IN THE COURT OF APPEAL
AT NAKURU
(Coram: Omolo, Shah & Keiwua, JJ.A.)
CRIMINAL APPEAL NO. 62 OF 1999
BETWEEN

ANTONY MUMUTO KARUMBA................................APPELLANT
AND
REPUBLIC..RESPONDEN

T (Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Rimita & Mulwa, JJ.) dated 9th July, 1999
in
H.C.CR.A. NO. 98 OF 1995)

JUDGMENT OF THE COURT:

This is an appeal by the appellant against his conviction for robbery with violence contrary to section 296(2) of the Penal Code. The conviction was entered against the appellant by the superior court after hearing his first appeal to that court from a conviction for simple robbery contrary to section 296(1) of the Penal Code and the sentence of seven years imprisonment imposed upon him by Mr. H.K. Bomett, the Senior Resident Magistrate at Nakuru in Criminal Case No. 98 of 1995.

The relevant facts are that on 13th day of January 1995 at about 10.30 a.m. the complainant Amelia Lapot was in her garden when she saw three persons inside the compound of her house and two persons outside the compound. One of them got hold of her and pulled her inside the house, and forced her to lie down. He then tied her hands with a neck-tie, cut the telephone line. He forced her to take him to her room, demanded her key and asked her to open the cupboard under verbal threat of death pointing a gun (which turned out to be a toy pistol) at her. The intruder removed all the things which were in that cupboard including moneys. Another intruder went to her daughter's room. He had a screw driver.

The men then left and the complainant managed to untie herself. Her two employees Samuel Mwachi (P.W.2) and Wilson Atulo (P.W.3) were forced to lie down in the complainant's dining room. In the cash stolen from her were some U.S.A. Dollars in addition to Kenya Shillings.

Two of the intruders, one man and one woman with plaited hair remained at the gate of the house whilst the others were perpetrating the robbery inside.

PW.2, a guard, saw the intruders and was able to identify the first accused, the appellant before us. He told the learned Magistrate that the appellant forced him, PW.3 and one Abigael inside the house and tied them up using neck-ties. When PW2 looked at the appellant, the appellant kicked him. This witness managed to escape when the appellant entered the room. He alerted people who were outside P.W.1's compound.

The appellant managed to escape and ran towards an estate knownP oalsi cKee nhlealnpds .was almost instant and the policemen chased the robbers. PW.2 saw two persons having been shot at Kenlands one of whom was dead and the other still alive. PW.2 identified the two as the ones who had attacked them. The

accused persons were found inside a house. PW.3 gave evidence in substance similar to that of PW.2 except in regard to the chase to Kenlands. He did not take part in the chase. Hellen Mboli (P.W.4), a maid to the complainant, narrated the events of that morning but was unable to identify any of the intruders.

Corporal Chrisantus Obwocha (PW.5) who was on duty at the Divisional Criminal Investigation Department, Nakuru, was informed of the robbery on his walkie-talkie. Upon being directed he gave chase accompanied by other police officers and forcibly entered the Kenlands house where the suspects were said to be holed-up.

There were four men and one woman in the house. The men had locked themselves up in the kitchen and the woman in the bedroom. They refused to surrender. When the kitchen was forced open one man jumped out. He was shot and later had to be hospitalized. The couple who surrendered were charged. A sum of K.Shs.12,260/= and 150 US Dollars were recovered from the appellant's back pocket, together with the toy pistol the appellant was holding in his hand. The appellant led PW.5 to a toilet where he recovered another toy pistol. P.W. 5 produced in court 4 ties which were allegedly used to tie up the complainant and her workers.

In his defence the appellant gave sworn testimony. He said he was carrying out his normal duties as a photographer when he was arrested near the gate. In other words he said that he had nothing to do with the robbery.The learned Magistrate convicted the appellant of the offence of simple robbery as earlier pointed out by us. This he did as the pistol used in the robbery was a toy pistol.

The learned Magistrate considered the appellant's defence but rejected it as he was, according to the Magistrate, identified properly, the toy pistol was identified, cash money (Kenya Shillings & US Dollars) was recovered from him, the toy pistol was found upon him, and another one recovered as a result of the appellant leading PW5 to the place where it was kept.

The appellant appealed to the superior court against both, the conviction and sentence. The learned Judges of the superior court (Rimita and Mulwa, JJ) dismissed the appeal, set aside the sentence of seven years imprisonment and substituted the same with death sentence. Although the learned Judges did not formally convict the appellant of robbery with violence contrary to Section 296(2) of the Penal Code, such conviction is implicit in their judgment. The Judges concluded that when an offender is in company of another during the process of robbery the offence committed was contrary to section 296(2) of the Penal Code.

The learned Judges agreed with the learned Magistrate primarily on the basis that the chain of events leading to his arrest, that is robbery, chase and apprehension, was unbroken. They also considered the fact of recovery of the toy gun and cash from the appellant and held that the learned Magistrate was correct in holding that under those circumstances there was sufficient identification of the appellant and that there was no need of an identification parade.

We have already set out the relevant facts and we see no misdirection on the part of the superior court. The learned Judges re-evaluated the evidence in its entirety and concluded that the learned Magistrate was right, save in regard to conviction contrary to Section 296(1) of the Penal Code. We must mention here that the appellant was warned of the probable consequences, that is, death sentence, before the appeal was heard in the superior court. Despite the court's advise to him the appellant decided to prosecute his appeal. He was entitled to continue with his appeal with the result that at the end of it, the High Court substituted the conviction with one carrying the death penalty. The High Court was bound by law to do so.

We would also wish to point out that counsel for the appellant confined himself to only one ground of appeal, namely, identification during the incident of robbery. We have already pointed out that the identification, coupled with the immediate chase and recovery of relevant items (cash & toy pistol), cannot be faulted.

Despite the appellant's denial there was overwhelming evidence of his involvement in the robbery.

In all the circumstances we have no alternative but to dismiss this appeal and we do so.

Dated and delivered at Nairobi this 17th day of March

2000.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.