



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 105 OF 2015

REPUBLIC..... APPELLANT

VERSUS

NIXON MANGI

IBRAHIM YAA MANGI.....RESPONDENTS

(From the Original Conviction and Sentence in Criminal Case No. 64 of 2014 in the Chief Magistrate's Court at

Malindi before Hon. Y. A. Shikanda (SRM) dated 28th July 2015)

CORAM: Hon. Justice Reuben Nyakundi

Mr. Mwangi for the State

Respondents in person

J U D G M E N T

The state challenges the decision by the trial Court of acquitting the accused persons of the following counts:

Count 1 - Attempted robbery with violence contrary to Section 297 (1) as read with Sub-Section (2) of the Penal Code.

Count 2 - Attempted murder contrary to Section 220 (a) of the Penal Code.

Count 3 - Attempted murder contrary to Section 220 (a) of the Penal Code

Count 4 - Attempted murder contrary to Section 220 (a) of the Penal Code.

Being aggrieved of the findings and final order, the Director of Public Prosecution on behalf of the state based his appeal on the following memorandum.

(1). That the Learned Magistrate erred in law and fact by acquitting the respondents against the weight of evidence adduced by the prosecution.

(2). That the Honourable Magistrate erred in law and in fact by holding that the ingredients of the offences the respondents were charged with were not established.

(3). That the Learned Magistrate erred in law and fact by relying on extraneous matters to acquit the respondent.

(4). That the Learned Magistrate erred in law and fact by misapplying the law therefore arriving at a wrong decision.

(5). That the Learned Magistrate erred in law and fact by holding that a prima facie case had not been made against the respondents in respect of the charge of attempted robbery with violence.

(6). That the Honourable Magistrate contradicted himself and erred in law and fact by holding in his ruling that the offence of

attempted robbery was not proved in respect to count 1 and holding in his Judgment that the offences of attempted murder had not been proved and the only offence under the circumstances was that of robbery.

(7). That the Honourable Magistrate erred in law and fact by holding that the circumstances for identification of the respondents were not proper and that the identification parade was not carried out properly.

Consequently, the appellant counsel in support of the appeal filed written submissions. The appellant submits that the trial Court misapprehended the provisions of Section 297 (1) and 220 of the Penal Code in manner which occasioned a miscarriage of justice. The appellant urges that all the ingredients of the offences were proved beyond reasonable doubt notwithstanding the misdirection by the trial Court.

The appellant's contends that their rights as public prosecution were violated by the decision of acquitting accused persons who happened to be positively identified and placed at the scene of the crime. He therefore prayed for review of the Judgment and setting aside acquittal orders with a retrial of the respondents afresh.

The respondent

In response to the appeal, it was contended by **Ibrahim Yaa Mangi**, that the indictment was a fabrication arising out a distortion of the truth by the witnesses. He urges the Court to find that the trial Court appropriately applied the principles on the burden and standard of proof to establish that the case was based on suspicions.

The appellant contends that the impugned Judgment is clear on identification and failure on the part of the witnesses to present evidence on the charges filed by the state.

He also faulted the state in filing an appeal after expiry of 14 days and in every way the three-year period delay was never explained. The respondent prayed for the dismissal of the appeal.

Determination

It has long been established that the jurisdiction of the Court springs only from the constitution and the Criminal Procedure Code. That jurisdiction of first appellate Court is clearly stated in the case of **Pandya v R C {1957} E.A. 336 at page 337 and Shantilal M. Ruwala v R {1957} E.A. 570**:

“On first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellate is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellate Court must then make up its mind not disregarding the Judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate Court must be guided by the impression made on the Judge or Magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the Court in differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate Court has not seen. On second appeal it becomes a question of law as to whether the first appellate Court in approaching its tasks, applied or failed to apply such principles” (See also Shantilal M. Ruwala v R {1957} E.A. 570).

Coming to the facts of the case the record indicates that the appellant summoned ten witnesses in support of the indictment. The Learned trial Magistrate examined the evidence and the rebuttal defence by the respondents for purposes of satisfying himself as to whether the burden of proof of beyond reasonable doubt had been discharged.

A novel feature of this appeal is that no new compelling evidence has been disclosed to demonstrate that the Learned trial Magistrate failed to exercise due diligence, including analysis of the witness testimonies. There are several levels of evaluation and scrutiny undertaken by the Learned trial Magistrate in light of the elements of the offence as preferred by the appellant.

On review by this Court, there is no error of Law or fact that stands out in the original Judgment to warrant this appeal’s Court exercise discretion to interfere with the decision. In my view a re-opening of a final Judgment of the trial Court from an acquittal of an accused person, occurs only rarely, even more rare is the re-opening of the final Judgment by the state.

I am of the conceded view that the prima facie evidence by the prosecution was decisive, and taken into account by the trial Court upon which the impugned Judgment was based. The presumption of innocence is contained in our Article 50 (2) (a) of the Constitution. The universal Declarations of Human Rights (Article 11), the International Covenant on Civil and Political Rights (Article 14 (2)), the African Charter on Human and People’s Rights (Article 16). The principle is guilt cannot be presumed before the prosecution proves a charge beyond reasonable doubt and this principle applies until the Judgment is made final.

In the instant case, the burden of proof referred to in **Woolmington v DPP {1935} AC** and **Miller v Minister of Pensions {1942} 3 ALL ER** calls for the state to prove particular facts or set of facts beyond reasonable doubt. The proof standard itself is subject to constraints that appear to damage what might be called the “epistemic legitimacy” of criminal proceedings, generating verdicts that are either factually untrue or factually unsupported. It is widely conceded that, while a trial has the twin objectives of truth and justice, there are various respects in which the goal of justice takes precedence over the commitment to truth. Even so, what the problems to be discussed here suggest is that the Law’s epistemic shortfalls compromise not only the duty to get at the truth of things but also the duty to render justice. In this Section and the one to follow I shall attempt to expose a pair of these difficulties. In so doing, it will become apparent that the two problems together

create at least the strong appearance of a dilemma concerning how criminal verdicts are reached. In Section 3, I will consider ways in which the dilemma might be escaped. In Section 4, I examine implications for the structure of jury deliberations.

Glanville Williams in his book **‘Criminal Law’ Second Edition** has opined that the phrase ‘reasonable doubt’ is virtually indefinable. This concept of ‘reasonable doubt’ is explained by **Justice Cookbur**, as follows:

“It is business of the prosecution to bring home the guilt of the accused to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled to must be such as rational thinking, sensible man fairly and reasonably entertain, not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle skepticism. There must be doubt which a man may honestly and conscientiously entertain.”

It is important to note that the trial Court distilled all the issues raised by the prosecution against the respondent in support of the charges but failed to pass the hurdle to secure a conviction (**See also Section 107 (1), 108 and 109 of the Evidence Act**). Whereas, the state believes, that there was sufficient prima facie evidence, reference to the Judgment contrasts their belief in greater detail.

The view I take of this matter is that the foundation of the case was lost at the trial Court. A second bite at the cherry is unacceptable in absence of substantial and compelling evidence of misapprehension and misdirection by the trial Court. This appeal lacked merit on arrival.

Consequently, the appeal against an acquittal of the respondents is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state
2. The respondents