IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 19 & 186 OF 2002

RASHID GEDI ADAN

MALELE AHMED …………………………………......……………… APPELLANTS

AND

REPUBLIC ………………………………………………………. RESPONDENT

(Appeal from judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ.) dated 13th September, 2001

in

H.C.CR.A. NOS. 223 & 227 OF 2000)

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JUDGMENT OF THE COURT

Criminal Appeal Nos. 19 and ***186 of 2002*** respectively were consolidated and heard together. The appellants, ***Rashid Gedi Adan*** (1st appellant) and ***Malele Ahmed Hussein*** (2nd appellant), and three other persons whose appeals are not before us were jointly charged with robbery with violence, contrary to ***section 296 (2)*** of the Penal Code. Both of them faced separate additional counts of being in possession of firearms and ammunition without a firearm certificate contrary to ***section 4 (2)*** of the Firearms Act Cap 114 Laws of Kenya. In those additional counts, too, they were jointly charged with other persons whose appeals are not before us. Both of them were found guilty and convicted in the respective counts they faced, were convicted and sentenced to death in the first count and were additionally ordered to serve imprisonment terms in the other counts.

We wish to observe that where, as in this case a person faces several counts, and he is sentenced to suffer death in one of those counts, it is undesirable for the trial court to impose an imprisonment term or terms on the other counts unless the imprisonment term or terms are ordered to be in abeyance. Otherwise no sentence should be imposed on those other counts.

The prosecution case against both appellants was that on 18th January, 1999, in Joy-Adamson camp in Shaba Game Reserve, ***Arthur Mburu Kiragu*** (Arthur) an employee of a Tour Company, was within that camp inside a tent when some people fired their weapons into the tent. He was near the door of the tent. One of the bullets hit him on his right hand. As he writhed in pain, a person appeared whom he identified

as the 1st appellant and demanded money. Arthur gave him about Kshs.5,000/=. The witness was sure the person he saw was the appellant because he talked to him, he was close to him and the time was about 6 p.m. when visibility was still good. The appellant had a gun.

The attackers then left the camp and ran into a nearby bush.

Both appellants were arrested on 23rd February, 1999; the 1st appellant at a spare parts shop at Isiolo, and the 2nd appellant inside a room within premises known as Nanyuki Guest house lodge. Their arrest was effected by among other people ***Adan Ali Dida***, (Adan) a security guard with Kenya Wildlife Service at Isiolo. He testified that he acted on information received that both appellants and others were among the raiders at Joy Adamson Camp on 18th January, 1999.

The 2nd appellant and two other people he was arrested with led Adan and his party to a place known as Shambani, where inside a river a gun wrapped in a polythene paper was recovered. In its magazine were twelve rounds of 7.62 by 39 mm ammunition.

The 1st appellant also led Adan and his party to the house of one Moses or Amos with whom he said he had left his gun. We say ***Moses*** or ***Amos*** because Adan described the person as Moses, while other witnesses called him Amos. All the witnesses were however in agreement that the person they had in mind was ***Amos Nyaga Mwathi*** who was the appellant's co-accused. The said Amos led Adan and his company to a place known as Kimbo in Kibirichia near Mount Kenya, and under a fallen tree two guns were recovered wrapped in a "*nylon paper*". One of the guns had 9 rounds of a 7.62 by 39 mm ammunition, and the other 7 of the same caliber.

A witness ***Mbogo Donald Mugo***, a Firearms Examiner, testified that he examined the alleged firearm and ammunition which were recovered from the 2nd appellant and two firearms and ammunition which were recovered from Amos, and came to the conclusion they were firearms and ammunition within the meaning of the same as defined under the Firearms Act Cap 114 Laws of Kenya. It was also further his evidence that a comparative microscopic examination he conducted of spent cartridges which had been recovered from the scene of the robbery in conjunction with 9 life test-fired ammunition from those recovered revealed no marching markings. His conclusion was that the spent cartridges recovered from the scene of the robbery were not fired from any of the guns he examined.

In his defence the 1st appellant made an unsworn statement and said that he is a livestock trader, was not involved in the robbery complained of, he did not have in his possession any gun or ammunition, he did not know Amos nor had he given him any gun or ammunition, he had been exposed to Arthur at the Kenya Wildlife Service Camp on arrest and that is why Arthur easily identified him at an identification parade, and that on being picked he protested and said that the witness had seen him earlier while he was in the custody of Adan.

The 2nd appellant also gave an unsworn statement denying not only the charge of robbery with violence but also being in possession of a firearm and ammunition. He stated further that he was arrested from a place known as Bord, was taken to the Kenya Wildlife Service Camp where he was interrogated about the robbery at Joy-Adamson Camp and whether he knew a man who was pointed out to him. The man later turned out to be Arthur and the identifying witness in an identification parade, which was held later on in which he was the suspect. He stated further he was easily identified because, firstly, he had been exposed to the witness; secondly, he was the only Somali in the parade; and thirdly, he was the only young member of the parade. Even after stating all this, the 2nd appellant concluded that Arthur did not pick him at the identification parade. Whatever the position it does not matter as the superior court, on first appeal, held that he had been improperly convicted on the robbery with violence charge.

The trial magistrate after setting out the evidence and the law applicable found as fact that Arthur had ample opportunity and circumstances favoured his identification of both appellants during the robbery, and he positively identified them as having been among the people who participated in the said robbery. He was also satisfied that the evidence showed beyond any reasonable doubt that both appellants had

possession of firearms and ammunition. He then proceeded to convict each of them as charged. He, likewise, convicted their co-accused, who included ***Issa Osman Ibrahim***, ***Mohamed Noor Disali*** and ***Amos Nyaga Mwathi***, but these were acquitted on first appeal and their appeals are therefore not before us.

The superior court (Juma and Tuiyot, JJ.) on first appeal, considered each appellant's case separately. On the robbery charge the court rendered itself thus:

"The learned trial magistrate found that Accused 1 was properly identified as having taken part in the robbery. After evaluating the evidence ………. We too agree with the learned trial Magistrate that there was sufficient evidence against Accused 1 to warrant a conviction."

We think that the learned Judges should have said more. They did not show on record how they went about in their evaluation of the evidence.

It is not enough for a first appellate court to state that it had evaluated the evidence without more and proceed to uphold the conviction. An appellant is entitled to be shown what that court considered in coming to the conclusion that the evidence is sufficient to uphold his conviction.

In ***OKENO V. R*** [1972] EA. 32 at p. 36. The Court of Appeal for East Africa dealt with this issue and rendered itself thus:-

"***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."***

The record has evidence that the robbery at Joy Adamson Camp on the material day took place in broad daylight, in an open area, and that Arthur was close to the appellant, talked to him and handed over some money to him. He had more than just a moment to observe the appellant. They faced each other. The witness had ample opportunity of looking at and registering in his mind the appearance and features of the 1st appellant, who did not have any covering over his head.

It is instructive that in an identification parade which was held about a month later, Arthur was able to identify the 1st appellant. He had observed his gait, and at the parade he asked for the 1st appellant to walk, which he did. The witness without hesitation said the 1st appellant was one of his attackers and that he was armed with a firearm during the said attack.

In view of this clear evidence both courts below cannot be faulted for coming to the conclusion that the 1st appellant was one of the people who raided Joy-Adamson Camp. We do not agree with Mr. Ghadially for the appellants that evidence of identification is wanting. The 1st appellant was properly identified. We are satisfied that notwithstanding the economical evaluation of the evidence by the superior court, in the end that court came to the correct finding that the 1st appellant's conviction for the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code was safe.

The 1st appellant's conviction on the charge of possession of firearms and ammunition was quashed by the superior court and we find no necessity of considering the same.

As regards the 2nd appellant, we stated earlier that his conviction on the charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code was quashed and the sentence imposed on him set aside on the ground that identification evidence against him was not clear. His conviction on possession of a firearm and rounds of ammunition were upheld. The superior court in doing so said, among other things, that the 2nd appellant led the arresting officers to the place where a gun with 12 rounds of ammunition was recovered. The 2nd appellant personally retrieved the gun from where it was hidden. He

did not have a firearm certificate to possess both the firearm and ammunition. In view of the concurrent findings of fact by both courts below and in absence of any good reason or special circumstances to constrain us to interfere, we uphold his conviction on both counts relating to possession of a firearm and ammunition contrary to ***section 4(2)*** of the Firearms Act, Cap. 114 Laws of Kenya.

We are satisfied the appellants' respective convictions are proper and consequently dismiss their respective appeals in their entirety.

Dated and delivered at Nyeri this 12th day of May, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

W.S. DEVERELL

……………………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR