REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL NO.47 OF 2001

BETWEEN

ABDI HUSSEIN KAIMOI…….APPELLANT

AND

REPUBLIC…….RESPONDENT

JUDGMENT OF THE COURT

The appellant ABDI HUSSEIN KAIMOI was jointly charged before the Senior Resident Magistrate, Nanyuki, with two others namely Mahat Ugas (2nd accused) and Osman Bidu J. Thuo (3rd accused) with five counts of robbery with violence contrary to section 296(2) of the Penal Code; and one count of attempted robbery with violence contrary to section 297 of the Penal Code.

The appellant was separately charged in counts VII with the offence of being in possession of a firearm without Firearm Certificate contrary to section 4(1) of the Firearms Act Cap. 114 and in count VIII with the offence of being in possession of 19 rounds of ammunition contrary to section 4(1) of the Firearms Act.

The charges against the third accused were withdrawn before trial. The second accused was acquitted in all counts after trial. The appellant was convicted of the offence of robbery in count IV and sentenced to death. He was also convicted of the offence of being in possession of a firearm – AK 47 rifle and being in possession of 19 rounds of ammunition in counts VII and VIII respectively and sentenced to 2 years imprisonment in each count. The appellant was however acquitted of offences in counts 1,2,3,5, and 6. His appeal to the superior court was dismissed. He now appeals to this Court on three grounds.

On 2/4/98 at about 7.15 p.m. a gang of many people who were armed with rifles raided the home of JOHN DYKE KENYON (Dyke) – complainant in count I – in Mugwooni farm which is about 30 kms from Nanyuki Town. Dyke lived in the farm with his wife JANE BERRET KENYON (Jane), complainant in count IV – his son JOHN WILFRED GEORGE KENYON (Wilfred) – complainant in count III; his daughter in-law Amanda Kenyon (Amanda); complainant in count II and his many workers including his watchman AKALE LOKUOL (Akale), complainant in count V and ABDI GOLLO BOBA (complainant in count VI). Wilfred, his wife Amanda and their two children had gone out of the farm to inoculate sheep. They returned home in a Land rover at about 7.15 p.m. After the Landrover passed the gate Akale saw two people who were dressed in military shirts running after the vehicle. He asked who they were and he was shot at three times. Many people emerged and started shooting at the vehicle and in the air. Wilfred stopped the vehicle at the farm's car park about 30 metres away. Upon stopping they were ordered out of the vehicle and beaten. The people wore jungle jackets and military boots and were speaking in Somali language. They stole some personal items from Wilfred and Amanda and then demanded money. Wilfred told them that he would show them where the money was.

Thereafter, he led them to the door of his father's house. Dyke called him to open the door. Dyke took his revolver and peeped through the back glass door. A robber who was outside armed with an AK 47 rifle spotted him and shot at him. Dyke fell down unconscious. The robbers broke the door of the house open and Wilfred and about four robbers entered in the house leaving some outside. Upon entering into the house one of them went to the dining room where Jane was. She was thrown on the floor and kicked with boots and hit with the butt of the gun several times. She was injured. Wilfred was pushed into his mother's bedroom where the safe was. He took about Sh.70,000 which he gave to them but they beat him saying the money was not enough. Wilfred told them that there was more money in the office.

The robbers took a radio cassette, a portable digital radio, a load of clothes and Dyke's revolver from the house. They then proceeded to the office outside the house where Wilfred gave them a petty cash box with about Shs.4,000/=. The robbers also took Shs.500/= in coins after which they jumped over fence and left. Dyke and Akale sustained serious injuries. They and Jane were taken to Nanyuki Cottage Hospital. The robbery was reported at Nanyuki police station. Chief Inspector William Okello and other police officers went to the farm. Wilfred handed over seven empty cartridges to him. On the following morning several police teams were formed who started tracing the robbers at 6.00 a.m.

The police followed footprints from the scene led by a tracker dog. They followed the footsteps along a stream, crossed a stream and then descended down into a valley at Ilopolei area where they spotted the bandits at about 10.00 a.m. An exchange of fire ensued. Somebody screamed during the shooting. The bandits ran away as they were shooting. They were pursued until they completely disappeared. Police returned to the "hideout" where they had found the bandits and started searching the scene. They spotted a person not far from the stream and near a bush (appellant). He had been shot in the leg and hand and was seriously injured. Next to him was an AK 47 rifle, and a magazine with 19 rounds of ammunition. There were many goods strewn around by the stream. Police called for a helicopter which airlifted the appellant to Nanyuki Police Station from where he was taken to hospital. Some of the recovered goods were identified by Jane as some of the goods stolen from the house during the robbery. William Lubanga, a firearms examiner, upon examination of the rifle and the live and spent cartridges recovered, concluded that three guns had been used to fire the cartridges and that the AK 47 assault rifle recovered was used to fire only one of the spent cartridges.

The appellant in an unsworn statement at the trial stated that he was a herdsman and that he was at the material time at the river grazing cows when police appeared and shot him.

The learned Ag. Senior Resident Magistrate in a concise judgment concluded thus:-

"what is to be considered is whether 1st accused is one who had the recovered items; some are well identified as belonging to the complainants and ones stolen on the material night. I have no doubt that the same were well so identified. The circumstances under which 1st accused was arrested clearly indicate he was found by the stream where the items were recovered. He was also shot and injured in the shoot out that ensued between police and the bandits, there was a rifle by his side. From the ballistic expert, it is clear that one of the cartridges recovered from the scene of the robbery had been fired from the rifle recovered from the first accused. The explanation given by the accused in defence does not clear him from the fact that he was not innocently shot while grazing his cattle. There was no evidence to show he had any cattle or at all---- --"

It is apparent from that passage that the learned trial magistrate was satisfied that the first accused had the recovered items, that the recovered items were identified as belonging to the complainants, that the appellant was found by the stream when the items were recovered, that the appellant was shot and injured in the shoot out that ensued between the police and bandits, that the rifle was recovered from appellant and that one of the cartridges recovered from the scene of robbery had been fired from the rifle recovered from the first accused.

In more precise terms, the learned trial magistrate found that the appellant was in recent possession of the goods stolen during the robbery; that the appellant was found in possession of the gun used in the robbery; that he was a member of the gang which exchanged gunfire with the police and that he was

injured during that shoot out. There are three grounds of appeal drafted by the appellant himself thus (in summary):-

1. The testimonies tendered to establish appellant's mode of arrest was riddled with doubts and was not enough to sustain a conviction.

2. That the connection between the appellant and the recovered exhibits was not sufficiently established.

3. The two courts below erred in law in failing to give any weight to the appellant's defence.

In support of the first ground of appeal Mr. Kiage for the appellant referred to the evidence of the two police witnesses C.I. William Okello (PW8) and P.C. Timothy Mutuma (PW10) who gave evidence regarding the circumstances of the arrest. He pointed out some discrepancies in the evidence of the two witnesses; that according to C.I. William Okello, he saw two bandits before the shoot out while P.C. Timothy Mutuma saw six bandits; that C.I. William Okello said that it was not the appellant who was arrested while P.C. Timothy Mutuma said that it was the appellant who was arrested after the shoot out.

He submitted further that the appellant was found unconscious and that in that state he was incapable of being in possession of anything. In support of the second ground, Mr. Kiage referred to the discrepancy in the serial number of the gun shown in the charge sheet and in the evidence and the inconsistency and discrepancy in the evidence as to the number of spent cartridges recovered at the home of the Kenyons and submitted to the firearms examiner and doubted whether the single cartridge said to have been fired from rifle in question was recovered from the home of Kenyons.

Lastly, in support of the third ground of appeal Mr. Kiage submitted that the appellant raised a defence which was probable and which was not negatived by the prosecution. All those complaints were raised by the appellant in his detailed written submissions in the superior court.

The superior court considered the evidence of C.I. William Okello and P.C. Timothy Mutuma and came to the conclusion that the appellant was in recent possession of the rifle with ammunition and some of the stolen goods. The superior court also concluded that one of the spent cartridges recovered from the farm was fired from the rifle found in possession of the appellant. Thus there were concurrent findings on the material facts by the two courts below. A second appeal must be confined to points of law and the second appellate court will, as a general rule, not interfere with concurrent findings of fact of the two lower courts unless they are shown not to have been based on evidence (see KARINGO VS. REPUBLIC [1982] KLR 213.

Although the appellant was found injured in the bush and was not actually carrying the goods or the rifle and the ammunitions the definition of "possession" in section 4 of the Penal Code is wide enough and covers the circumstances of this case. The conviction of the appellant was based on circumstantial evidence – that is, recent possession of stolen goods, the appellant being in the group of bandits which exchanged gun fire with the police, the fact that the appellant was shot during the exchange of fire and that the appellant was found in possession of one of the guns used in the robbery.

If a person is found in possession of recently stolen goods and does not account for his possession there is a presumption of fact that he is either the thief or a receiver – (see ANDREA OBONYO VS. R [1962] E.A. 542.) In order to draw an inference of guilt from such circumstances, the evidence must satisfy the well known standards stated in many decisions of the court – see for instance JAMES MWANGI VS. REPUBLIC [1983] KLR 327. The first and second grounds of appeal mainly raise questions of fact. We are satisfied that the concurrent findings of fact by the two courts below were based on overwhelming evidence. We are further satisfied that the two courts below drew the correct inference from the totality of the circumstantial evidence – that the appellant was one of the robbers. We see no merit in the appeal. Before we conclude, we note that the appellant was charged with several capital offences but was convicted of one capital offence and sentenced to death. He was also convicted of two other offences and sentenced to two years imprisonment respectively. We would respectfully repeat the previous observation of this Court in MUIRURI VS. R [1980] KLR 70 – that where a person is charged with a number of

capital offences it is preferable for the prosecution to proceed on one capital charge only and leave the other capital charges in abeyance, even though the charges appear to be inter-linked.

In our view, if the prosecution fails to heed that advice then it is a good practice for the trial court to sentence the accused on one capital charge and leave the sentence in the other charges in abeyance. The prevalent practice by subordinate courts of sentencing an accused person to a prison term in addition to a sentence of death should be discouraged.

For that reason we would set aside the prison sentences in count VII and VIII. Subject to that correction the appeal against conviction for capital robbery in count IV is dismissed.

DATED AND DELIVERED at NYERI this 13th day of May, 2005.

R.S.C. OMOLO …….

JUDGE OF APPEAL

E.M. GITHINJI ……..

JUDGE OF APPEAL

W.S. DEVERELL ……..

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR