



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 110 of 2005

ROBERT THUO MUGO APPELLANT

AND

REPUBLICRESPONDENT

*(Appeal from a judgment of the High Court of Kenya
at Nairobi (Makhandia & Kimaru, JJ.)*

dated 19th February, 2004

in

H.C.CR.A. NO. 205 OF 2000)

JUDGMENT OF THE COURT

The appellant, *Robert Thuo Mugo*, was charged with the offence of attempted robbery with violence contrary to *section 297(2)* of the Penal Code. The particulars of the offence as stated in the charge sheet were that on the *18th day of November 1998* at Nairobi Railway Station while armed with a dangerous weapon namely a pistol jointly with others not before the court attempted to rob *Robert Ondego* of cash *K.Shs.354,148/=* and at or immediately before or immediately after the time of such attempted robbery, used actual violence on the said *Robert Ondego*. The appellant was also charged with two other counts, namely being in unlawful possession of a firearm contrary to *section 4(2) (a)* of the *Firearms Act (Cap.114 Laws of Kenya)* and being in unlawful possession of ammunition contrary to *section 4(2)(a)* of the said *Firearms Act*. The appellant pleaded “*Not Guilty*” and his trial commenced on *24th May, 1993* before the learned Principal Magistrate at Kibera (Mrs. J. Ondieki).

The facts presented to the trial court by the prosecution were brief and somewhat interesting. On the *18th November, 1998* at about 7.40 p.m., ***Robert Ondego (PW1)*** a booking clerk working with the Kenya Railways was being escorted by ***Pc Joseph Kathurima (PW2)*** from the booking office to the strong room at the Nairobi Railway Station platform. Ondego had a cash box containing *KShs.354,148/=*. ***Pc Kathurima***, although not armed, was in police uniform. When *PW1* and *PW2* arrived at the strong room they saw two men coming towards them. These two men ordered *PW1* to drop the cash box. *PW1* hesitated and one of the two men pounced on him. A struggle ensued. On seeing what had occurred the other man fired a bullet at the pair. ***Pc Kathurima (PW2)*** pounced on the man who had fired the bullet.

There was confusion as gunshots were fired from all directions. *PW1* dropped the cash box and ran for his dear life. He went to a nearby restaurant from where he telephoned the Head office and informed them of the unfortunate incident. Meanwhile, as *PW1* was struggling with one of the men, *PW2*, being a policeman, had the presence of mind to confront the man with the firearm. He slapped him hard on the face and held his right hand. He bit him on the nose, grabbed him by his chest and wrestled him to the ground. He grabbed the firearm that the man had and hit him repeatedly on his head. He was using the flat side of the firearm. The man who had the firearm started bleeding profusely from the head where he had been hit by *PW2*. *PW2* also sustained injuries on his arm, both knees, face and chest. When *PW2* saw that he had immobilized the man, he crawled to where the cash box had been dropped and recovered it. The immobilized man was still lying on the ground as *PW2* telephoned Nairobi Police Control Office and as a result members of the Flying Squad arrived. When *PW2* went to the place where he had left the immobilized man lying down he (*PW2*) was surprised not to find him there as he had escaped. The police at the scene called a police dog and a handler. The police dog traced the scent of the man to Rhodes Clinic. Meanwhile ***Patricio Kaberia*** (*PW5*) a security guard was at shed No. 3 of the Railway Station when a man who was bleeding profusely came. *PW5* asked the bleeding man where he was going but on hearing this the bleeding man changed direction and started running away. *PW5* blew his whistle and his colleagues assisted in chasing the bleeding man and arrested him. They took him to the Railways Police Station where he gave a story that he had been attacked by robbers. The man was taken to Rhodes Clinic. The man's injuries were assessed at the Rhodes Clinic to be serious and he was referred to *Kenyatta National Hospital*. Before the man could be taken to *Kenyatta National Hospital* the police led by the police dog arrived and arrested the injured man. The man is the appellant.

As *PW2* struggled with the appellant, ***Inspector Manjani*** (*PW4*) arrived and with assistance of *PW2* managed to get the Pistol Serial No. U11710S from the appellant. In that pistol's magazine were five rounds of ammunition. The firearm and the rounds of ammunition were later examined by ***Mbogo Donald Mbogo*** (*PW3*) a firearm examiner who found them to be in good working condition. ***Mbogo*** (*PW3*) produced his report in evidence which showed that the recovered pistol was a firearm as defined by **section 4(2)(a)** of the Firearms Act. The report also showed that the recovered rounds of ammunition were ammunition as defined under **section 4(2)(a)** of the Firearms Act.

The learned trial magistrate considered the evidence adduced and in the course of her judgment stated:-

“Indeed, the evidence as adduced by the prosecution is wholly overwhelming. It is a trail of accused's involvement in the attempted robbery. PW2 identified the accused more so when he was hitting him all over. After he left the accused for dead, the accused somehow managed to get away only for him to be confronted by the watchman who took him to Rhodes from where he was arrested. As I have said hereinabove, this is simply an open and shut case. The prosecution has proved its case beyond any reasonable doubt.”

Having so stated, the learned trial magistrate proceeded to convict the appellant on all the three counts. In sentencing the appellant, the learned trial magistrate stated:-

“Court:- The accused has offered no mitigation. It is also clear from his previous convictions that he has chosen a life of crime.

Sentence:

On the 1st count, the accused is sentenced to death as is by law required. On the 2nd count, the accused is sentenced to serve 10 years imprisonment.

On the 3rd count the accused is sentenced to serve 10 years imprisonment.

Prison sentences to run concurrently”.

The appellant being dissatisfied by the decision of the trial court filed an appeal to the High Court. In

its judgment dated 19th February, 2004 the superior court (Makhandia & Kimaru, Ag. JJ.) stated:

“The High Court exercising its Appellate jurisdiction in criminal case has to re-evaluate the evidence adduced before the trial court as if it were the court of the first instance, analyse the said evidence and reach its own conclusion as to whether or not the Appellant was properly convicted”.

Pursuant to the foregoing, the learned Judges of the superior court re-evaluated the evidence and in their judgment stated:-

“The evidence of PW2 and PW4 is corroborated by the evidence of PW5 Patricio Kaberia, the watchman who was guarding Railway shed No. 3. He saw a man bleeding heavily coming into the shed that he was guarding. When he asked him where he thought he was going, the man ran away. PW5 blew the whistle and with the help of his colleagues had the man arrested. The man was the appellant. He was taken to the police and then to Rhodes Clinic where he was arrested by PW4 Inspector Rotich and taken to Kenyatta National Hospital for treatment and later charged with the offence now facing him.”

The learned Judges continued in their judgment as follows:-

“We find that the chain of events beginning with the evidence of PW2 to that of PW5 and that of PW4 is such that there is no doubt that it is the appellant who was the person involved in the attempted robbery with violence. PW2 Police constable John Kathurima at the risk of his own life, confronted the appellant disarmed him and was able to injure him sufficiently to disable him and dissuade him from continuing with the criminal enterprise that he had set to undertake.”

The learned Judges then concluded their judgment thus:-

“We find that the learned Principal Magistrate did not err in convicting the appellant. We have independently re-evaluated the evidence adduced before the trial court and we have reached the same decision as the learned trial Magistrate. We find that the occurrence book entries of the day confirm the events as it happened. We find that she was correct in believing the evidence of the prosecution and in disallowing the Appellants defence. At best the defence offered by the appellant can be said to be based on a fiction. In the premises therefore, we see no merit in the appeal filed by the appellant. As a consequence we dismiss it and confirm the judgment of the trial court.”

Being dissatisfied by the foregoing the appellant now comes to this Court by way of second appeal. The appellant has, through his counsel Miss. Goretti Nyariki, canvassed the following four grounds of appeal:

1. **THAT the identification of the Appellant was not proper.**
2. **THAT prosecution failed to call crucial witnesses to testify, thus leaving gaps in the prosecution case.**
3. **THAT the prosecution evidence is marred with contradictions and inconsistencies.**
4. **THAT the trial court failed to give reasons for rejecting the Appellant’s Defence”.**

When this appeal came up for hearing before us on 15th February, 2007 Miss Nyariki made gallant efforts in trying to convince us that the appellant’s conviction was unsafe. She argued her four grounds of appeal with considerable zeal. However, it is manifestly clear that the only substantial point of law raised by this appeal is the issue of identification. Both the trial and the first appellate courts were satisfied that the appellant was properly identified as the man who attempted to rob **Robert Ondego** on the evening of 18th November, 1998 at the Nairobi Railway Station. Miss Nyariki appeared to raise issues relating to the facts of the case in the trial court but we must reiterate that a second appeal (like the present one) must be confined to points of law and this Court would not interfere with concurrent findings of fact of the two

courts below unless they are shown to have been based on no evidence. In KAINGO V. REPUBLIC [1982] KLR 213 at page 219, this Court said:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja v. Republic (1950) 17 EACA 146).”

Having considered the points of law raised in this appeal and the submissions by counsel appearing for the State and the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was indeed inevitable and the superior court was entitled to uphold it.

The only matter that invites our intervention is the sentences meted out by the two courts below. The appellant was sentenced to death on the first count of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code and a jail sentence of **10 years** on the **2nd and 3rd count** for the non-capital offences. In that respect, we need only repeat what we have said severally and more recently in ABDUL DEBANO BOYE & ANOTHER VS. R – Criminal Appeal No. 19 of 2001 (UR) 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 1st 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 sentence 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 sentencing courts will take heed of these simple requirements and act appropriately.”

Also see ABDIHUSSEIN KAIMOI V. R Criminal Appeal No. 47 of 2001 and MUIRURI V. R [1986] KLR 70.

In the result, we dismiss this appeal against the convictions recorded against each of the three counts. We set aside the sentences imposed on *counts 2 and 3* and uphold the death sentence imposed on count one.

These are our orders.

Dated and delivered at Nairobi this 16th day of March, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR