



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 111 OF 2014

BETWEEN

GABRIEL OMONDI.....FIRST APPELLANT

VINCENT ONYANGO MISINGO.....SECOND APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a Judgment of the High Court Of Kenya at Kisumu, (Chemitei & Muchelule, JJ.) dated 7<sup>th</sup> July, 2014*

in

HCCRA NO. 59 OF 2013)

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JUDGMENT OF THE COURT

1. The appellants were arraigned before the Principal Magistrate's court at Ukwala on four counts of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the **Penal Code**. They also faced two counts of being in unlawful possession of a firearm and ammunition contrary to **section 89 (1)** of the **Penal Code**. The appellants were also charged for consorting with a person in possession of a firearm contrary to **section 89 (2)** of the **Penal Code**. They were convicted on all the counts. On the counts of robbery with violence, they were sentenced to death but sentence in respect of the other charges was held in abeyance.

2. The appellants were dissatisfied with the trial courts judgment and preferred an appeal to the High Court. The appeal was dismissed in its entirety. Undeterred, the appellants preferred a second appeal to this Court. This being a second appeal, under **section 361 (1)** of the **Criminal Procedure Code**, such an appeal is confined to matters of law. See **M'RIUNGU V REPUBLIC [1983] KLR 455**.

3. What were the facts of the case which inform issues of law for our consideration? On 7<sup>th</sup> June, 2011, four complainants, PW 1, PW 2, PW 3 and PW 4, were travelling in a vehicle from Bondo to Siaya at around 4.00 p.m. On their way they were stopped by two people, (the appellants herein), who forcefully entered the vehicle and ordered PW 1 to turn back. The two strangers were armed with a rifle and they

assaulted the complainants.

4. As they approached a market known as Uranga, PW 1 gathered courage and twisted the steering wheel of the motor vehicle and it veered off the road. The person who was driving the motor vehicle opened the door and took off. The other one who had the gun dropped it and also ran away. Members of the public gave chase and apprehended one of the robbers. The police quickly arrived at the scene and combed a nearby forest. They managed to arrest the other robber, who was found in possession of one round of ammunition.

5. The complainants were able to identify their assailants as the offence was committed in broad daylight.

6. Police investigations revealed that the second appellant was a police reservist based at Kitale who had been issued with a gun.

7. In his defense, the first appellant said that on the material day he was coming from a funeral and on his way back home he was accosted by two police officers who arrested him.

The second appellant said that he was a police reservist and on the material day he was abducted by some unknown people and bundled into a car. After a whole night, the abductors released him but stole his gun.

8. Both the trial court and the High Court held that the appellants were well identified by the complainants as well as the police officers who arrested them. There was also no dispute that the recovered gun had been issued to the 2<sup>nd</sup> appellant as a police reservist.

9. **Mr. Indimuli**, learned counsel for the first appellant, raised three grounds of appeal, namely, that the High Court erred in law in failing to analyse the entire evidence; in shifting the burden of proof; and in giving undue regard and emphasis to the evidence against the appellants.

10. Mr. Indimuli briefly submitted that the charges of robbery with violence were not proved beyond reasonable doubt. He stated that the first appellant was arrested near the scene of the robbery but he was not found in possession of anything. Secondly, counsel submitted that the charge as drawn was defective because it did not indicate that the appellants were armed with a dangerous weapon, it simply stated that they were armed with a firearm namely, a G3 rifle. Lastly, Mr. Indimuli submitted that the complainants' evidence regarding the amounts of money they had been robbed of did not tally with the amounts stated in the charge sheet.

11. The second appellant, through **Mr. Lore**, also raised three grounds of appeal. He stated that the High Court judges erred in law by holding that: there was proper identification; there was sufficient circumstantial identification; and that there was overwhelming evidence against the 2<sup>nd</sup> appellant.

12. Mr. Lore submitted that it was not clear where the 2<sup>nd</sup> appellant was arrested at; and that PW 5 gave contradictory evidence regarding the ammunitions that the 2<sup>nd</sup> appellant was found in possession of.

13. **Ms Nyamosi**, Senior Assistant Deputy Public Prosecutor, opposed the appeal. She submitted that all the charges were proved beyond any reasonable doubt; that the appellants were properly identified by the complainants; and that the charge was not defective for failing to state that the appellants were armed with a dangerous weapon. She urged the Court to take judicial notice that a rifle is a dangerous weapon.

14. We have carefully considered the record of appeal as well as the brief submissions by counsel.

The first issue for our disposal is whether the charges as drafted in relation to the offences of robbery with violence were defective.

15. Counts 1, 2, 3 and 4 indicated that on 7<sup>th</sup> June, 2011, the appellants, jointly with others not before court and "while armed with a firearm namely, "G 3 rifle", robbed each of the complaints, PW 1, PW 2,

PW 3 and PW 4 of cash 1,000/=, Kshs.460/=, Kshs.460/= and Kshs.460/= respectively and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the complainants. Mr. Indimuli's contention was that failure by the prosecution to indicate that the robbers were armed with a dangerous weapon rendered the charges defective.

16. In support of that submission he cited this Court's decision in **JUMA V REPUBLIC [2003] 2 E.A.471**. The charge in that matter that gave rise to the aforesaid appeal stated, *inter alia*, that the appellant jointly with others not before court, "*while armed with knives*", robbed the complainant of one sack of tea leaves valued at Kshs.7,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the complainant.

17. This Court held that to the extent that the particulars of the charge did not clearly state that the knife the appellant was armed with was a dangerous weapon, the charge was defective. The Court allowed the appeal.

18. On our part, we do not agree that the charges were defective. The ingredients of the offence of robbery with violence under **section 296 (2)** of the **Penal Code** are well known and proof of at least one of them is sufficient, see this Court's decision in **JOHANA NDUNG'U V REPUBLIC [1995] KLR 387**

The ingredients are:

**(i) if the offender is armed with any dangerous or offensive weapon or instrument;**

**or**

**(ii) if the offender is in company with one or more other person or persons;**

**or**

**(iii) if at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses any other personal violence to any person.**

See also **OLUOCH V REPUBLIC [1985] KLR 549**.

19. There can be no dispute that a G3 rifle is a dangerous weapon. In **JOHN MAINA KIMEMIA & ANOTHER V REPUBLIC**, *Criminal Appeals No. 105 & 110 of 2003 (unreported)* this Court held that "dangerous or offensive weapon" in **section 296 (2)** of the **Penal Code** bears the same meaning as defined in **section 89 (4)** of the **Penal Code**, that:

**"any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use".**

The Court went on to state:

**"A firearm is made for causing injury. Similarly, a bow and arrows are made for causing injury to a person. It is not necessary to state in the charge Sheet that such weapons are dangerous or offensive weapons as they are inherently so".**

20. In the matter before us, the charge sheet contained all the three ingredients of the offence of robbery with violence and the three were sufficiently proved. We must therefore reject the first appellant's contention that the charges were defective.

21. We do not agree that the High Court did not analyse the evidence that was tendered before the trial court. The court did so and gave its reasons for disallowing the appeal. Mr. Indimuli did not demonstrate how the High Court shifted the burden of proof to the appellants. We reject those grounds of appeal.

22. The appellants were well identified by the complainants, PW 1, PW 2, PW 3 and PW 4. They all testified that the first appellant was the one who drove the motor vehicle while the second appellant had the G3 rifle. The offence was committed in broad daylight when there were favourable circumstances for a positive identification.

23. The rifle that was left inside the vehicle by the second appellant was the one he had been issued with as a police reservist. He had, however, elected to use it for unlawful purposes.

24. Regarding the amounts of money that the complainants were robbed of compared to the amounts indicated in the charge sheet, we agree that there were some discrepancies. PW 1 did not testify that he was robbed of Kshs.1,000/= as indicated in count I; PW 2 was robbed of Kshs.500/= but count II states Kshs.460/=; PW 3 was robbed of Kshs.450/= but count III states Kshs.460/=; and lastly, PW 4 testified that he was robbed of Kshs.900/= whereas count IV states the figure as Kshs.460/=.

25. Those are minor discrepancies that were not shown to have occasioned any injustice to the appellants. They are curable under **section 382** of the **Criminal Procedure Code**.

26. Having carefully considered all the grounds of appeal, we find no merit in this appeal. Consequently, it is dismissed in its entirety.

**DATED and delivered at Kisumu this 11<sup>th</sup> day of October, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**