



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 40 OF 2015

BETWEEN

JULIUS MUGAMBI NJERI.....1<sup>ST</sup> APPELLANT

EDWARD NJORONGE MBURU.....2<sup>ND</sup> APPELLANT

FRANCIS MAINA GICHANDE.....3<sup>RD</sup> APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Nairobi (Ogola & Kamau, J) dated 19th December, 2013*

in

**HC.CR.A 339,340 & 341 of 2009)**

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**JUDGMENT OF THE COURT**

The appellants were charged, tried, convicted and sentenced for robbery with violence contrary to **Section 296 (2)** of the **Penal Code** by **C. W. Meoli**, Chief Magistrate at Thika, in that on 11th day of November, 2008 at Field 49 of Delmonte (K) Limited in Thika Town within Kiambu County jointly with others not before court, while armed with dangerous weapons namely; panga, sword and rungus, they threatened two security guards using the said weapons and thereafter harvested 30 pineapple fruits valued at Ksh. 1,500. They were also convicted of injuring an animal contrary to **Section 338** of the **Penal Code**. The particulars of the offence were that on the same date and in the same place, they jointly willfully and unlawfully wounded an animal capable of being stolen namely a dog the property of Delmonte (K) Limited.

Their first appeal against both conviction and sentence was dismissed by the High Court (**Ogola & Kamau, JJ**), provoking this appeal in which only one point of law has been raised, namely: whether the appellants were positively identified as among the gang of seven men who committed robbery at Delmonte (K) Limited, on the night of 11th November, 2008.

Arguing the appeal before us, **Mr. Omari**, learned counsel for the appellants confined his submissions to dog identification, contending that this is a case of mistaken identity. He submitted that the three appellants were being chased by guards of Delmonte (K) Limited having allegedly stolen 30 pineapples which they abandoned. There were a total of seven thieves being chased and they all disappeared into the bush. The guard had a dog which was let loose on the thieves. The dog found three people, which it picked and brought back to the guards one by one. The guards took them plus the pineapples to Gitumbu police station. As they had been bitten by the dog, they were first taken to hospital.

Counsel contended that the dog found the appellants in the bush not on the chase and the guards did not pursue the other four. In his view, there ought to have been an identification parade for the guards to identify the appellants. He expressed doubts whether the appellants were among the seven thieves.

**Miss Maina**, the learned Senior Principal Prosecution Counsel, supported the appellants' conviction and sentence. Referring to the testimony of **David Kamau** (PW4), she submitted that the dog was able to sniff or sense that there were intruders on the farm as it was trained. She contended that there were no other farms and no member of the public nearby, therefore there was no need for an Identification Parade since there was no mistake or doubt as to the identity and involvement of the appellants in the offences.

We have considered the record of appeal, submissions by the counsel and the law. This being a second appeal and by dint of **Section 361** of the **Criminal Procedure Code**, this Court is restricted to a consideration of matters of law only. Whether or not a person was properly identified as the perpetrator of an offence is a question of mixed fact and law and proper for our consideration. The Court, will however not 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 **MWITA vs. R** [2004] 2KLR 60.

The two courts found as proved that the appellants were indeed among the gang of seven men who accosted PW2 and PW3 at about 9.30pm on 11th November, 2008. They were armed with dangerous weapons namely; panga, sword and rungu. They harvested 30 pineapples which they abandoned as the four Delmonte (K) Limited guards with the dog gave chase. David Kamau, was the dog handler. He testified that he released the trained dog after the intruders defied his orders to stop. The dog led him to where they were hiding in the bushes in the farm and brought out the three appellants one by one. He also confirmed that each had a dog bite. He testified that the first accused had a sword while the second a panga. Immediately he noted that the dog suffered a deep cut wound, he flashed a light on the sword and saw blood on it.

As pointed out by the learned SPPC, there was one unbroken transaction from the time of attack, harvesting, flight, picking up of the scent by the guard dog and the eventual arrest of the appellants who each bore canine bites. This debunked the theory that wrong persons were arrested at Delmonte Farm.

In those circumstances, it is clear that the evidence by the prosecution witness relating to identification of the appellants was adequate to connect them to the offence even while bearing in mind the caution with which identification evidence should be treated. See **ABDALLAH BIN WENDO & ANOTHER vs. R** [1953], EACA 166: **OMONDI vs. R** [1967] EA 802.

Before concluding this judgment, let us address two issues that arose relating to evidence of dogs; first, the admissibility of that evidence and second, its evidentiary value. It is quite clear from the authorities, including **OMONDI vs. R** [1967] EA 802, that evidence of tracker dogs may be admissible in certain circumstances. It is in the nature of opinion evidence, and like all types of opinion evidence, the basis of its admission has to be established as such evidence is worthless unless a proper foundation is laid for its admissibility. This kind of evidence should be received and applied with caution. See **KENNEDY MAINA vs. R** Criminal Appeal No. 14 of 2005.

A dog handler is competent to testify as to the tracking ability and reliability of the dog if not on its training as well. In the instant case, **David Ngugi Kamau** (PW4) the dog handler testified that his dog

was trained in a manner that when it sensed the presence of intruders, it usually stood on the pineapples which was the case in this matter. For that reason it can be safely concluded as was found by the two courts below, that the scent led to the bush where the appellants entered.

The importance of this was highlighted in DAVID NJERU KIBUTHI & 2 OTHERS vs. R Criminal Appeal Nos. 7, 8 and 9 of 1999 where this Court held;

***“However, we are concerned at the lack of evidence as to both the experience of Omas (police dog) as a tracker dog and as to the ability of tracker dogs to distinguish between the scents of a number of persons at a scene of a robbery such as this. It is probably the case that a competent experienced dog can do so but there should be evidence adduced from a tracker dog expert as to these sort of issues.”***

As for the evidence of the dog handler in our case, it is significant as it was preceded by an inquiry as to the training of the dog. The evidence did advance the prosecution case.

From the record it is indisputable that the appellants sustained dog bites. Not only were they taken to hospital upon arrest, they actually sought treatment for those bites during the trial. Moreover, the evidence of the recovery of the pineapples squarely placed them at the scene of crime as arrest was immediate.

It is quite clear from what we have stated above that the evidence of identification of the appellants as part of the gang in the robbery was sufficient and safe to sustain their conviction. In the result, we do not agree with **Mr. Omari**, learned Counsel for the appellants, that identification by the dog led to mistaken identity.

We find no merit in this consolidated appeal and we accordingly dismiss it as against all the three appellants.

**Dated and delivered at Nairobi this 22nd day of September, 2017.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**