



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Miller JJA & Simpson Ag JA)

CRIMINAL APPEAL NO. 87 OF 1981

BETWEEN

STENICE MKONO MAKAYORA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Madan JA This is a second appeal. The appellant's first appeal to the High Court was dismissed.

The appellant was convicted with two others on a first count of conspiracy to commit a felony namely robbery contrary to Section 393, and on a second count of preparation to commit a felony namely robbery with violence contrary to Section 308(1), of the Penal Code. A fourth accused was acquitted.

The particulars of the offence of the first count were that on the May 17, 1980, at Majengo area, Mombasa, the four accused jointly with others not before the court conspired to commit a felony namely robbery; and of the second count that during the night of May 18, 1980, at Port Gate Night Club at Mombasa, the four accused, were found, armed with dangerous or offensive weapons, namely one toy pistol and three knives with intent to commit a felony namely robbery with violence.

Acting upon information received five police officers arrived, at the Club at about 2 am on May 19, 1980. The manager of the Club who had earlier alerted the police was waiting for them. He pointed out to them three people who were sitting under a tree drinking beer. One of them ran into a lavatory.

On being searched the appellant was found to have a toy pistol in his socks, and also a knife under his trousers and belt. The second accused also had a big knife under his trousers and belt. The third accused was brought out of the lavatory. He also had a knife. The fourth accused was arrested on the following day as a result of information given to the police by the appellant and the second and third accused.

When the trial of the four accused began in the court of the Resident Magistrate, Mombasa, the appellant told the magistrate that he wished his case to be heard by another magistrate because he believed, the court was not impartial, that the magistrate had promised to send him to prison before trying him, and he did not release him on bond from the beginning. The second accused told the magistrate that he did not wish to be tried by him because he also had no confidence in the court. The third and fourth accused both said that they had confidence in the court and wished their case to go on.

The magistrate refused to transfer the case to another court. He said the accused were unknown to him.

The magistrate was right to reject the appellant and the second accused's spurious objection.

The appellant and the second accused took no part in the trial. When the prosecution witnesses gave their evidence they repeatedly refused to cross-examine them saying each time that they did not wish to be tried by the court. When CI Malala gave evidence that he recorded a charge and caution statement from the appellant for an offence contrary to Section 308(1) the appellant said that he did not wish to say anything "about the taking of the statement" as he did not wish to be tried by the court. The court then ordered the statement to be admitted in evidence as the appellant did not object to the production of the statement. Again, the magistrate was right.

The appellant has complained to us that he was beaten and forced to sign the statement. He did not make this complaint to the magistrate, nor even in his first memorandum of appeal which he filed on June 25, 1981. He did say in his supplementary memorandum of appeal which he filed on October 5, 1981 that the learned judge of the High Court "failed to take into account the possibilities of duress applied in obtaining the confessed statement." We think that if the appellant was really beaten and forced to sign the statement he would, have lodged his complaint when given the opportunity, by the magistrate.

At the end of the prosecution case the magistrate complied with Section 211 of the Criminal Procedure Code whereupon the appellant said that he had nothing to say in the case, that he understood his rights fully as explained by the court, and he could speak on oath, make an unsworn statement but he wished to keep quiet voluntarily and say nothing. He also had no witnesses to call.

The appellant said in his statement made to CI Malala that he and the other three accused were at the Club at 9.00 am on May 17. They discussed and agreed to rob the Club of money at 1 am on the night of May 18 and 19. He bought a toy pistol on May 18 at a shop in Mombasa. He could take the police to the shop. The pistol was to scare people at the time of the robbery. He went to the Club at 7 pm with the pistol. He was drunk. The second and third accused arrived there at 8 pm. He did not know if they had knives. He told them he did not "want that work of robbery". They agreed with him and they continued to drink beer. They were arrested at 3 am. He still had the pistol and his friends were found with two knives.

Like the two courts below who made concurrent findings of fact on this issue we are also satisfied that the appellant and the first and second accused were found sitting together at the Club and when searched by the police they were found armed with dangerous weapons, and consorting with each other.

The appellant's statement was a full confession. As the magistrate pointed out it contained matters of which the appellant only could have known. The statement was corroborated by the presence of the appellant at the Club in possession of offensive and dangerous weapons which could only have been intended to be used to commit the felony of robbery as planned by the appellant and his co-accused. An imitation firearm is deemed to be a dangerous weapon for the purposes of the Penal Code Section 34(2), Firearms Act (Cap 114).

The conspiracy to commit a robbery was proved by their initial meeting on May 17, and their rendezvous later at the Club on the evening of May 18 when the appellant was admittedly armed with at least a toy pistol.

We do not think the charges were defective or that the magistrate did not comply with Section 211 of the Criminal Procedure Code as is complained in the memorandum of appeal. The record speaks to the contrary.

The appellant was properly convicted. His appeal is dismissed.

As **Miller JA & Simpson Ag JA** agree, it is so ordered.

Dated and Delivered at Mombasa this 22nd day of October 1981.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

A.H.SIMPSON

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the
original.

DEPUTY REGISTRAR