



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: LAKHA, O'KUBASU & KEIWUA, JJ.A.**  
**CRIMINAL APPEAL NO. 132 OF 2001**  
**BETWEEN**

**DANIEL ENORCH BARASA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at  
Kisumu (Birech, Commissioner of Assize) dated 28th  
February, 2001**

**in**

**H.C.CR.APP. NO. 59 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code that on June 6, 1999 along Accra Street at Neema Enterprises in Kisumu Township, jointly with others not before the court while armed with dangerous weapons namely Pistol and knife robbed Jagdish Chandra Patel of cash Kshs. 90,000/= and a motor vehicle valued at KShs. 790,000/= and at or immediately before or immediately after the time of such robbery used actual violence on Jagdish Chandra Patel.

The appellant was also charged with the offence of being armed with a dangerous or offensive weapon namely a SHE Gun in circumstances, which indicated that he was so armed with intent to commit a felony namely robbery with violence. The third charge was that of being in possession of a firearm without a firearm certificate contrary to section 4 (2) (a) as read together with section 4 (3) (a) of the Firearms Act [CAP.114]. The fourth charge was of being in possession of ammunition without a valid certificate. The appellant was also charged with being in possession of public stores contrary to section 324 (3) of the Penal Code.

The evidence to support these charges was tendered by P.W.2 No.67067 Martin Simiyu Tiege on behalf of the prosecution. In his evidence in chief he said:

*"When we reached Geneva Guest -House, we met two men coming from a corridor between the Geneva Guest House and Kimwa. They began to run away. We chased them and arrested one of them. He had a certificate of appointment of the Police force. We carried out a quick search on him and he was violent and we recovered a small gun hidden on his left leg trouser. This is the certificate of appointment -MFI. 1. This is the gun MFI. 2 which, we recovered from him. It had three rounds of ammunition MFI.3." PC. Simiyu Tiege in cross-examination had this to say: "We recovered the firearm protruding from the left*

*leg. .... We could not tell the make of the firearm. There is no such firearm in the Police force."*

This witness has also stated that PC. Koros recovered the gun from the appellant, but PC. Koros stated that it was PC. Cheboi who recovered it. It is, however clear to us that these witnesses were agreed on one very crucial piece of evidence that the gun was recovered from the appellant. The witnesses were also agreed that the item recovered was a gun though they did not know its name or make.

There is also the evidence of PC. Cheboi (P.W. 4) who forwarded the firearm to the ballistic expert to determine whether the weapon which was recovered from the appellant was a gun and what make. The report of the ballistic expert confirmed that the weapon was a scorpion gun. The Magistrate acquitted the appellant of the offences of robbery with violence and being in possession of public stores. The appellant was, however, convicted of the offences of preparing to commit a felony, being in possession of a firearm certificate and ammunition.

The appellant thereupon appealed to the superior court urging there were material contradictions in the testimony of the prosecution witnesses. One witness did not agree with the other as the exact place the gun was recovered from the appellant and as to which of these witnesses recovered the gun. The other ground of appeal in the superior court was that the gun was not produced in evidence in the Magistrate's court.

Our analysis of the evidence shows that contrary to the assertion by the appellant, the gun was identified in the Magistrate's court as the one recovered by the Police from the appellant. The prosecution had also produced in court the report of the ballistic expert, which showed that the weapon was a gun.

We are also satisfied that the learned judge properly found no merit in the contention that the witnesses called by the prosecution contradicted themselves or that he had shifted the burden of proving the appellant's guilt.

We are accordingly satisfied that the prosecution had proved its case beyond any reasonable doubt and the learned judge did not shift any burden of proof to require the appellant to assume any responsibility of proving his innocence. The appeal is therefore dismissed.

Dated and delivered at Kisumu this 22nd day of November 2001.

**A. A. LAKHA**

.....

**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR