



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 98 OF 2015

CONSOLIDATED WITH HCRA NO. 99 OF 2015

GEOFREY MURIITHI Alias GIKUNDI..... 1ST APPELLANT

ROBERT KINYUA PHILIP.....2ND APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

J U D G M E N T

1. The appellants were jointly charged and convicted by Runyenjes Principal Magistrate Hon. B.M. Kimemia with the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code and sentenced to serve eight (8) years imprisonment. The appellants filed separate appeal Nos. 98 and 99 both of 2015 which were consolidated.

2. The petitions of appeal contain three (3) grounds of appeal which are almost identical to both appellants. Firstly it is contended that the trial magistrate conducted an unfair trial by taking evidence in the absence of the appellants. Secondly, that the trial magistrate convicted them on the evidence from a single source, that is of three police officers PW1, PW2 and PW3. Thirdly, that the appellants were not supplied with witness statements thus violating their constitutional rights.

3. The appeal was argued by way of written submissions filed by the parties.

4. The appellants in their submissions explain their grounds of appeal and urged the court to declare that the trial was not fair for their rights were violated. Based on this conviction, the appellants argued that it is in the interest of justice that the convictions be quashed, sentences be set aside and a retrial be ordered.

5. Ms. Nandwa for the respondent opposed the appeal on grounds that the court was determined to conduct the trial in the presence of the appellants. The appellants became uncooperative forcing the court to invoke Section 194 of the Criminal Procedure Code when they voluntarily walked out.

6. The appellants told the court that they wanted to be absent during trial before walking out of the court room. The state argued that law supports the decision of the court to proceed with the trial even in the absence of the accused persons if their conduct makes it impossible for the trial to proceed. The state contends that the rights of the accused person were not violated during the trial.

7. The issues for determination in this appeal as follows:-

(i) Whether the rights to a fair trial under Article 50(2) (f) of the Constitution were violated by

holding the trial in absence of the appellants.

(ii) Whether the rights of the accused persons for a fair trial under Article 50(20)(j) were violated by failing to provide witness statements.

(iii) Whether the case against the appellants was proved beyond any reasonable doubt to sustain a conviction.

8. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **KARIUKI KARANJA VS REPUBLIC [1986] KLR 190** that:-

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

9. Firstly, the court will deal with the issue of law of whether the rights of the appellants were infringed during the trial.

10. Briefly, the history of this case is that the appellants were jointly charged at Runyenjes Court with the offence of preparation to commit a felony. Before the Senior Resident Magistrate Hon. P. Nandi the appellants refused to take plea and said they had no faith in that court. The prosecution withdrew the case under Section 87(a) of the Criminal Procedure Code and registered it in Embu Chief Magistrate court.

11. On 4/06/2015 and 5/06/2015 the appellants appeared before Hon. S.K. Mutai and Hon. Oigara respectively and raised an issue which frustrated the taking of plea. Hon. Oigara referred the matter to the Chief Magistrate Hon. M.N. Gicheru for directions. The appellants had said they had no faith in the two courts without giving any reasons.

12. In 9/06/2015, the prosecutor informed the court that the appellants were now facing two charges as opposed to the single charge as it was before Runyenjes court. The 2nd count was for refusal to allow fingerprints to be taken by police in due execution of duty contrary to Section 55(5) as read with Section 103(a) of the National Police Service Act. The prosecutor asked the court to warn the accused to desist from being confrontational and cooperate with the court.

13. The plea was taken on 10/06/2015 and a plea of not guilty was entered for each of the accused persons in respect of Count I and that of guilty for Count II.

14. The accused persons said they wanted their case heard at Runyenjes. The file was therefore sent to Principal Magistrate Runyenjes for disposal with the following order:-

"Now that the accused are willing to have their case heard at Runyenjes Law Courts, I direct that the file be dispatched thereto. Mention on 15/06/2015. In the meantime accused be remanded at Runyenjes Police Station and to have their fingerprints taken. If the accused refuse to have the fingerprints taken again, necessary force to be used."

15. On 17/06/2015 before Hon. P. Nandi at Runyenjes, the court was informed that the appellants had cooperated with the police in taking their fingerprints. The second count was withdrawn under Section 87(a) of the CPC. The plea was taken afresh as required by the law and a plea of not guilty entered.

16. The case was taken over by Hon. B. Kimemia Principal Magistrate on 24/06/2015 after Hon. P. Nandi was transferred to another station. The prosecutor was ready to proceed with the case in the morning of 13/08/2015. The two accused persons also indicated they were ready to proceed with the case which was given time allocation later in the morning.

17. When the court was re-convened, the accused persons said:-

1st accused – I opt to be absent during my hearing. You can proceed.

2nd accused – I also opt to be absent during my hearing.

18. The court noted that the accused persons had walked out of court and directed that the case proceeds. The evidence of the three witnesses was taken and prosecution closed its case. The court found the accused persons had a case to answer and fixed defence case on 9/09/2015.

19. During the defence hearing, the two accused were present in court. The accused persons refused to give their defences and made the following remarks:-

Accused 1

I will not be calling any defence as the matter proceeded and I did not hear the evidence. You found this file here and the case was here before you came. You came with your laws or you do not understand the law. I have already made an application to the High Court, you can proceed with the case (accused has spoken very disrespectfully to the court bordering on insults to the court).

Accused 2

I will also not call a defence, you came and found this case here and proceeded with it. I do not want to be heard, let the court do what it wants with the case. I have applied to the High court because you seem to be using a different law which we do not know and you are mistaken that you can proceed with the case when we are not there.

20. After making the uncalled for remarks, the accused persons walked out of the court. The learned magistrate gave the accused persons another date for defence hearing. The accused persons attended court on 8/10/2015 and said they were not ready to proceed. They said they wanted another date and the witness statements. The application was allowed and the two were instructed “to collect the witness statements as previously ordered”.

21. The appellants did not pay the photocopying charges and did not collect the statements. The court ordered that the statements be supplied at the court's cost on 5/11/2015. The order was made in their presence in open court.

22. The case came up for defence hearing again on 9/11/2015. This time the appellants said they were not giving any defence because the court heard the case in their absence. They told the court to proceed an “determine the case as it wants”.

23. The court made the following orders:-

The two accused having opted not to call any defence, the defence case is hereby ordered as closed as against the two accused.

24. In deciding whether the appellants was given a fair trial, the court will apply the relevant law and evaluate the facts and evidence on record.

Article 50 (2)(f) of the Constitution provides:-

Every accused person shall have the right to a fair trial which includes the right:-

(f) to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed.

25. These provisions are explained in the Criminal Procedure Code Section 194 which provides:-

Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).

26. It is noted that the appellants were not present during the time the evidence of the prosecution was taken. The court requires to interrogate the reasons for their absence, whether the court denied them their right to be present or whether the absence was voluntary. If the absence was not voluntary, what were the circumstances leading to that state of affairs.

27. The appellants walked out of the court twice during the trial after making disrespectful remarks to the effect that the court could proceed in their absence and make any decision it wished to make. Each of them said:-

“I opt to be absent during the hearing. You can proceed”

28. The Court of appeal in the case of **AGGREY MBAE INJAGA VS REPUBLIC [2014] eKLR** dealt with a similar case. The accused in that case had said. “I won’t participate in these proceedings” (before retiring hastily to the cells).

29. The court observed and held:-

“The trial court then noted that as the accused had left the court of his own accord, it was impracticable to proceed with the hearing in his presence, and therefore ordered that the trial do proceed in his absence. We concur with Mrs. Murungi that the appellant had conducted himself in a manner to render the continuance of the proceedings impracticable by requesting for numerous adjournments whenever the trial court sought to proceed with the matter, and by walking out of court and refusing to participate in the proceedings.

We therefore find no merit in the assertion that the appellant was denied a fair hearing.

30. The appellants in this case had a long history of defiance which started at Runyenjes court when they refused plea to be taken by the Senior Resident Magistrate Runyenjes without giving any reason. It was the first time the pair attended the court which means that they had not met the magistrate in court before and had no reason to refuse the taking of plea in that court.

31. The second incident was the refusal to have fingerprints taken by the police followed by refusal for plea to be taken by the magistrates in Embu Court when the case was transferred there.

32. Finally, the appellants refused on their own accord to participate in the trial. After the first walking out incident following which the evidence of the prosecution witnesses was taken, the court accommodated the appellants by adjourning the matter three times so that they could participate in the defence. Each of them said: *“I will not be calling any defence”*

33. The absence of the appellants from the trial was voluntary expressed very candidly and disrespectfully to the court. The trial magistrate did the best she could to accommodate the appellants whose conduct bordered on contempt on the face of the court. It was a scheme designed to make it impossible for the trial to take place. The pair talked in unison which was evidence of preparation to defy and intimidate the court not to conduct the trial.

34. The magistrate explained in details the unbecoming conduct of the appellants in court in her judgment which was carried from one court to another. This exonerates the magistrate from any bias against the appellants. It was also explained that the appellants finally decided to be absent from the proceedings. Article 50(2)(f) empowers the court to proceed in the absence of the accused person where his conduct makes it impossible for the trial to proceed. This was one such case but before the magistrate made that pronouncement, the appellants opted to be absent.

35. As for the witness statements, the state has a duty to supply to the accused person as stipulated by the law.

36. The court ordered on three occasions that the appellants be supplied with witness statements and directed that they pay photocopy charges. The reason for this cost was not explained by the court. However, I take judicial notice that the prosecution sometimes have shortage of funds and sometimes no office equipment/machine to do photocopying. During such times the prosecutor may make such a request before the court.

37. If the accused persons cannot afford the photocopying charges, the court is informed and further directions may be given to ensure the statements are supplied. In this case, I note that the appellants did not give any indication to the court whether it was within their means to pay photocopying charges. However, the court went further and directed that the statements be supplied at the cost of the court. Most courts have photocopying machines and I believe this is the facility that the magistrate had in mind.

38. The issue of statements was not brought to the attention of the court again and the matter ended there. It would be assumed unless the contrary is proved that the statements were supplied to the appellants. I suppose that if the statements were not supplied, the issue would have been raised in court and recorded in the proceedings. I reach a conclusion that this ground of appeal has not been proved.

39. I therefore come to the conclusion that the appellants were not denied their constitutional rights and that they were given a fair trial by the honourable magistrate. The other issue for determination is whether the prosecution proved the case against the appellants beyond any reasonable doubt.

40. The evidence of the prosecution witnesses was that the three police officers PW1, PW2, PW3 were on patrol duties within Runyenjes township on 25/3/2015. At around 3.00 a.m. they were at Runyenjes Bus stage opposite Kirima Bar. Aided by light of motor vehicles, they saw the appellants hiding at a wooden structure used for shoe shine business. They ordered them to stop and arrested them. They found a metal crow bar and an axe at the place of arrest.

41. Upon conducting a personal search on the appellants, the officers recovered some implements from the 1st appellant, a knife and a luminous handle inside the sock of the left leg. From the 2nd appellant, a pair of pliers was recovered tucked in the waist.

42. The appellants were arrested and escorted to Runyenjes police station where they were charged. On interrogation at the scene, the appellants said they were watchmen of Kisima bar implying that they were on duty. The owner of Kisima Bar was summoned and he said that he did not know the appellants and that they were not their employees.

43. At the close of the prosecution's case, the court explained the rights of defence in accordance with Section 211 of the Criminal Procedure Code to the appellants who said they did not wish to offer any defence.

44. The appellants were arrested in possession of crude weapons namely an axe and a crowbar. A pair of pliers being an implement normally used for house-breaking, a luminous handle and a knife were found in their possession. The two were together and went to hide upon seeing the officers approaching.

45. The appellants were armed with crude weapons which confirms that they were prepared or were preparing to commit a felony. This may have been robbery or any other felony the implements in their possessions and hidden in their clothes are mostly used by thugs for house or shop breaking. They were arrested at a very odd hour of 3.00 a.m. when most law abiding citizens were resting in their houses to prepare to go to work in the morning. They did not explain why they went to hide after seeing the police and still went further to their identities.

46. In the absence of any explanation by the appellants as to what they were doing at the commercial area of the town at 3.00 a.m. armed with dangerous weapons and with house breaking implements, the

inference may be rightly drawn that they were preparing to commit a felony of robbery or that of shop-breaking.

47. I am in agreement with the findings of the learned magistrate that the evidence of the prosecution was overwhelming against the appellants. The ingredients of the offence were established and the evidence was evaluated as required by the law.

48. The conviction was based on cogent evidence and I find it was safe.

49. Section 308(1) of the Penal Code provides for a sentence of not less than seven (7) and not more than fifteen (15) years imprisonment. The sentence imposed by the learned magistrate was therefore within the law.

50. I find that the conviction was safe and sentence lawful and are hereby upheld.

51. The appeal is accordingly dismissed.

52. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF FEBRUARY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Both appellants

Ms. Nandwa for Respondent