



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

Criminal Appeal No. 181 of 2001

JAMES MUNYI THIONG'O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant and one George Odhiambo Onditi, were jointly charged together with three other persons who escaped from police custody for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 30th August, 1999 at Keep Left Molo Township, within Nakuru District being armed with dangerous weapons namely rifles, swords and harmer robbed Moses Ndungu Kiarie of one handbag, stationery, one video, drinking chocolate, tooth paste and a bunch of keys all valued at Kshs.2,070/- and at or immediately before or immediately after such robbery used personal violence and fatally wounded John Mbugua Kiarie. The appellant was tried, convicted and sentenced to death as by law provided but his co-accused, George Odhiambo Onditi was acquitted of the said charge.

The appellant was aggrieved by the said conviction and sentence and he appealed against the same. He raised the following grounds of appeal:-

1. That the trial magistrate erred in law and fact in putting reliance on the evidence of Inspector Daniel Muindi, PW9 which evidence was uncorroborated.
2. That the trial magistrate erred in law and fact in convicting him on insufficient prosecution evidence.
3. That the trial magistrate erred in law and fact in holding that fifteen spent cartridges that were found in the scene of the crime were fired by two guns which had been recovered without evaluating the evidence of a ballistic expert.
4. That the learned trial magistrate erred in law in failing to consider the appellant's defence.

At the request of the appellant, we allowed him to submit written submissions during the hearing of the appeal.

This being the first appellate court, we are mandated to reconsider and re-evaluate the evidence that was adduced before the trial court so as to reach our own independent determination whether or not to uphold the conviction of the appellant by the trial court. However, we must remind ourselves that we did not have the benefit of seeing nor hearing the witnesses as they testified – see **NJOROGE VS R. (1987) KLR 19**. In **UGANDA BREWERIES VS UGANDA RAILWAYS CORPORATION [2002] 2 EA 634** it was stated that:-

“There is no set format to which a re-evaluation of evidence of a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case.”

The evidence before the trial court can be summarized as hereunder:-

Moses Ndungu Kiarie (PW1) testified that on 30th August 1999 at about 3 a.m. he woke up to prepare to travel to Nairobi. He was to travel with his brother Dominic Kiarie. They were to use a lorry registration number KAL 175K and Dominic Kiarie was to drive the same. The two were being escorted by their other brother John Mbugua Kiarie (hereinafter referred to as “**the deceased**”) who was driving a saloon car registration number KXH 390 Nissan Sunny. As they were driving off, they were attacked by a person who had a G3 gun. He ordered the lorry to stop and he started shooting. The person then shot at the lorry and also shot the deceased killing him on the spot. PW1 was not able to identify the assailant. His evidence was corroborated by that of Dominic Macharia Kiarie (PW2), the brother to PW1 who also said that he was not able to identify the person who shot at them.

Dolsan Shibuli (PW3), was a watchman at Molo and he testified that on the material night at about 7 p.m. he saw two strangers whom he did not identify. The two strangers were later joined by others. He notified his fellow watchmen since they had in the recent past arrested a person with a master key and handed him over to the police. He said that on that night at about 3 a.m. as PW1 and PW2 were driving from their house, he heard some shooting when he was about 25 metres away. He said that there were lights from a nearby hardware shop. He saw somebody holding a gun and the witness said that it was George Odhiambo Onditi. There were more than five people at the scene but he was only able to identify the said Odhiambo and the appellant herein. The witness said that the appellant was not having any gun and that it was George Odhiambo Onditi who shot the deceased.

PW4, Joseph Mbugua Njoro, was also a watchman guarding a shop near the scene of the robbery. He said that he saw George Odhiambo holding a G3 rifle and confronting PW1 and PW2 and he ordered them to come out of the vehicle and give him money or else he would kill them. He got scared and he ran away and screamed then members of the public went to the scene. He said that he was able to identify George Odhiambo only.

PW5, Jotham Amedi Simon, corroborated the evidence of PW3 and 4 but said that the person who he identified holding a gun was George Odhiambo who shot and killed the deceased.

The father to the deceased also testified but his evidence was not of much relevance as he had not identified any of the robbers since he was inside his house at the time of the robbery.

PW8, Inspector Paul Cheruiyot was attached to Molo police station and he testified that on 2nd September 1999 at about 8.50 p.m. he received information from a police informer that some suspects who had harassed people in Molo Town were in Molo and others were in Eldburgon. He went to Molo with other police officers and apprehended two suspects who later escaped from police custody. He found some items in the house where the suspects were. He took the suspects and the items to Molo police station. Other three suspects were also arrested at Elburgon. The witness said that the two suspects whom he arrested at Elburgon were the appellant and his co-accused.

Inspector Daniel Muindi (PW9), told the court that on 2nd September 1999 at about 7 p.m. he was instructed by the Provincial Criminal Investigations Officer, Rift Valley to proceed to Molo Police Station with other police officers and assist the officer commanding molo police station with investigations in respect of a robbery which had occurred at an administration police camp and where two rifles had been stolen. He said that there were some suspects who had been arrested and were in custody. The witness further stated that he took one suspect from Molo to Elburgon police station and he identified another suspect, the appellant, who led him to a bush and pointed at a place from which he recovered a rifle that had six rounds of ammunition. Another suspect who was not before the court showed the witness another spot in the bush where the second rifle was recovered from. The witness said that he delivered the two rifles to Molo police station.

In cross examination, the witness said that he did not know when the guns were stolen and insisted that the appellant was the one who led him to the bush and pointed at a place from which one of the stolen guns was recovered from. The witness did not record that incidence of recovery of the guns anywhere and neither did he take any photographs at the scene of the recovery.

PW10, Administration Police constable Wilson Kiprono Kiptoo, confirmed to the court that the said rifles had been stolen from their camp.

PW11, Administration Police Constable Peter Letoya Tipis, told the court that on 10th August 1999 at about 3 a.m. members of the public woke him up and told him that their cows had been stolen. When he walked out of his house he was confronted by three people who shone torch light on him and started beating him up. They overpowered him and stole two guns from his house. He identified the two guns as the ones which had been recovered by PW9 and which had been produced in court as exhibits. The witness said that each of the guns had 20 rounds of ammunition. He further stated that he was able to identify the appellant and George Odhiambo Onditi as having been among the people who attacked him.

PW12, Inspector Mohamed Osiemo, said that on 30th August 1999 at about 3.30 a.m. he heard a gun shot and woke up and went to Molo police station and with other police officers they went to the scene where the deceased had been killed. PW12 recovered 15 spent cartridges which were produced in court as exhibits. Later on four suspects were arrested and he said that the appellant was one of them.

A firearm examiner, **William Lubanga (PW13)**, testified that on 6th October 1999 the following items were presented to him for examination and analysis:-

- Two G3 rifles which had allegedly been recovered from the bush by PW9.
- Ten rounds of rifle ammunition.
- Two fragmented pieces of metal.
- 15 fired cartridges.

The witness said that in his opinion each of the two rifles were capable of being fired and they were both firearms in terms of the Firearms Act. The ten rounds of ammunition were also suitable for use in the two firearms. Regarding the fragmented pieces of metal, he said that they could have formed part of a military rifle bullet but since they were damaged they were not suitable for microscopic examination. He said that the same could have been fired from any military rifle. PW13 further stated that the two guns had been used to fire the 15 cartridges.

When the appellant was placed on his defence, he chose to give sworn evidence and said that he was a shoe hawker at Elburgon and that on 2nd September 1999 after he closed his business he went to take “changaa” in a certain house and police officers conducted a swoop and was one of the people who were arrested and taken to Elburgon Police station. The following day, he was taken to Molo police station where he was locked up until the 10th September 1999 when he was charged in court.

In her judgment, the trial magistrate rejected the prosecution evidence regarding identification of the appellant and in our view rightly so, because it was not shown that the prevailing circumstances were suitable for a positive identification. No identification parade had been conducted. The robbery took place at about 3 a.m. and the only source of light was that from a hardware shop which was about 10 metres away from the scene. It was also not shown how bright that light was. In **NGOYA VS REPUBLIC [1985] KLR 309** it was held that in accepting evidence of identification the court should take into consideration the circumstances at the time and assess whether or not the same favoured accurate identification.

PW4 and PW5 talked of having identified the appellant’s co-accused as the person who shot and killed

the deceased and not the appellant.

The trial magistrate convicted the appellant on the basis of the evidence of PW9 that he was the one who led the police to the scene where one of the guns was recovered. In our view, that evidence was far from being sufficient to warrant the conviction of the appellant. The gun that was allegedly recovered was not dusted and examined to determine whether it contained finger prints of the appellant. No witness corroborated the evidence of PW9 and neither was any entry made in any record to show that such recovery had been made. PW9 was with many other police officers yet the others did not testify and corroborate this very important evidence, if at all it was true. Whereas it is trite law that a fact may be proved by the testimony of a single witness, that does not lessen the obligation on the part of the court to test with the greatest care evidence of such a witness. In any event, a trial court can order the calling of any witness whom it deems appropriate to appear before it to testify in proof of any fact or corroboration of any evidence tendered before it. In **BUKENYA & OTHERS VS UGANDA [1972] E.A. 549 at pg. 551** it was held that:-

“The court has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case.”

It should also be borne in mind that PW9 said that a suspect whom he took from Molo police station to Elburgon police station was the one who identified the appellant who in turn led PW9 to a bush where one of the guns was allegedly recovered. Who was that other suspect who was not named by PW9? If indeed that unnamed suspect identified the appellant, he was an accomplice and ought to have been charged together with the appellant but he was not. Uncorroborated accomplice evidence is of very little evidential value and ordinarily a court will not rely solely on such evidence to found a conviction, see **M'INANGA VS REPUBLIC [1985] KLR 294.**

The alleged recovery of the gun was on 2nd September 1999 at about 7 p.m. as per the evidence of PW9. However, PW8 told the court that the report that he received from his informer, and that led to the arrest of the appellant, was given on 2nd September 1999 at about 8.50 p.m. The evidence of PW8 and that of PW9 is contradictory. We find that the evidence relating to recovery of the alleged gun from the bush insufficient to warrant conviction of the appellant. For this reason, we allow the appeal, quash the conviction and set aside the sentence that had been pronounced by the trial court. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated at Nakuru this 3rd day of March, 2006.

M. KOOME

JUDGE

D. MUSINGA

JUDGE