



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 25 OF 2018

WILFRED THOMAS MWITA alias BABU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 24 OF 2018

SAMWEL MWITA KURUS alias SONKO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being appeals arising from the conviction and sentence by Hon. P. N. Maina, Senior Principal Magistrate in Kehancha Senior Principal Magistrate's Criminal Case No. 496 of 2017 delivered on 20/06/2018)

JUDGMENT

1. The twin appeals were consolidated and heard together since they arose from the same criminal trial before the lower court. The main contention in these appeals was whether the evidence of a co-accused person implicating other co-accused persons would form a basis of conviction without corroboration.
2. The two Appellants herein were jointly charged with one **F.J.M.**, a minor, Tanzanian and hereinafter referred to as '**the Co-Accused**'), with the offence of **Burglary** contrary to **Section 304(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya and **Stealing** contrary to **Section 279B** of the **Penal Code**. Whereas the Appellants herein denied the charges, the Co-Accused admitted the charges and a plea of guilty was entered. The Co-Accused further admitted the facts and she was 'convicted' on her own plea of guilty. Being a minor she was thereafter warned and discharged under **Section 35(1)** of the **Penal Code** and was ordered to be forthwith repatriated to Tanzania.
3. Apart from the Co-Accused who testified as **PW1**, three more witnesses testified. They were **Peter Ombaba** who was the complainant (**PW2**), **Angel Elias (PW3)** and the investigating officer **No. 92430 PC Ahmed Bashir Abdila (PW4)** attached at Isebania Police Station. The Co-Accused testified that the appellants had threatened to kill her unless she gave them the keys to the room where PW2 operated his Music Studio from. By then the Co-Accused was staying with PW3 in PW2's house. PW3 had been employed by PW2 as a house help and the Co-Accused joined PW3 as her friend. The Co-Accused narrated how she gave the keys to the studio to the Appellants at night and who in turn stole most of the equipment therefrom.
4. When PW2 realized the theft he caused the Co-Accused and PW3 to be arrested and were placed in custody. It was when the Co-Accused was in custody that she explained all what had happened. PW4 had the Appellants arrested and he jointly charged the Co-Accused and the Appellants. Apart from the evidence of the Co-Accused there was no any other evidence linking the Appellants with the theft. There were as well no recoveries of any of the stolen items made.
5. The Appellants were tried and found guilty as charged. They were convicted and sentenced to 5 years' imprisonment and 2 years' imprisonment on each limb respectively. The sentences were to run concurrently.
6. It was the convictions and sentences that prompted each of the Appellants to file an appeal. As said, the appeals were subsequently consolidated and Appeal No. 25 of 2018 was ordered to be the leading appeal file. Directions were taken and the appeals were disposed of by way of written submissions and highlighting. Counsel for the Appellants, **Mr. Jura**, strenuously submitted that the convictions were not founded in law for want of corroboration of the evidence of the Co-Accused and ought to be quashed. He relied on several decisions in

support of the submission. Counsel further submitted that the offences were altogether not proved as required in law as there were so many lacunas which were to be resolved in favour of the appellants. There was a further argument that the Charge Sheet was defective and lastly that the sentence was unlawful and illegal.

7. Counsel for the State opposed the appeals and submitted that the charges were proved since there was adequate corroboration.

8. This being the Appellants' first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In discharging the foregone duty, I will first deal with the issue of corroboration. **Article 50(1)** of the **Constitution** provides the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or any other independent and impartial tribunal or body. It must be on the foregone basis that the Appellants contended that the law on corroboration was not properly applied.

10. **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya provides as follows: -

Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

11. The above provision therefore calls for corroboration in criminal cases save in those cases involving sexual offences. Corroboration involves further and independent evidence which only comes up to buttress facts initially tendered in the trial. In this case, the initial evidence was that of the Co-Accused which was in the form of a confession. The confession was proved since the trial court found the Co-Accused guilty as charged when she admitted the facts.

12. The confession in this case was therefore the initial facts tendered before the trial court which facts pursuant to **Section 124** of the **Evidence Act** called for corroboration by other independent evidence. Corroboration in the context of the offences that faced the Appellants herein could have been by way of further evidence of witness(es), the recovery of the stolen items among others. For clarity, a confession cannot at the same time be treated as corroboration. In this case the confession was not therefore corroborated.

13. The need to corroborate confessions was discussed by the Court of Appeal at Nyeri in **Peter Kinyua Ileri vs. Republic Criminal Appeal No. 68 of 2014 (2016) eKLR** that: -

.... Even if it could be held to have been a confession, which it was not, the law is that the statement and evidence of a co-accused person is evidence of the weakest kind since an accused person can implicate another, intending to save himself from blame. See Gopa s/o Gidamebanya & Others vs. Republic Criminal Appeal No. 106 of 1983. (emphasis added)

14. It is that weakest nature of a confession which is usually strengthened by corroboration. The far a properly proved confession can legally go is provided for under **Section 32** of the **Evidence Act** where a court may take such a confession into consideration as against such other person as well as against the person who made the confession. In this case, even if the confession is taken into consideration, but in the absence of corroboration such a confession remains weak and cannot be a basis of a conviction.

15. Respectfully, the trial court erred in basing the convictions on the uncorroborated confession of a co-accused person. Those convictions cannot stand and are hereby quashed accordingly. The sentences are hereby set-aside.

16. As the consideration of the other grounds of appeal will not add any value in this decision, I choose not to deal with them. The upshot is that the appeals are allowed and the Appellants are hereby set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MIGORI this 28th day of March 2019

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Jura, Counsel for the Appellants.

Mr. Kimanathi Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

