



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI
Criminal Appeal 311 of 2005

SIMON KARIUKI MURIITHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nairobi (Ochieng & Makhandia JJ) dated 22nd day of July 2004

in

H.C.CR.A NO. 504 of 2001)

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JUDGMENT OF THE COURT

On 1st November 1999, two police officers from Spring Valley Police Station were deployed by their superior to go on foot-patrol duties along General Mathenge Drive and Brookside Drive in Westlands area of Nairobi. They were Pc Morris Mutuku (PW 1) and Pc Edward Sang (PW 4). Pc Mutuku was armed with a G3 rifle with 20 rounds of ammunition while Pc sang was armed with a sub-machine gun (SMG) patchet with 20 rounds of ammunition.

At about noon that day, the two spotted an abandoned car along Brookside drive and they went to check it out. Soon after, they saw two casually dressed men walking towards them on the opposite direction of the road. The two men looked suspicious to the officers so they were stopped for questioning. One of them was SIMON MURIITHI KARIUKI, the appellant now before us, the other is still at large. As soon as they were stopped, the other person spoke to the officers in a friendly manner telling them, he and the appellant were not bad people as they were just workers who were going to install electrical wiring in a building site nearby. The officers however demanded that they produce their identity cards (ID) and the appellant gave Pc Mutuku a police abstract claiming he had lost his ID, while the other man produced an ID in the name of Simon Ngunyi Kibubi. Pc Mutuku passed them on to Pc Sang who started examining them. Just then, Pc Mutuku noticed some eye communication between the two and the appellant stepped backwards and removed an American Colt Pistol tucked under his trousers before Pc Mutuku could reach him. Pc Mutuku rolled down the pavement and tried to cock his G3 rifle but it failed to function immediately. Suddenly he heard two shots and Pc Sang started screaming. Pc Sang had been shot by the appellant through the right shoulder and he fell down. The appellant then picked up Pc Sang's patchet and hit him on the head and then aimed at Pc Mutuku and fired some rounds at him but the officer rolled several times along the road while still trying to cock his rifle. The appellant

dropped the colt pistol and remained with the patchet. Luckily the G3 rifle started functioning and Pc Mutuku started exchanging fire with the appellant as his unarmed colleague ran away. The appellant was shouting “NIKUI”, NIKUI” or words to that effect, meaning “dog” in Kikuyu language, as he retreated backwards while still firing. Due to the persistent firing by Pc Mutuku, the appellant dropped the patchet and started running away but the officer gave chase and arrested him on lower Kabete road. He handed him over to other officers who were passing in a police patrol car which took him to Spring valley police station. The whole incident had taken about thirty minutes and Pc Mutuku had chased the appellant for about 600 metres without losing sight of him. Between them, the appellant and Pc Mutuku had expended 31 rounds of ammunition in the shoot out.

Pc Sang was assisted by a good Samaritan and taken to MP Shah hospital where he was admitted and treated for five days. The patchet and Colt pistol were collected and subsequently handed over to a ballistics expert, Mbogo Donald Mugo (PW5) for examination.

Upon his arrest, the appellant was transferred to Gigiri Police Station where investigations into the matter commenced under CID Cpl Samuel Ngenywa (PW2). He was taken before IP John Odinga (PW3) of that station who recorded a statement under inquiry from him which amounted to a confession. Four counts were then preferred against the appellant before Nairobi Senior Resident Magistrate as follows:-

- (1) **Robbery with violence contrary to Section 296(2) of the Penal Code**, in that he did, jointly with others not before the court being armed with a dangerous weapon, namely a pistol, rob Pc Edward Sang of his patchet valued at Kshs. 30,000 and used actual violence on him.
- (2) **Being in possession of a firearm without a firearm certificate contrary to section 4(1) of the Firearm Act Cap 114 Laws of Kenya**, in that he had in possession a US Army Colt Pistol serial No. 154451 without a firearm certificate.
- (3) **Being in possession of ammunition without a Firearm certificate contrary to section 4(2) (a) of the Firearm Act**, in that he was in possession of four rounds of .45mm caliber (sic) ammunition without a certificate.
- (4) **Preparation to commit a felony contrary to section 308(1) of the Penal Code.**

Five prosecution witnesses testified in the matter as did the appellant who gave sworn testimony. He conceded that he met the two police officers at the time and place described by those officers but denied that he was in the company of any other person. He was innocently going to see a friend nearby when he was stopped by the officers and asked for his Identity card. He gave it to Pc Mutuku, who read and returned it to him. Then another person came along the same road and Pc Mutuku asked him for his ID. Instead of producing an ID card, that person produced a gun and shot Pc Sang. As Pc Sang fell, both the appellant and Pc Mutuku ran to take cover. The appellant found a three-foot-deep ditch in which he hid for the next seven minutes or so when gun-fire rent the air. When the shooting stopped, Pc Mutuku went to him and asked him where the man had gone but he could not tell since he had been hiding. He was then taken away by some police officers to assist in making a statement about the incident and possibly become a witness if they arrested the assailant. He was not under arrest at Spring Valley police Station where he stayed for 1½ hours before being taken to Gigiri Police Station. It is there that he was put in a cell and was beaten up and forced to record an incriminating statement against his will. He was later to repudiate that statement at the trial but it was admitted in evidence after trial within trial. He pleaded mistaken identity.

The trial magistrate was satisfied beyond reasonable doubt that the appellant was in the same company with the man who escaped and that both of them were not only preparing to commit a felony under count 4, but did in fact commit the felony of robbery with violence under count 1. He also found that the appellant had in his possession the US Army Colt pistol which was used in the robbery under count 2, but acquitted him on count 3 for lack of clear evidence. He was sentenced to death on count 1, and to terms of imprisonment for 18 months on the other two counts, the sentences to run consecutively.

In passing, we must once again deprecate the persistent failure by subordinate courts to heed this Court's directive on sentencing where the offences charged carry both capital and imprisonment terms. We need only reiterate what we have stated before in many other decisions, among them: **Abdul Debano Boye & Another v R Cr Appl. No. 19/01 (ur)**, **Abdulhussein Kaimoi v R Cr. App NO 47/01 (ur)**, **Samuel Waithaka Gachuru v R, Cr App 261/03** and **Muiruri v R [1980] KLR 70**. In the *Boye Case* (Supra) the court stated as follows:

**“We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1<sup>st</sup> appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that the sentencing courts will take heed of these simple requirements and act appropriately.”**

The appellant was aggrieved by the decision of the trial court and so appealed to the superior court on the grounds that the prosecution case was riddled with discrepancies, inconsistencies and contradictions; the appellant was only a victim of circumstances; there was insufficient evidence to connect him with possession of the firearm and preparation to commit a felony; and that his defence was disregarded without reasons. All these issues were thoroughly analysed by the superior court (Ochieng & Makhandia JJ) and it came to the conclusion that the appellant was properly convicted on count 1 relating to robbery with violence. The court however noted conflicting evidence relating to the identification of the colt pistol which the appellant was alleged to have had and gave the benefit of doubt to the appellant thereby allowing the appeal on that count and on count 4. The convictions on those counts were set aside. The sentence of death nevertheless remained because the appellant was in company with another when they violently robbed Pc Sang of the patchet and injured him in the process.

The appellant was still not satisfied by that decision and now comes before us on a second and final appeal. As such, only matters of law may be raised as this Court would not interfere with concurrent findings of fact unless they were based on no evidence at all or on a perversion of it - See **section 361** of the Criminal Procedure Code, **Njoroge v R 1982 KLR 388**, and **Karingo v R. [1982] KLR 213**.

Although there were four grounds of appeal summarized in a supplementary memorandum of appeal filed on behalf of the appellant by M/s Ngumbau Mutua & Associates, learned counsel Miss Masaka who argued the appeal informed us that the issue of law that arises is that the superior court did not subject the entire evidence to a fresh and exhaustive scrutiny. If they had done so, they would have noted material contradictions, inconsistencies and discrepancies in the prosecution evidence; that the ingredients of the offence had not been proved beyond reasonable doubt; and that the appellant's defence was not considered. Miss Masaka in particular submitted that the very finding by the superior court that the appellant was not in possession of the offending firearm as contended by the two police officers meant that it was not the appellant who shot Pc Sang and therefore the evidence of the officers was not only doubtful but supported the appellant's evidence that he was innocently at the scene of the crime and had nothing to do with the assailant who disappeared. Such evidence could only have been believed if it was augmented by other evidence from persons who were mentioned in evidence as having been present. There was also defence evidence on a report made in a Police Review Magazine which contradicted the evidence of Pc Mutuku, which report and the failure to call the author of it, were not considered. For

those reasons, she submitted, it was not safe to uphold the appellant's conviction.

It is of course trite law that on a first appeal, the superior court has a duty to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld - **Okeno v R [1972] EA 32**. In doing so however, allowance must be made for the fact that the trial court had the advantage of hearing and seeing the witnesses – **Peters v Sunday Post (1958) EA 424**

We have stated above the grounds upon which the trial court's decision was impugned. The issue of contradictory and inconsistent evidence was raised in the superior court as it was before us. We have carefully examined the superior court's record and it is clear to us that the court discharged its duty of re-evaluation of the evidence and made findings of fact on that issue. The complaint related to four areas: the manner in which the two strangers approached the police officers; the stage at which the gangsters began their attack on the police officers; the distance between the place at which the incident occurred and the place where the appellant was arrested; and the recovery of the US colt pistol. The evidence in respect of those complaints was analysed, and we must say admirably so, before the superior court came to the conclusion on all three complaints, that there were no inconsistencies, contradictions or discrepancy and any such inconsistencies as there were, were immaterial and incapable of affecting the totality of the incriminating evidence tendered against the appellant. We do not accept the submission that those issues were not considered sufficiently or at all.

Miss. Masaka's next example confirming that there was no re-evaluation of evidence was that the superior court did not consider the appellant's defence. The defence was that he was a victim of mistaken identity which contention was supported by a Police Review magazine produced in evidence. That aspect was examined by the trial court which delivered itself as follows: -

**“It was also submitted that PW1 gave an interview to Mr. Ombati for the police review magazine in which it was reported that the gangster who shot Pc Sang and robbed him of the police patchet made good his escape. This was denied by PW1 who was recalled for cross examination. Mr. Ombati was not called as a witness to reinforce his report in the police Review magazine the court cannot be expected to rely on what was reported in a newspaper to be the truth and what is before court to be untrue. The evidence in total shows that he was together with another person who escaped and the accused person did take part in whatever happened on this material day.”**

The superior court also examined the contention and stated: -

**“As regards the contention by the appellant that he may have been the victim of mistaken identity, we find that there was no possibility of the alleged mistaken identity. PW1, who exchanged gunfire with the appellant, clearly testified that at no time did he lose sight of the appellant. We are convinced by his evidence, because if he had lost concentration, PW1 would most probably have also been shot. Secondly, the incident occurred in broad daylight, at about 11.30 a.m. We therefore do find that the identification of the appellant was positive, and thus very safe, in the circumstances prevailing.”**

The appellant had applied before the trial court for the summoning of one *Jasper Ombati* who was interviewed by a journalist in the magazine to testify on his behalf and a witness summons was issued. The witness however had not been served by the time the hearing of the trial resumed and the appellant's counsel applied to dispense with him if the Magazine could be produced through the appellant. That was done and thereafter the propriety of such evidence was considered and weighed against the sworn evidence on record but was disbelieved. The courts below were perfectly entitled to that assessment. Once again we find no substance in the complaint that the defence was not considered.

The final example given by Miss. Masaka that there was no re-evaluation of evidence was the failure to note that the elements of the offence were not proved. We think the submission arose out of the finding made by the superior court that the appellant did not have in his possession the firearm specified in the charge sheet because the serial numbers given in the evidence were at variance with the charge. Such

doubts led to his acquittal on that count. That however was not the end of the matter since **section 296(2)** of the Penal Code which constitutes the offence has several limbs any of which, if proved, would lead to a conviction. The superior court examined the issue and expressed itself thus: -

**“To our minds, the ingredients of the offence of robbery with violence had been duly proved. The appellant was in the company of another person. Between the two of them, they were armed with a pistol, which is a dangerous weapon. The said weapon was used to shoot PW4. Thereafter, the appellant robbed PW4 of his gun. Accordingly, we hold that the conviction for the offence of robbery with violence was safe.”**

We agree with that assessment of the evidence and the law.

There is of course no yardstick for the manner in which the first appellate court ought to carry out the duty of re-evaluation or fresh scrutiny of evidence. The right approach, we think, was expressed by the supreme court of Uganda in **Uganda Breweries Ltd v Uganda Railways Corporation [2002] EA 634** at page 641:

**“There is no set format to which a revaluation of evidence by a first Appellate Court should conform. The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the Appellate Court. In this regard, I shall refer to what this Court said in two cases. In *Sembuya v Alports Services Uganda Limited* [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**

***“I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate Court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).”***

**In *Odongo and another v Bonge* Supreme court Uganda civil appeal 10 of 1987 (UR), Odoki JSC (as he then was) said: *“While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance”*. I agree with the views expressed by the Learned justices of this court in the two cases immediately referred to above.”**

We are in no doubt that the evidence upon which the appellant was convicted on count 1 was sound and was carefully re-evaluated by the superior court. The evidence of the police officers was believed by the two courts below and we have no reason to doubt them, that the appellant was together with another person who escaped from the scene of the robbery while the appellant was pursued and apprehended by one of the officers. The retracted confessionary statement was corroborated by those officers and was consistent in part with the evidence on oath tendered by the appellant himself. Learned Principal State Counsel Mrs. Murungi vigorously opposed the appeal and we express our appreciation for her submissions.

The upshot is that the appeal has no merits and is hereby dismissed in its entirety.

***Dated and delivered at Nairobi this 10<sup>th</sup> day of November, 2006.***

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**I certify that this is**

**a true copy of the original.**

**DEPUTY REGISTRAR**