



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 61 of 2005

SIMON KIHARA WAINAINA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

**(Appeal from a judgment of the High Court of Kenya
Nakuru (Musinga & Kimaru, JJ) dated 27th January, 2005 In H.C.CR.A. NO. 53 OF
2001)**

JUDGMENT OF THE COURT

SIMON KIHARA WAINAINA, the appellant herein, was on 7th February, 2001 convicted by the Senior Principal Magistrate at Nyahururu of attempted robbery contrary to section 297(2) of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Nakuru was dismissed on 27th January, 2005 by Musinga and Kimaru JJ. This is his second and final appeal.

The concurrent findings of the two lower courts were as follows. On the night of the 16th and 17th of August 1998 at about 10.00am, Samuel Maina Mwangi (PW1), (hereinafter referred to as the complainant, (PW1) was asleep in his house near Gathanji Trading Centre. He heard someone knocking at the front door. He woke up, picked his torch and panga and went out of the house using the back-door. No sooner had he stepped outside, than he was hit on his forehead by an object. He screamed and ran towards the front of the house. He met with three robbers who confronted him. He cut one of them with a panga. The reaction by the complainant forced them to flee. The complainant pursued them while at the same time raising an alarm. In an attempt to escape one of them fell into a culvert. The complainant pounced on him and apprehended him. In the course of the struggle the robber bit the middle finger of the complainant. The screams of the complainant and the commotion attracted neighbours who came to his rescue. Among the neighbours who rushed to help were Charity Waitherero (PW3) and an Administration Police Sergeant. The appellant was arrested and a home-made pistol was recovered at the scene of the struggle.

During the trial, the complainant testified that although it was dark, he used the light emitted by his torch to enable him see the robbers. The complainant further testified that he did not lose sight of the robbers when pursuing them until the appellant fell down and he pounced on him pinning him down and thus enabling his arrest.

Joseph Kingori (PW4) also heard the complainant's scream and rushed to the scene. He found the complainant on top of the appellant. He assisted other villagers in arresting the appellant and later he identified him at the Police Station.

In his defence the appellant testified that the charge against him was a fabrication. It was his testimony that he was attacked by the complainant when he responded to the alarm raised within the neighbourhood. He testified that when he was attacked by the complainant, he identified himself as the son of one Maina Waweru. He contended that the home-made gun which was recovered was planted on him. He further testified that the complainant had sought to extort shs.20,000/- from him as an inducement to abandon the charges against him. The appellant denied that he was involved in the robbery.

The trial court carefully directed itself as to the danger inherent upon convicting on the evidence of a single witness at night. It noted that the complainant had flashed his torch at the appellant. He chased the appellant and caught him in the ditch. He pinned him down while screaming until neighbours came. PW3 and PW4 had corroborated this evidence. It is worthy of note that the ditch or the culvert was only a few metres from the house of the complainant.

On a second appeal this Court is concerned with points of law. Once it is established that there was some evidence to support a conviction, this Court will not on a second appeal examine the sufficiency of that evidence.

The appellant was, in fact, arrested “red handed” and he admitted being near the compound of the complainant. If he had only gone to assist him as he says, then why did he find it necessary to fight the complainant and thereby inflicting an injury on his finger?

Mr. Simiyu for the appellant submitted that no plea was taken before the trial began and therefore the trial was a nullity. We have carefully checked the record. We find that though this was not done when the appellant first appeared in court, this was however done before the trial commenced. We think that the omission is curable under **section 382** of the Criminal Procedure Code as it did not occasion the appellant any prejudice. Mr. Simiyu has further submitted that the charge as laid was incurably defective in that the particulars of the charge as laid do not clearly state whether the panga and the home made gun were dangerous weapons. While a panga *per se* may not be a dangerous or offensive weapon, the same cannot be said of a gun which is a firearm, whose main purpose at that hour of the night could not be said to have been innocent or peaceful. Both instruments or weapons were found with the appellant and it cannot be said that he did not intend to use them for a criminal act. Moreover, he failed to give any or any reasonable explanation why he possessed them at the ungodly hour. We reject the submission that the charge sheet was defective.

The acts committed by the appellant were in the circumstances immediately connected with his attempt to rob the complainant. The said acts went far beyond mere preparation since the evidence shows that the appellant had begun to put his intention to rob the appellant into execution by an overt act, namely, the assault upon the complainant.

In our view the evidence on record did sustain the conviction. We accordingly uphold the conviction.

For these reasons we dismiss the appeal against both the conviction and sentence.

Dated and delivered at Nakuru this 28th day of September, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR