 in anyway. Lastly, the point about the Trial Magistrate shifting the burden of proof on the appellant, when he said on page 32 line 17, “…..unless there is some other evidence to convince the court beyond reasonable doubt that they did not do so” Here, we are in agreement with the submission of the learned state counsel that this was, “an unfortunate choice of words.” However, it is our considered opinion that it did not occasion any miscarriage of justice to the appellant as it is curable under section 382 Criminal procedure Code (Cap 75) in any event the Magistrate by use of these words was not shifting the burden of proof on the appellant as it is clear from reading the judgment as a whole. We have weighed, shifted and considered all the evidence on record, and have found that the prosecution proved the offence of robbery against the appellant, following the Doctrine of Recent Possession of Goods coupled with fact that appellant was in the neighborhood at the material time. The gun in question was positively identified by the 2 guards, P W 4 and 5. It was recovered within, “a reasonable time” of its loss It was in fact taken from the complainant in circumstances that accounted to robbery, i.e. it is on record that complainant was found writhing on the ground groaning with pain, with an injury on his head and hand. Evidence of P W 2 on cross examination at page 9 lien 9 reads:

“At the scene there were marks that people had been struggling there” The inference we can draw from appellant’s recent possession of the gun is that he did not rob the complainant of it. We however make no findings on the second count and also the alternative count of handling. As regards sentence, Mr Khamati did not address us, we on our part consider that the sentence was eminently reasonable. Appeal against sentence is also dismissed.

Dated 17th July 1984.

F E ABDULLAH

JUDGE

J ALUOCH

JUDGE