



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

**Criminal Appeal 486 of 2007
BETWEEN**

**GEORGE NYAKUNDI BIKERIAPPELLANT
AND
REPUBLIC RESPONDENT**

(Appeal from a Judgment of the High Court of Kenya at Kisii (Bauni & Warsame, JJ.) dated 27th November, 2006

in

H. C. Cr. A. No. 206 of 2003)

JUDGMENT OF THE COURT

Between the 7th February, 2003 and the 7th July, 2003, George Nyakundi Bikeri, the appellant herein, together with two other persons, was tried on a charge of robbery with violence contrary **section 296 (2)** of the Penal Code. The particulars of the charge against him were that on 22nd October, 2002 at about 9.30 pm at Nyambuya Village in Nyamira District, the appellant, jointly with his two co-accused, and while armed with dangerous weapons, robbed Rhoda Nyanjama Ongwenyi of Kshs.20,000/= cash and that during the robbery, they killed Richard Ongwenyi Omosa. Richard Ongwenyi Omosa was the husband of the complainant Rhoda Nyanjama Ongwenyi. Rhoda testified that on the 22nd October, 2002, her husband was feeling unwell and so the two of them were in bed by about 9.30 pm, when they heard their dogs barking outside. Richard left the bed to go out and check what was happening; Rhoda was following closely behind. When Richard opened the door, he was promptly shot down. He subsequently died of his injuries. Rhoda raised an alarm but she was ordered to stop it. There were three attackers and they demanded money from Rhoda. She gave them Kshs.20,000/= and the attackers disappeared.

Chief Inspector Ludechi Majani (PW 6) visited the scene of the robbery that night, and having seen what had happened, he returned to Nyamira Police Station where he was based as the District Criminal Investigations Officer. Chief Inspector Majani returned to the scene on 23rd October, 2002 at 9.00 am and according to him, he picked up five spent cartridges and one bullet head, which had been lodged in a fencing pole. These items were thereafter sent to Lawrence Ndulwa (PW 4), a firearms examiner based at the CID Headquarters, Nairobi.

Police Constable Zakariah Kariuki (PW 5) arrested the appellant at Keroka in Kisii on 22nd December, 2002. Constable Kariuki was in fact based at Molo Police Station and was unaware of the robbery in Kisii. According to him he had followed the appellant all the way from Molo because of information given to him by an informer and after arresting the appellant he took him to Molo Police Station. It was the evidence of Constable Kariuki that on 23rd October, 2003, the appellant led them to a place called Michina and that from a kei-apple fence, the appellant showed them a G3 rifle No F. MP 405045. The gun was thereafter submitted to the firearms examiner Lawrence (PW 4) and the evidence of

Lawrence was basically that the five spent cartridges which had been collected by Chief Inspector Majani from Rhoda's home in Kisii had been fired from the G3 Rifle found in Molo.

The prosecution also called Inspector Lewis Kigathi (PW 7) and the effect of that witness' evidence was that on 12th February, 2003, he conducted two identification parades at Nyamira, the identifying witness being Rhoda. Rhoda did not identify the appellant during those parades; she identified two other people who were jointly charged with the appellant but who were acquitted by the trial magistrate. On his first appeal to the High Court (Bauni & Warsame JJ), the learned Judges appeared to have thought that Rhoda had identified the appellant as well during the parades. The learned Judges said:-

“..... As the trial court concluded it was difficult to make positive identification and evidence of a single witness on identification at night should always be treated with caution. The trial magistrate in the light of holdings in cases of Abdala Bin Wendo & Another vs Reg (1953) 20 EACA 166 and Reg vs Turnbull & Others [1973] 3 ALL E. R 549 rejected the evidence of identification though found other evidence to warrant conviction. However the other evidence should not have been dismissed without further scrutiny. She had told the court that the appellant and others were in the house for one and half hours. This fact was confirmed by her niece Emily Kerubo Gichana (PW 3) who though she did not see the attackers told the court they were there for one and half hours. That was a long period. The attackers had loaded their torches with new batteries and they therefore must have been quite bright. The witness therefore had good opportunity to see the attackers though she did not know them before then.”

We agree with Mr. Oluoch, learned counsel for the appellant and Mr. Gumo, the Deputy Public Prosecutor, that the learned Judges misunderstood the evidence with regard to the issue of identification. As we have pointed out, the only two people identified on the parade conducted by Inspector Lewis were the two people charged with the appellant. The record before us contains only two identification parade forms and they were in respect of Edward Marwa Maisori (Exhibit 6) and Alfred Muhere Rioba (Exhibit 7). None was produced in respect of the appellant and even if Rhoda told the Magistrate that she had also identified the appellant and actually pointed out the appellant in the trial court, that would amount only to a dock identification which this Court has repeatedly said is not all that reliable. As the trial magistrate had, correctly in our view, appreciated the position, if the only evidence the prosecution was relying on in support of its charge against the appellant was the purported identification by Rhoda, the appellant would have been more entitled to an acquittal than his two co-accused.

Despite the misdirection by the superior court on the issue of identification, there was still the evidence of Chief Inspector Majani that he collected five spent cartridges from the home of Rhoda and submitted them to Lawrence (PW 4) for ballistic testing. There was also the evidence of Constable Kariuki that the appellant took him to a place called Michina where a G3 rifle was recovered from a fence. The G3 rifle was also submitted to Lawrence who swore in his evidence that the five spent cartridges had been fired from the G3 rifle recovered at Michina with the assistance of the appellant. That kind of evidence is no longer admissible but as at the time of the appellant's trial, it was perfectly admissible under the then **section 31** of the Evidence Act which was repealed in 2003 by **Act No 5 of 2003**. The Criminal Law (Amendment) Act, No 5 of 2003 was assented to on 18th July, 2003 and the date of its commencement is shown as 25th July, 2003. The appellant's trial was concluded by the magistrate's judgment dated 7th July, 2003 when the appellant was convicted and sentenced to death.

What was the appellant's answer to the evidence of Constable Kariuki (PW 5) that it was the appellant himself who took him (Kariuki) to Michina and showed Kariuki where the gun was hidden in a fence?

In an unsworn statement, the appellant had told the Magistrate:-

***“On 20th December, 2002 at 9.00 p.m. I was at my place of work called Ramasha. Alfred Ogero and others came to my house. He had been handcuffed. He was with police officer. Ogero told me that he had been arrested on allegations of having a gun. He told police officers that he had given it to me for custody. I denied the same. I was arrested and put in a motor vehicle. They took me to Molo where I stay. We arrived there at 3 a.m. They searched my house but recovered nothing. We then proceeded to the home of Alfred Ogero. They left me in the motor vehicle. They returned with a rifle from the home of Alfred Ogero. We were taken to Molo Police Station. On the way, Ogero was released after he gave police officers some money. He was told to come on the following day and record a statement. Later I*”**

was collected by police officers from Nyamira. I was not involved in the offence I am charged with. I know nothing about the gun. That is all.”

It is clear from this statement that the appellant was contending that the gun which Constable Kariuki said he recovered with the appellant’s assistance was in fact recovered from Alfred Ogero who then bribed the police and was released. But apart from the recovery of the gun, Constable Kariuki also swore that it was the appellant who took him to Langas Estate in Eldoret town and that there they arrested Alfred Moheri Rioba who was in fact charged with the appellant as Accused 2. Kariuki said the appellant next took him to Kehancha and there Edward Marwa Maisori was arrested and charged with the appellant as Accused 1. The appellant had cross-examined Constable Kariuki at some considerable length. At no stage was the name of Alfred Ogero put to Kariuki as the person who had been found with the gun and who had been released after bribing Kariuki. Dealing with this issue the trial Magistrate held:-

“In the instant case, I find that the evidence against the third accused – George Nyakundi Bikeri – Admissible. The question that crosses one’s mind is how he knew that the G3 rifle was where he led the police to recover the same. Since I do not have evidence to show that his knowledge of where the rifle was recovered was innocent, then I must make a finding that he must have kept it there. This is the same rifle that was used in the robbery the subject of this case.”

It is clear from this passage that the learned trial magistrate was satisfied with, and accepted the evidence of Constable Kariuki that it was the appellant who showed the officer the place where the rifle was hidden. It must follow that the magistrate rejected the appellant’s unsworn version that the gun had been found with Alfred Ogero but that Ogero had bribed Constable Kariuki who in turn chose to lay the blame on the appellant.

For its part the superior court dealt with the point in this manner:

“The appellant led police to recover the G3 rifle used at the scene. PW 6 C. I. P. Majani had told court that he recovered 5 spent cartridges at the scene. When the appellant was arrested, P. C. Kariuki (PW 5) told the court that he led them to his grandmother’s compound and showed them the rifle in a kei-apple fence. Appellant in defence said that it was one Ogeto (sic) who had the gun. However when he was cross-examining PW 5 he never at any time alluded to the fact that the gun was found with anybody else. This was clearly an afterthought. PW 4 had candidly told the court how they arrested the appellant who led to the recovery of the gun. His evidence was a (sic) straightforward and the trial court rightly accepted it.

As said above, the gun itself was the one used at the scene. It was examined by PW 4 who confirmed it was the one used to fire the bullets whose spent cartridges C. I. P. Majani recovered at the scene.”

Once again, the superior court itself accepted the version of Constable Kariuki that it was the appellant who led him to the place where the gun was recovered. The version by the appellant that Alfred Ogero or Ogeto was the one found with the gun and that Ogeto had bribed Constable Kariuki into releasing him was stoutly repelled by the two learned Judges on the first appeal to them. There was clearly more than adequate evidence upon which the two courts could come to the concurrent findings that the appellant led to the recovery of the gun. This Court can only interfere with such conclusions if it be shown to it that either there was no evidence to support the conclusion or that if there was some evidence, it was of such a nature that no reasonable court properly directing itself as to the law and such evidence could have possibly come to such a conclusion, in other words that the conclusion was perverse. Mr. Oluoch did not contend that any of these positions was applicable to the case under discussion. Mr. Oluoch concentrated on the question of why Alfred Ogero or Ogeto was not called; why the owner of the home where the gun was found was not called; why the other police officers with Constable Kariuki were not called and things of that nature. In the face of the evidence which was accepted by the two courts below, these questions are really irrelevant and cannot change anything. The prosecution is bound to call such witnesses as will prove their case and there is no law requiring that a particular number of witnesses, be called. **Section 143** of the Evidence Act is clear on that. Like the two courts below, we are satisfied the appellant was convicted upon evidence which proved beyond any reasonable doubt that he was one of the three persons who attacked Rhoda at her home and robbed her of **Kshs.20,000/=**; and in the process they shot dead Rhoda’s husband. This appeal wholly fails and we order

that it be and is hereby dismissed.

Dated and delivered at Kisumu this 26th day of November, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

P .N. WAKI

.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR