



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, KOOME, & SICHALE & JJ.A)**

**CRIMINAL APPEAL NO. 27 OF 2015**

**BETWEEN**

**IDRIS ABDI GURHAN.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment of the High Court at Nairobi*

*by Odunga & Muchemi, JJ.*

*in*

**HC.CR NO. 540 OF 2007)**

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**JUDGMENT OF THE COURT**

The Appellant **IDRIS ABDI GURHAN** was charged with the offence of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. The particulars were that on the 9th May, 2005 at Eastleigh Nyota Clinic Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely a pistol attempted to rob **ABDIRAHMAN MAWIYA** of cash Ksh.2,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **ABDIRAHMAN MAWIYA**.

In Count II he was charged with the offence of being in possession of a firearm contrary to section 4(1) of the Firearm Act. The particulars of this count were that on 9th day of May, 2005 at Eastleigh Nairobi within the Nairobi area he was found in possession of a firearm namely a Barreta pistol (serial number not visible) without a firearm certificate.

On 26th May, 2015 the appellant appeared before Hon. Nzioka, the then Chief Magistrate, Makadara and pleaded not guilty in all the 3 counts. Consequently, his trial commenced on 7th March, 2007 before Hon. Karani, the then Senior Resident Magistrate, Makadara who recorded the evidence of **ABDURAHAMAN MAWIYA (PW1)**, **JOSHUA IRUNGU NDUNGU (PW2)** **THOMAS OTIENO (PW3)** AND **LINDSAY KIPKEMOI (PW4)**.

On 20th June, 2007 the trial court found that the appellant had a case to answer and he was put on his

defence. The appellant made an unsworn statement of defence on 2nd July, 2007 and he denied the offence, he did not call any witness. In its judgment rendered on 12th September, 2007, the appellant was found guilty of all the 3 counts and sentenced to death in Count 1 and 7 years in each of counts II & III. The sentences in Count II and III were to run concurrently. The appellant was dissatisfied with the outcome of the trial and he filed an appeal which was heard by Muchemi and Odunga, JJ. On 16th December, 2013 the learned judges dismissed the appellant's appeal save that the sentences in Counts II and III were to be held in abeyance. The appellant was dissatisfied with the outcome of his appeal and duly filed a memorandum of appeal dated 11th June, 2015 and a further supplementary memorandum of appeal filed on 22nd June, 2015 by Mr. Nyaga, the learned counsel then representing the appellant.

On 20th March, 2004 the appellant came before us for plenary hearing; he was then represented by a new counsel, Mr. Alibhai Hassan. Mr. Alibhai urged us to find that the charge sheet was defective as it stated that the appellant was arrested on 9th May, 2005 at the scene yet he was arrested on 14th May, 2005 and if this is the case, he could not be at the scene five days later after the alleged date of the commission of the offence. As regards Count II, it was the learned counsel's submission that the evidence was contradictory as **PW4 LINDSAY KIPKEMOI**, a firearm examiner found the firearm to be Helwan and not a Barretta pistol as stated in the particulars of the charge. Further, counsel urged us to find that the death sentence was unlawful.

In opposing the appeal, Mr. Mailanyi the Senior Assistant Director of Public Prosecutions maintained that the date of the commission of the offence was 9th May, 2005 and not 14th May, 2005 and that even if an error had been made as regards the date of arrest, this was curable by dint of section 382 of the Criminal Procedure Code. Further, that the issue of the date of arrest was neither raised during the trial and/or during the appellate proceedings in the High Court. Secondly, the issue of the appellant's constitutional rights being infringed was not raised in the trial court and/or the High Court. As to the contradiction as to the type of firearm, it was Mr. Mailanyi's submission that PW1 was a lay person and hence did not know the difference between a barretta and helwan pistol.

In brief rejoinder, Mr. Hassan for the appellant urged us to find that section 297(2) of the Penal Code is an affront to the appellant's right to life.

This is a second appeal before us. This being so, this Court will not as a general rule interfere with the concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In **David Njoroge Macharia v Republic [2011] eKLR** it was stated that under Section 361 of the Criminal Procedure Code:

**“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemangong vs Republic (1984) KLR 213).”**

PW1 was an employee of a pharmaceutical Company at Nyota Clinic Eastleigh. On 9th May, 2005 at about 8.00 pm he received 2 persons as patients. One came to the consultation room and the other remained seated in the waiting room. Soon thereafter, the person who had entered into the consultation room pulled a gun and pointed at him. A scuffle ensued and luckily for him his guard, Irungu (PW2) who had heard the commotion came to his rescue. In the meantime the 'patient' who had been in the waiting room joined the appellant and started biting PW1 on his shoulders. PW1 and Irungu (PW2) were able to disarm the appellant and Irungu (PW2) held onto him as the second assailant took off. At this point in time, PW1 was bleeding profusely. Shortly thereafter, the police arrived and the appellant was taken to Kenyatta National Hospital before being taken to Pangani Police Station by PW3 who also recovered the gun and two bullets. PW4, a firearm examiner examined the pistol and the two rounds of ammunition and found them to be a firearm (albeit Helwan and not barretta) and ammunition, respectively.

In his unsworn statement of defence the appellant told the trial court that on the material day at about 8.00 pm he was on his way home. He got to Galore street and found a gathering of many people. These people

started attacking him with *pangas* and *rungus*. The police came to his rescue and as he had been badly injured, he was taken to Kenyatta National Hospital and later he was taken to Pangani Police Station. He denied having committed the offence.

The above evidence was considered by the trial court as well as the 1st appellate court. The first appellate court summarized the findings of the trial court as follows:

**“...the learned trial magistrate found the prosecution evidence to be consistent and well corroborated. She found that since the appellant was arrested at the scene there could be no room for mistaken identity as advanced by the appellant hence there was no need for identification parade. He (sic) further found that since at least one of the ingredients of the offence under Section 296(2) of the Penal Code was established there was no need for medical evidence. She found that though the appellant had no chance to demand the money, she was satisfied that the appellant was after money. She therefore convicted the appellant on count 1. With respect to counts 2 and 3 she found that the gun that was examined was the one which was wrestled from the appellant and having been found to be a firearm the appellant was similarly guilty of counts 2 and 3 and convicted him accordingly.**

The 1st appellate court reconsidered the evidence and concluded as follows:

**“On our part we have reconsidered the evidence on record and we hold that the case against the appellant was watertight. We have also considered the defence which we find wanting.”**

Having come to the conclusion that the trial court and the 1st appellate court properly re-analyzed and re-evaluated the evidence, we reject the appellant’s contention that the 1st appellate court failed to examine and re-evaluate the evidence. Further, there were no inconsistencies and/or contradictions in the evidence adduced. The appellant was arrested inside the clinic. PW1 and PW2 held onto the appellant until PW3 arrived. In the meantime, the appellant’s partner in crime fled away. We too are in agreement that the evidence against the appellant was water-tight.

As regards the allegation that the charge sheet was defective as it gave the date of the commission of the offence as 9th May, 2005 and yet the appellant was arrested on 14th May, 2005, again we see no defect. In his own statement of defence, the appellant told the court that due to

the beatings inflicted on him by the crowd that had gathered, he was taken to Kenyatta National Hospital, admitted and confined there for treatment. He was later taken to Pangani Police Station. His re-arrest at Pangani Police Station may have been on 14th May, 2005. This does not mean the charge sheet was defective. In any event, an error on the charge sheet in the particular circumstances of this case did not occasion any prejudice to the appellant. **S.382** of the Criminal procedure Code provides as follows:

**“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.....”** (emphasis added)

We do not fathom that any miscarriage of justice was occasioned to the appellant, if the charge sheet had erroneously indicated the date of the commission of the offence as 14th May, 2005.

One more issue deserves mention. The appellant stated that a charge under **Section 297(2)** of the Penal Code is an affront to his constitutional right to life. Whereas we do not wish to belabour this

point as it was not urged in the trial court and/or the 1st appellate court, suffice to state that the curtailment of the right to life is backed by constitutional provisions. **Article 26** of the Constitution provides that whereas every person has a right to life, a person can be deprived of life “**... to the extent**

**authorized by this Constitution or other written law.”** We shall say no more on this.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed.

*Dated and delivered at Nairobi this 28th day of July, 2017.*

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**