



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 158 OF 2014

BETWEEN

JOHN MUGUTHI KANGETHE APPELLANT AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ) dated 29th October, 2013

in

HC. CR. A. NO. 322 OF 2006)

JUDGMENT OF THE COURT

1. The appellant John Muguthi Kangethe was charged, tried and convicted by the Magistrate's Court at Thika for three offences. Under count one, he was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code. Under count two and three, he was charged and convicted for the offences of being in possession of a firearm and ammunition, respectively, without a certificate under section 4 of the Firearms Act chapter 114 of the Laws of Kenya.
2. The particulars of the charge under count one were that on 1st October 2004 at Mithandukuini village in Thika, while armed with a pistol, he robbed Patrick Wainaina Kagoiya of his mobile telephone and cash, and used force. Under count two the particulars were that on the same date he was found in unlawful possession of a firearm without a certificate under the Firearms Act and under count three he was found in unlawful possession of ammunition also without a certificate under that Act.
3. The appellant was sentenced to death on count one; and on counts two and three he was sentenced to serve 8 years imprisonment on each count. The sentences were to run concurrently.
4. The appellant's appeal to the High Court on grounds that the trial court relied on a defective charge sheet; that the evidence adduced before the trial court was contradictory; that evidence was admitted in breach of section 33 of the Evidence Act and Section 77 of the Criminal Procedure Code and that his defence was wrongly rejected and dismissed by the High Court in a judgment delivered on 29th October 2013. Dissatisfied, the appellant has appealed to this Court.

Background

5. On 1st October 2009 at 9.00 pm the complainant Patrick Wainaina Keguoya (PW1) was in the process of closing up his shop at Muthandukuini village, Ndakaini, when he was approached by a person posing as a customer intending to buy cigarettes. PW 1 referred that person to a neighbouring shop and continued to close up the shop. As he held the door to the shop to close it, the customer turned assailant drew a gun and ordered PW 1 to surrender money. PW 1 and the assailant entered the shop where PW 1 opened the cash box. The assailant helped himself to all the notes in the cash box.

He also took PW1's mobile telephone, a Motorola in make. The assailant then demanded the coins. PW 1 placed the coins on the table. The assailant then asked PW 1 to place the coins in a paper bag. PW 1 sought the assailant's help to hold one side of the paper bag. As the assailant held the paper bag, PW 1 noticed the assailant looking outside. PW 1 seized the moment and held the assailant tightly, subduing and immobilizing him in a way that he could not use the gun. As he did so, he screamed for help. Neighbours responded and came to PW1's aid. The assailant was disarmed, beaten up and the money and cellphone recovered from him. Kirwara Police Station was then called in and the assailant was then taken into custody alongside the gun.

6. James Kamande Kimani (PW 2) a shop attendant at Muthandukuini village testified that he heard people screaming on 1st October 2004 at 9.00 pm. He went out to check and found two people holding and struggling with each other. One was holding the other from behind and the other one was holding a gun 'upwards.' Alongside other members of the public, he helped subdue the person holding the gun; the gun was hit and it fell and was pushed aside. The assailant was then tied up with ropes and thereafter the police came and took the assailant into custody.

7. Administration Police Constable Dishon Kamau Maina (PW 4) recalled in his evidence that on 1st October 2009 he was at the camp at Gatunyu Post when a report was brought in of a robbery. Accompanied by P. C Kiruthi, they immediately proceeded to the scene where the crime was reported to have occurred and found the appellant who was under arrest by members of the public being beaten up. They rescued the appellant and escorted him to Kirwara Police Station. They also took with them a gun given to them by PW 1.

8. At the police station, Police Constable Peter Kamanu (PW 5) re-arrested the appellant who was brought in by PW 4 and another officer. He also received a pistol and a mobile telephone that were brought in by PW 4. He placed the appellant in the cells and thereafter the appellant was charged with the offence.

9. Senior Sargent Eustace Wahome (PW3) forwarded the firearm and ammunition recovered from the appellant to a ballistics expert in Nairobi. He thereafter received a report from the firearms examiner Lindsay Kipkemboi confirming that the gun was capable of being fired and the ammunition was successfully test fired, and concluding that the firearm and the ammunition were firearm and ammunition respectively as defined in the Firearms Act, chapter 114 of the Laws of Kenya.

10. In his defence the appellant stated that he was a businessman trading in avocados; that he was in the course of his business going to receive avocados from his sister's house when someone emerged from the bush, flashed a torch at him and threw a stick at him hitting his eye; that he began to scream and on discovering that he was not from that neighborhood, the attacker hit him on the head with a metal bar and he lost consciousness; that when he regained consciousness he found himself surrounded by many people; that the police then put him in a vehicle and took him to the Gatundu Chief's office where he was questioned about a robbery he knew nothing about; that he was shown a gun and asked whether he knew anything about it and when he replied in the negative he was informed that he would be taken to court after which he was placed in the cells instead of being taken to hospital. He was later charged with an offence he did not know anything about.

11. Based on the evidence, the trial magistrate was satisfied that a robbery did take place and the prosecution had proved its case against the appellant to the required standard. In its judgment, the trial court stated:

“There is no doubt that he [the appellant] was the one who attacked PW1. There was electricity on and the PW1 was able to see his face. Further when they entered the shop and accused demanded for money after showing PW 1 the gun, it was the accused that PW 1 gave the money to as well as his mobile which was recovered from his accused pocket by PW1 after they subdued him PW2 witnessed the weapon being recovered from accused jacket. There is no issue of mistaken identity as the PW1 managed to hold the accused when he realized he was not looking at him. And while holding him called for help and people came and helped him tie the accused while they sought help from PW4.”

12. The High Court on its part as the first appellate court evaluated the evidence and reached the conclusion that:

“In our view we are satisfied that a robbery took place and that the person who committed that offence was armed. That person the evidence shows, was the appellant herein. The offence of robbery was proved beyond any reasonable doubt.”

13. Against that background the appellant instituted the present appeal.

Submissions by counsel

14. In this second appeal, learned counsel for the appellant Mr. Amutallah Robert referred us to the appellant’s memorandum of appeal and urged us to quash the conviction and set aside the sentences on grounds that there was no offensive weapon; that the charge was defective; that section 77 of the Evidence Act was violated in that the report of the examining officer relating to the firearm and ammunition was produced by an unqualified person, namely a sergeant, and not by the firearms examiner who prepared it, and no reason was given why the examiner was not called to tender the report. In that regard counsel referred us to the case of **Musee Joseph Musyoka vs. Republic Cr. Appeal No. 156 of 2013** where the High Court stated that courts in this country have frowned upon production of expert evidence by witnesses who are not the experts or makers of such reports.

15. Counsel went on to say that the ingredients of the offence of robbery with violence are absent in this case because there was no evidence that the appellant was in the company of others; that the evidence of PW 1 and PW 2 was not consistent as to whether the appellant was found inside or outside PW 1’s shop; that as the revolver was improperly tendered into evidence, there was effectively no gun, and no force or violence was inflicted and nothing was robbed or stolen, so that, the offence of robbery with violence was therefore not proved to the required standard; that the name of the complainant as indicated in the exhibit Memo Form is different from the one in the charge sheet; that the High Court failed to properly evaluate the evidence for if it had done so it should have found the offence of robbery with violence was not proved and that at worst the offence disclosed would have been simple robbery or assault.

16. Opposing the appeal, Miss Mary C. Oundo, learned Senior Assistant Director of Public Prosecutor submitted that the appeal has no merit; that on the first appeal the High Court reminded itself of its duty to re-evaluate the evidence and to draw its own conclusions which it did; that the revolver was properly produced before the trial court and was duly identified; that the omission to call the ballistics expert as a witness did not prejudice the appellant; that the High Court decision of **Musee Joseph Musyoka vs. Republic** (supra) cited by counsel for the appellant is distinguishable as the pistol in this case was produced before the trial court.

17. According to Ms. Oundo the offence of robbery with violence was proved to the required standard; that as the appellant was armed with a firearm the ingredients of the offence were fulfilled; that the court duly considered the complaint that the charge sheet was defective and concluded that that complaint was devoid of merit; that based on the evidence there is no doubt that the appellant was placed at the scene of crime, he robbed the complainant of cash and a mobile telephone which was also produced before the trial court; that the appellant was arrested at the scene of crime and the complainant did not at all lose sight of him; and that there are concurrent findings of fact by both lower courts with which this Court should not interfere. With that counsel for the respondent urged us to dismiss the appeal.

Determination

18. We have considered the appeal and submissions by learned counsel. This is a second appeal. Our mandate on a second appeal is confined to a consideration of matters of law by reason of section 361 of the Criminal Procedure Code. In

Karingo vs. Republic [1982] KLR 213 the Court stated:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja vs. R (1956) 17 EACA 146)”

19. Based on the grounds of appeal urged before us by counsel for the appellant, the only issue that we have to determine in this appeal is whether the offence of robbery with violence was proved. As this Court stated in **Oluoch vs. Republic [1985] KLR 549** robbery with violence is committed where the offender is armed with any dangerous and offensive weapon or instrument; or where the offender is in the company with one or more other person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person.

20. There are concurrent findings by the lower courts that the appellant approached the complainant when he was closing his shop; that he drew and showed the complainant the gun and demanded money from the complainant. We agree with the High Court that in those circumstances the offence of robbery with violence was complete. To borrow the words of this Court in **Njoroge vs. R [1982] KLR 388** we ***“consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence...”*** In our view, the concurrent findings of the lower courts are based on the evidence, particularly of PW 1 and PW2, and there is no basis for us to interfere.

21. The appellant would also have us believe that the offence of robbery with violence was not disclosed because, according to him, there was no offensive weapon as the report of Lindsay Kipkemboi the firearm examiner was not produced by the maker, but by Senior Sargent Eustace Wahome (PW3). In that regard counsel referred us to section 77 of the Evidence Act.

22. Section 77 of the Evidence Act provides, among other things, that any document purporting to be a report of any ballistics expert may be used in evidence in criminal proceedings and that the court may presume the signature to any such document to be genuine and that the court may, if it thinks fit, summon the ballistics expert for examination.

23. There is no requirement under that provision for the ballistics report to be produced in court by the ballistics expert. Furthermore, there was no suggestion by the appellant after PW 3 produced the ballistics experts report or at any other time that he required the maker of the report to be examined on the report. PW 1 also identified in court the gun as the one the appellant used in the course of the robbery. The complaint that there was no offensive weapon used in connection with the robbery is therefore devoid of merit.

24. Finally the appellant complained that that the evidence of PW 1 and PW 2 was not consistent as to whether the appellant was found inside or outside PW 1’s shop. The evidence of PW 2 as to where the complainant and the appellant were was not very clear as he stated that when he came out after hearing screams he *“found 2 people holding each other they were fighting on the road there were houses.”* What is clear from his evidence is that there were two people one holding the other from behind and one was holding a gun holding it upwards. As he stated under cross examination:

“I saw the gun well and there was electricity. You had been held from behind under the shoulders and the other was holding the hand. The hand was looking up. The PW 1 has rented the neighboring house. I was there when the gun was taken from you. We came and held you and he released you and took the gun from you. When we were taking the gun from you people came.”

25. In material respects the testimony of PW 2 confirms that of the complainant on the basis of which it is evident that the complainant and PW 2 never lost sight of the appellant from the time PW 2 found the appellant subdued by the complainant whilst the appellant held the gun to the time the appellant was taken into custody by the police.

26. Based on the evidence therefore, there is no doubt that the person who drew the gun on the complainant demanding money is the same person that PW2 found immobilized by the complainant and the same person who was arrested and charged. That person is the appellant.

27. For all those reasons there is no merit in the appellant's appeal and the same is dismissed.

Dated and delivered at Nairobi this 22nd day of May, 2015.

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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