REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

CORAM: CHUNGA, C.J., OMOLO & SHAH, JJ.A.
CRIMINAL APPEAL NO. 169 OF 2000

BETWEEN

KATANA PEKESHA KENGA

JOHN NDUATI MUCHIRI ....APPELLANTS

AND

REPUBLIC ....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at
Mombasa (Hayanga J) dated 7th May, 1999
in
H.C.CR.A. NOS. 420 & 422 OF 1999)
****

JUDGMENT OF THE COURT

On the 21st May, 1996, **John Nduati Muchiri,** the appellant hereinafter, and another man called **Katana Pekesha Kenga,** appeared before the Principal Magistrate at Malindi charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Cod**e . The particulars of the offence laid to their charge were that on 26th April, 1996, at Palm Garden Area in Malindi Location within Kilifi District of the Coast Province, the appellant and Kenga, jointly with others not before court and while armed with a dangerous weapon, to wit, a pistol, robbed **Samuel Nzai Kombe** of a motor vehicle registration number KAD 163E valued at Shs.300,000/= and at or immediately before or immediately after such robbery, they used actual violence on Samuel Nzai Kombe. The appellant and Kenga were tried on that charge and in his judgment, the Magistrate concluded after saying:

> ***"Although the two people drew out a knife and pistol, there is no evidence that they manhandled and used personal violence against the complainant,"***

the appellant and his colleague were only guilty of simple robbery under Section 296 (1) of the Penal Code and the Magistrate convicted them of that offence instead of the capital robbery under Section 296 (2) of the Penal Code . The appellant and his colleague were then sentenced to eight years imprisonment with four strokes of the cane and the mandatory five years of police supervision after their release from prison. They appealed to the High Court, but on the 7th May, 1999, Hayanga, J. dismissed their appeals and confirmed the sentences imposed upon them by the Magistrate.

Both the appellant and Kenga appealed a second time to this Court but when the hearing of their appeals opened before us, and having heard our advice on the matter, Kenga informally applied to us to allow him to withdraw his appeal and, exercising the powers granted to the Court by Rule 67 (4) of the Court's Rules , we granted Kenga's request and allowed him to withdraw his appeal. Accordingly, Kenga is no longer an appellant before us and this judgment concerns only the appellant.

Samuel Nzai Kombe (Samuel - PW 1) was apparently employed by Nelson Chengo (Nelson - PW 2) as a driver and he drove Chengo's motor vehicle registration number KAD 163E which was being used as a taxi in Malindi. There was uncontroverted evidence, which was accepted by the Magistrate and confirmed by the High Court, that Samuel was robbed of the vehicle by two men who had hired him to take them to a place called Matsangoni. According to Samuel, when the two men came to him, he (Samuel) took them to his employer Nelson and the charge for the hiring was agreed at Shs.1,500/=. This must have been in the early part of the morning. Both Samuel and Nelson said Kenga was one of the two hirers. They did not, however, say that the appellant was one of the hirers, contrary to the learned Judge's assertion in his judgment that Samuel and Nelson identified the appellant as one of the hirers; they did not. Police Constable Karisa Banji (Karisa - PW 3) and Naftali Rioba (Naftali - PW 4) were on day patrol within Mombasa town. They were informed of the theft of the vehicle and were asked to look for it. It was their evidence before the trial Magistrate that having received the report of the robbery at about 10 a.m., they started to be on the lookout for the vehicle and that at about 12 midday, they located the vehicle at a place called Mlaleo in Kisauni area of Mombasa town. The vehicle was being pushed and Kenga was occupying the driver's seat, controlling the vehicle. The two witnesses swore that the appellant was a passenger in the vehicle, that on seeing the police, the appellant jumped out and started to run away. He was shot on his thigh and the two police officers were thus able to arrest him. Placed on his defence the appellant told the Magistrate in a short unsworn statement:

> "On the material date I was walking to Mwandoni area of Mombasa when I saw the vehicle in question. I was asked to help push it and I did so. Later, police officers arrived and arrested me after shooting me on the thigh. I did not commit the offence."

These were the two versions the trial Magistrate had to resolve. As we have said, there was no doubt that the appellant was found either inside the vehicle (according to the police officers) or just outside it pushing it (according to the appellant). According to the two police officers, they shot the appellant when he jumped out of the vehicle and started to run away. The appellant agreed that the two police officers shot him and arrested him, but there was not a single word from him as to why the two officers shot him. During the hearing of the appeal, the appellant told us that whenever Kenyans see the police they automatically run away and he asked us to believe his version of the story. He also asked us why he would be seated inside a vehicle which was admittedly being pushed.

The truth of the matter is that it is not for us to answer these questions of facts. The trial Magistrate who saw and heard the two police officers on the one hand, and the appellant on the other, believed the evidence of those officers and rejected that of the appellant. The Judge, in effect confirmed the trial Magistrate on these points, though he wrongly thought that Samuel and Nelson also said they had seen the appellant at Malindi. Had the Judge correctly appreciated this point, he would have inevitably come to the same conclusion as he did. It was not alleged before us that there was something inherently improbable in the evidence given by the two police officers which made their evidence unworthy of belief. We do not know of our own knowledge, and it is a matter of which we cannot take judicial notice, that at the mere sight of the police ordinary innocent Kenyans would simply take to their heels. Neither the trial Magistrate nor the first appellate Judge was asked to make that conclusion and we have no basis, evidential or legal, upon which we can make such a conclusion at this late stage. The truth of the matter is that the issues raised before us by the appellant were all matters of facts. They were considered by the Magistrate and he ruled on them against the appellant. The Judge on first appeal also considered them and came to the same conclusion as the Magistrate that the two police officers found the appellant seated with Kenga in the same vehicle, that the appellant jumped out of the vehicle and started running away, and that he was shot by the police who were then able to arrest him. There was reasonable evidence from which a reasonable tribunal, properly directing its mind as to the law applicable to that evidence, could properly convict. There is, accordingly, no legal basis upon which we can, on a second appeal, interfere with the

concurrent findings of facts by the two courts below.

We started this judgment by setting out what the prosecution alleged in the particulars of the charge, namely, that the persons who robbed Samuel were armed with dangerous or offensive weapons, to wit, a pistol and a knife. That evidence came from Samuel who was the actual victim of the robbery. As we set out earlier, the Magistrate found as a fact that the two people who robbed Samuel ***"drew out a knife and pistol"*** . That was what Samuel said. In his judgment, the first appellate Judge set out the ingredients of the offence under ***section 296 (2***) and then stated:

> "If th is evidence was accepted [i.e. the evidence of Samuel] then the appellants being two fitted the charge and as they were even then armed with a knife and a pistol. The offence under S.296 was provable."

The offence was not **"provable"** . The offence charged, namely, robbery under Section 296 (2) of the Penal Code was proved and neither the trial Magistrate nor the Judge had a discretion to reduce it to one unde**r Section 296 (1) of the Penal Code** , any more than a judge would be entitled to reduce a proved charge of murder to one of manslaughter. It is this aspect of the matter which made us, at the commencement of the appeal, to caution the appellant and Kenga of the possibility of our substituting their convictions under Section 296 (1) of the Penal Code with one under Section 296 (2) of the Penal Code. In exercise of the Court's powers under **Section 361 (2), (3) and (4) of the Criminal Procedure Code ,** we set aside the conviction under Section 296 (1) of the Penal Code and substitute it with a conviction under S**ection 296 (2) of the Penal Code** . The consequence of that is that we set aside the sentence of eight years imprisonment, four strokes of the cane and five years of police supervision and substitute them with the only sentence provided under **Section 296 (2) of the Penal Cod**e - namely that the appellant shall suffer death in the manner authorised by law. These shall be our orders in this appeal.

Dated and delivered at Mombasa this 19th day of July, 2001.

B. CHUNGA

CHIEF JUSTICE

R. S. C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR