



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

Criminal Appeal 124 of 2005

BENARD AKUSIMBA KEYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ) dated
17/12/2004***

in

H.C.CR.A. NO. 277 OF 2001)

JUDGMENT OF THE COURT

The appeal before us raises three main legal issues. First, whether or not the trial and the first appellate courts erred in holding that the appellant had been positively identified as one of the members of the gang that robbed the complainants of a revolver and other personal effects during the night of 16th August, 2000 at Kaptembwa area of Nakuru; second, whether or not the doctrine of recent possession was wrongly invoked to found a conviction against the appellant; and thirdly, whether or not the charge and cautionary statement allegedly made by the appellant and which was admitted in evidence after a trial within the trial after the appellant had retracted and repudiated it had been correctly admitted by the trial court.

BENARD AKUSIMBA KEYA, the appellant herein, was arraigned before the Chief Magistrate's Court at Nakuru on two counts of robbery with violence contrary to *section 296(2)* of the Penal Code and on two other counts of being in possession of a firearm and ammunitions without a Firearms Certificates. He was convicted on all the counts. For the robbery convictions he was sentenced to death as mandatorily provided by the law but for the offences under the Firearms Act the appellant was acquitted under *section 215* of the Criminal Procedure Code.

The brief facts of the case are that at about 11.00 pm during the night of 16th August, 2000 *Rose Waka (PW2)*, her boyfriend and *P.C. Joseph Muasya (PW3)*, who then lived at Kaptembwa Estate of Nakuru, were walking home when they were accosted by a group of people which was armed with *rungus* and *pangas* amongst other weapons. PW2 was hit with an iron bar and when she fell down she was robbed of a sweater, a watch and a wallet. Three members of the gang went for PW3 whom they

attacked and they struggled for about ten minutes. PW3 was eventually overpowered after suffering bodily injuries. The gang thereafter snatched from him his service revolver with five rounds of ammunition. It is the testimony of PW2 and PW3 that they were able to identify the appellant and two other assailants as the members of the gang since the place where the attack took place was well lit by electricity lights emanating from Mombasa Butchery.

The incident was reported to the police and investigations commenced. On 5th September, 2000, acting on information received, the police officers, including *P.C. Herman Kariuki (PW6)* proceeded to the house of the appellant at Rhonda Estate in Nakuru. Inside the house they found the appellant with a young girl. A search carried therein resulted in the recovery of a sack hidden under the bed. Inside the sack were a panga, a pair of scissors, a sweater belonging to PW2 and the revolver No. S/No. 112895 with ammunition which had been snatched from PW3.

The appellant later recorded a charge and cautionary statement which was admitted in evidence after a trial within the trial since the appellant had retracted and repudiated that statement. The statement was quite detailed and in it the appellant admitted that he had been a member of the gang that had robbed the complainants and that he had been in possession of the gun which he had hidden under the bed.

When put to his defence the appellant gave unsworn statement in which he admitted that the house he was found in was his dwelling. However, he denied committing robbery and being in possession of the firearm and ammunition.

In convicting the appellant, the learned trial Magistrate in the course of her judgment stated, *inter alia*, that:-

“Against the 1st accused (the appellant) there is evidence that he was identified, the witnesses however do not describe the circumstances of the identification in detail. Police following investigations also went to the house of the 1st accused recovered (sic) inter alia, the stolen gun and an assortment of other weapons. This in the opinion of the court connects the accused very strongly to the robberies. There is evidence that the accused confessed to the offence. He retracted this statement. His defence of being arrested does not cast any doubt on the prosecution evidence. The evidence against the accused when looked in totality leads to only one inference - that one of guilt.”

Being aggrieved by the decision of the trial Magistrate the appellant preferred an appeal to the High Court of Kenya at Nakuru (*Musinga & Kimaru, JJ*) who after re-evaluating the evidence dismissed the appeal. In their judgment, erroneously entitled “*Judgment of the Court*”, the learned Judges upheld the convictions and the sentences. We would point out here that in criminal appeals heard by two judges of the High Court there is no reason or occasion to style a “*Judgment of the High Court*” as such. See *PAUL MWANGI MURUNGA V R No. 35 of 2006* (Nakuru) unreported).

As already stated, this appeal raises three main issues for determination, namely, identification, recent possession and confessionary statement.

Mr. Karanja for the appellant submitted that the appellant was not properly identified as the circumstances surrounding the place where the incident took place were not favourable for positive identification and the victims could not have identified the appellant. He argued that the two courts below had not satisfactorily resolved the issue as to whether the identification of the appellant was free from error. As regards the charge and cautionary statement, *Mr. Karanja* averred that as the appellant had retracted his statement corroboration was lacking and hence there was no sufficient evidence on which the appellant could be convicted. Lastly, on the issue of recent possession *Mr. Karanja* contended that it had not been proved that the house did belong to the appellant.

On his part *Mr. Gumo*, the Assistant D.P.P., submitted that the appellant was properly convicted as there were concurrent findings of fact by the two courts below. He pointed out that the incident took place in a well-lit area and that the revolver was recovered from a house the appellant admitted was his. Moreover, *Mr. Gumo* argued, the charge and cautionary statement amounted to a full confession.

As regards identification, PW2 and PW3 testified that they were attacked only four steps from the verandah of Mombasa Butchery which was lit by electricity lights which enabled them clearly to identify the appellant whom they had no difficulty in picking out of an Identification Parade mounted on 14th September, 2000 by *Inspector Langat (PW1)*. On our part, we are satisfied on careful analysis of the evidence on record that there was no mistake as to the identity of the appellant.

On the issue of the charge and cautionary statement in which the appellant confessed having been involved in the commission of the offence it is to be observed that the statement is, indeed, detailed suggesting that it must have been given by a person who exactly knew what had happened and how it happened. Considering the record of the trial as a whole, we are satisfied that the statement by the appellant was properly admitted in evidence.

In our view, the prosecution led clear and detailed evidence as to how the revolver and other articles the subject matter of the robbery were recovered. The gun and ammunition was recovered from the house of the appellant about twenty days after the robbery. He had no Firearms Certificate lawfully entitling him to possess them nor did he give any explanation of how he came to possess them. This, in our view, and in the circumstances of this case amounted to recent possession of the stolen revolver and ammunition that connected him to the commission of the offence.

An issue was raised as to whether counts 2 and 3 were properly joined with the robbery charge. It was contended on behalf of the appellant that it is impracticable to obtain a Firearms Certificate for a stolen firearm. The submission has no merit as mere possession is a distinct offence regardless as to how one came in possession of the firearm. All in all, we are satisfied that the appellant was properly convicted on very sound evidence and we find his appeal to be without merit. The convictions are upheld. Accordingly the appeal is dismissed in its entirety.

DATED and DELIVERED at NAKURU this 22nd day of FEBRUARY, 2008.

P.K. TUNOI

.....

JUDGE OF APEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR