



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)**

**CRIMINAL APPEAL NO. 211 OF 2011**

**BETWEEN**

**SENGENGE MWITA KEROKA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at*

*Kisii, (Makhandia & Sitati, JJ) dated 18<sup>th</sup> September 2008*

**in**

**HCCRA NO. 116 OF 2008)**

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**JUDGEMENT OF THE COURT**

The appellant, Sengenge Mwita Keroba was charged before the Chief Magistrate's Court at Kisii with the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code, particulars being that on the 3<sup>rd</sup> day of November, 2005 at Migori Township in Migori District within Nyanza Province jointly while armed with a dangerous weapon namely home made gun he attempted to rob George Omondi Angila of an unknown amount of money and that at or immediately before or immediately after such attempt used personal violence to the said George Omondi Angila. There were 3 accused persons at the trial; the other 2 accused persons were acquitted at the trial pursuant to the provisions of Section 210 of the Criminal Procedure Code but the appellant was convicted and sentenced to suffer death in the judgement delivered by the learned Principal Magistrate ( S. M. S. Soita) on 20<sup>th</sup> March, 2007.

The appellant was aggrieved by the trial magistrate's findings and appealed to the High Court. In a judgement delivered on 7<sup>th</sup> March, 2011 ( Asike – Makhandia J (as he then was) & Ruth Sitati, J) the appellants appeal was unsuccessful and was dismissed.

The appellant is aggrieved by those findings and has filed this appeal. This is therefore a 2<sup>nd</sup> appeal and we are by the provisions of Section 361 (1) (a) of the Criminal Procedure Code to consider only matters of law. This is the position that has been stated in the many decisions of this Court such as **John Kados**

**v Republic Nyeri Criminal Appeal No. 149 of 2006** (ur) where this court stated:-

**“...This being a second appeal, we are reminded of our primary role as a second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law....”**

and **Stephen M'Riungu & others v Republic (1982 – 88) IKAR 360.**

The appeal came before us on 4<sup>th</sup> June 2013 when the appellant was represented by learned counsel Mr. James Abande while learned ADPP Mr. C. A. Abele appeared for the respondent. Mr. Abande abandoned the home made memorandum of appeal by the appellant and relied on the Supplementary Memorandum of Appeal drawn by M/s Otieno, Yogo, Ojuro & Company Advocates. This Memorandum has one ground of appeal as follows:-

**“1. That being the first appellate court, the high court Judges erred in law and fact by failing to subject the entire evidence rendered in trial court to afresh evaluation and assessment so as to reach their own conclusion as to the guilt of the appellant and specifically that,**

**a) The proof presented before the trial court was not beyond reasonable doubt**

**b) The facts of the case did not support the charges against thappellant.”**

In view of the complaint raised by the appellant and although we are not to consider matters of fact it is necessary to look at the evidence so that we can satisfy ourselves whether the first appellate court carried out its duty of perusing the evidence and re-evaluating it afresh so as to reach its own conclusion on the same (**Okeno v Republic [1972] EA 32.**)

On 3<sup>rd</sup> November, 2005 at 11:30 p.m. George Omondi Angila (PW1) (George) after closing his business at Migori town was headed home to Oruba Estate when he met 3 people. One of them had a torch which he flashed towards George making him (George) believe the 3 were police officers. George knew all the 3 people who he had seen at various times and places and for a considerable period of time within Migori town. Upon nearing the 3 people George was ordered to raise his hands which he did. He was then knocked down; a pistol was pointed at him and he was ordered to give money. He acted as if he was getting money but saw an opportunity which he seized and ran off. Hardly 10 metres therefrom he met police officers and alerted them accordingly. Presently the 3 people who had confronted George emerged, saw police officers and attempted to run away. The 2 police officers gave chase. No. 79235 PC Benard Chemonges (PW2) (Benard) was chasing the appellant while his colleague a PC Ndungu chased the others. While in flight the appellant produced a gun and threatened Benard. Benard had a revolver which he used to shoot the appellant three times. He disarmed and arrested him. The appellant was taken to Migori Police Station.

That, was then, the evidence that was led by the prosecution.

In the sworn statement the appellant related how on the 11<sup>th</sup> October, 2005 while working at his grandmothers land he dug up a gun by pure chance or coincidence. He showed the gun to George Ojijo, his co-accused. George Ojijo suggested that they could sell the gun and make some money. Some money exchanged hands from an unnamed third party. The final installment for the said transaction was to be paid on 3<sup>rd</sup> November, 2005. On this day the appellant carried the gun to a pre -agreed rendesvous but it turned out that George Ojijo was a sell-out as he appeared at 11:00 p.m with police officers who arrested the appellant after shooting him. On being taken to court he pleaded guilty to the charge of possessing an unlicensed firearm but denied the main charge.

The trial magistrate considered the prosecution evidence and also considered the said defence of the appellant but found that the charge had been proved as required by law.

In the first appeal the appellant raised in his home made grounds of appeal issues concerning alleged failure by the complainant to identify his attackers to police; that the other police officer involved in the arrest of the appellant was not called to testify; that an identification parade was not conducted; that alibi was ignored and not considered and that a fingerprint expert was not called to testify.

The trial court and the first appellate court found as a fact that the appellant was found with a home made gun. Indeed this could not be disputed as the appellant himself testified in his defence that he had found a firearm by mere chance while digging in a shamba. Upon finding the firearm the appellant was allegedly persuaded by his friend that they could make money from sale of the firearm and thus the appellant kept the firearm. The appellant pleaded guilty to a charge of being in possession of a firearm without a firearm certificate and was duly convicted.

The appellants' defence was that he did not commit the offence but was arrested while on a mission to sell the firearm. This is how the High Court after re-evaluating the evidence addressed the issue:-

**“...After reconsidering and evaluating the evidence, we are satisfied that the appellant was one of the three persons who accosted the complainant and demanded money from him. However, before the complainant removed the money the three persons ran off only to fall in the hands of the police who were nearby. The police chased the appellant without ever losing sight of him until he entered a dead end corridor. From there he threatened to shot PW2, but PW2 shot the appellant thrice in the chest, flooring him and forcing him to surrender...”**

Apart from the slight misdirection by the High Court on evidence that it was the three attackers who ran off when the evidence was that it was the complainant who saw and seized an opportunity to escape and did escape we are satisfied that this piece of evidence as related by the police officer who chased and arrested the appellant was consistent and the trial court and the first appellate court were entitled to believe it. The appellant attempted with others to rob the complainant who was however able to escape before the appellant and his accomplices could complete their robbery bid. The complainant was fortunate to meet with police officers a few metres from the scene of the offence. The appellant and his accomplices emerged immediately thereafter and attempted to escape. The appellant was chased by police officer Chemoges (PW2). The police officer never lost sight of the appellant. The appellant tried to shoot the police officer but the police officer was faster on the trigger and shot the appellant three times thus disabling him. The appellant was arrested and charged. There was no break in the chain of events at all.

The defence raised could not stand in the premises. The appellant did not surrender the gun to the authorities if, indeed, he had come by it in the manner alleged. He in fact used the gun to threaten the complainant in the attempted robbery.

There is no merit in the appeal which we accordingly dismiss.

***Dated and Delivered at Kisumu this 12<sup>th</sup> day of July 2013***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**