



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 498 of 2007

MICHAEL MURIITHIAPPELLANT
AND
REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Ouko, JJ.) dated 11th July, 2007

in

H.C.C.R.A. NO. 240 OF 2000)

JUDGMENT OF THE COURT

In this second and final appeal against conviction and sentence for the offence of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code and a second count of being in possession of ammunition without a firearm certificate, contrary to **section 4 (1)** of the Firearms Act, Cap 114 of the Laws of Kenya, the appellant, Michael Muriithi Reuben, has raised three broad grounds:-

“(1) Evidence of identification is full of contradictions that the alleged identification of the appellant could have been mistaken.

(2) There was variance between the particulars of the charge and the evidence adduced.

(3) The first appellate court failed to analyse and re-evaluate the evidence as was required of it.”

The background facts are short and straightforward. Sospeter Kaumbuthu Musili (the complainant) is a shopkeeper at Karaa Market, Mururi Location of Meru South District. On 14th October, 1998, at about 7 p.m., he was at his said shop when a person he identified as this appellant came to the shop with his face partially covered with a hat. He produced a gun and demanded some money from the complainant. The complainant who is a former policeman, quickly held the appellant by the hand which was holding the gun and at the same time screamed for help, saying that one Muriithi was trying to kill him. A struggle ensued. The appellant overpowered the complainant, freed himself and ran away with his gun, a pistol. As the appellant was running away one James Mugo Kamau, also a shop-keeper, whose shop was neighbouring that of the complainant appeared. The appellant allegedly pointed the gun he had at him and threatened to shoot him if he approached him. The appellant escaped and was not arrested until after about one year later.

Cpl. John Muguna of Ntumu Police Station arrested the appellant on 26th February 2000, from his aunt’s house. When he was searched 5 rounds of live ammunition were found in his trouser pocket. He was thereafter charged as earlier stated.

The appellant’s defence was an alibi. He also added that on an earlier date the complainant had expressed a wish to buy “our land.” The appellant objected and the deal fell through. That annoyed the complainant who later trumped up a robbery charge against the appellant. He was held in prison custody awaiting trial for over 7 months. On the date of trial he was acquitted because the complainant did not appear in court. The complainant in that case was a lady relative of the complainant in this matter. The appellant believed the charges herein are trumped up in like manner.

The main issue in this appeal is identification. The offence was committed at between 7 p.m. and 7.30 p.m. The complainant testified that his shop was lit with electric light both inside and outside. Miss Lucy Mwai, who appeared for the appellant

submitted that the prosecution did not call evidence to show the intensity of the light, nor did the court make any inquiry on the issue. In his evidence the complainant clearly stated that his shop was lit with electricity both inside and outside. James Mugo Kamau, too testified that the complainant's shop verandah was lit by electric security lights and that "the place was clearly lighted." In view of that evidence it cannot be justifiably argued that there was inadequate light at the scene, or that the evidence is lacking as to the intensity of light there.

The second aspect raised on the issue of identification relates to the fact that the appellant's face was allegedly partially covered. Both the complainant and James Mugo Kamau testified that they knew the appellant before. The complainant knew the appellant by name, and actually called him by name. The complainant's testimony on this aspect was as follows:-

"Michael Muriithi came and asked for cigarette which I sold to him. He was a person I knew. I had known him for long. I know his parents and grand parentsI have known him since he was quite young. He came wearing a sweater and hat. Both were brown. He left. That hat was almost reaching his face. I discussed with Mugo why Muriithi was covering his face with hat. When 7 p.m. news was about to start Mugo left saying he was going for news. I was left waiting to close. Then I saw Muriithi come back hurriedly. I had closed one door leaving the other. He did not talk to me. He passed me and entered the shop. He did not go beyond the counter. I saw him put his hand under the sweater and produced a pistol and shouted "PESA". I immediately held the hand that had pistol and turned it upwards, and started to scream for help. I was calling Mugo and telling him Muriithi wanted to kill me."

The circumstances outlined above clearly show that the complainant had ample opportunity and was close enough to the appellant to recognize him. It is clear that the hat did not cover the appellant's face as to make it difficult for someone close by to identify him.

Mugo, like the complainant came close enough to the appellant and was able to see his face. We earlier stated that the appellant had threatened to shoot him if he moved closer. At that time, according to Mugo's testimony, the latter was about 12 feet from the appellant. That was close enough to enable Mugo identify the appellant. The witness testified that he knew the appellant before although not by name. Besides the appellant was at the complainant's shop a short while earlier and had not changed his attire. Considering that both the complainant and Mugo discussed the appellant's manner of dressing a short while before the attempted robbery Mugo's identification of the appellant cannot be said to have been mistaken.

Miss Mwai also raised the issue of contradictions on certain aspects of the evidence more especially on the time of the alleged offences. It was her submission that both the complainant and Mugo testified that the offences were committed at about 7 p.m. and yet by 7.30 p.m. a report had been made at Ntumu Police Station. We do not know the distance between Karaa Market and Ntumu Police Station. Regarding time none of the witnesses specifically stated that he looked at his watch. The time they gave was only an estimation. We do not attach much weight on the discrepancy on the time of the alleged offences.

We are satisfied that the superior court analysed the evidence and re-evaluated it in the manner suggested in the case of Peters v. Sunday Post Ltd [1958] EA 424 as also the often cited case of Okeno v. Republic, [1972] EA 32 and we think that the ground is not available to the appellant as a basis for interfering with the decision of the superior court.

The last point we were addressed on is one of alleged variance between the charge and the evidence. The particulars of the charge allege in count 1, as material, that the appellant attempted to rob the complainant of "his shop goods".

The evidence, however, shows that the appellant cocked his weapon and pointed it at the complainant and demanded to be given "PESA" (money). Money is not "shop goods." The trial magistrate appreciated the variance, but did not consider it prejudicial to the appellant. He did not, however, explain why he thought so. The superior court too, addressed the issue and came to the conclusion that the discrepancy as to what the appellant attempted to steal and the date when rounds of ammunition were recovered were minor in nature considering the facts and circumstances of this case. That court cited, with approval, the case of Njuki v. R [2002] 1 KLR 771 in which this Court stated thus:-

"In certain criminal cases, particularly those which involve many witnesses discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused..... However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a Court is entitled to overlook those discrepancies and proceed to convict the accused."

We wish to add that a trial court is obligated to look at the case as a whole to see whether notwithstanding any discrepancies the prosecution's case is credible and the evidence adduced is reasonably sufficient to discharge the burden squarely on it to prove a charge beyond any reasonable doubt. We think that in the case before us the prosecution adduced acceptable and sufficient evidence to show that the appellant committed the two offences he now stands convicted of.

The last issue we wish to consider is the appellant's allegation that the charges are trumped up against him. We have this to say. There are concurrent findings of fact by the trial and first appellate courts that there was no proper basis to lead to such a

conclusion. In the result, we find no basis for accepting that complaint.

In the result, we find no basis for interfering with the decision of the superior court, and dismiss the appellant's appeal. It is so ordered.

Dated and delivered at this 19th day of November, 2010.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR