



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. 41 OF 2014
(CONSOLIDATED WITH)
CRIMINAL APPEAL NO. 42 OF 2014

JOHN KINYUA KARIUKI.....1ST APPELLANT

BENJAMIN MURIUKI CUBI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence of the

Resident Magistrate's Court (S. Ngii) at Wanguru, 358 of 2013

dated 16th July, 2014)

JUDGMENT

1. **JOHN KINYUA KARIUKI and BENJAMIN MURIUKI CUBI** , are the appellants in this appeal which was consolidated with appeal No. 42 of 2014 a related appeal filed by the 2nd appellant from the same conviction in Wanguru Resident Magistrate's Court Criminal Case No. 358 of 2013. The appellants were charged with three counts namely; (i) Causing grievous harm contrary to **Section 234** of the **Penal Code**.

(ii) Assault causing Actual bodily harm contrary to **Section 251** of the **Penal Code**. The particulars were that on the 15th March 2013 at Thiba Kasarani within Kirinyaga County the appellants jointly with others not before court unlawfully assaulted Ann Wanjiru Kariuki occasioning her actual bodily harm.

(iii) Malicious damage to property contrary to **Section 339 (1)** of the **Penal Code**. The particulars were that on the 14th March, 2013 at Thiba Kasarani village in Kirinyaga County jointly with others not before court willfully and unlawfully damaged the house of Ann Wanjiru Kariuki.

2. Both the appellants denied the charges and the case went for full trial whereupon the trial court acquitted them on the first and second counts but found them guilty of the 3rd count. They were each

convicted and each sentenced to serve 1½ years imprisonment. They were aggrieved by both the conviction and sentence but before I can consider the grounds, it is necessary to consider the case and evidence against them in summary and this is in regard to the 3rd count which is the subject of this conviction.

3. The appellants were initially charged with causing grievous harm to Josphat Kariuki Wainaina and assaulting Ann Wanjiru Kariuki. Later on on 3rd February, 2014, the prosecution amended the charge to include a 3rd count which was willful and malicious damage to the house belonging to Ann Wanjiru Kariuki. According to the complainant Ann Wanjiru Kariuki (P.W.2), people went to her house on 15th March, 2015 at around 2 a.m. wanting to cause further harm to her husband Josphat Kariuki Waweru who then was admitted in hospital following an earlier attack on him. She told the trial court that she saw John Kinyua the 1st appellant herein holding a panga and Benjamin Muriuki the 2nd appellant holding a metal claw bar. She stated that there was moonlight and was able to recognize the five people inclusive of the two appellants herein. She claimed that she was assaulted by the first appellant as the rest of the assailants were demolishing her house. She told the trial court that she ran for her safety and sought help from the Area in charge and the Police who accompanied her to the scene but found the house damaged. The culprits were not found at the scene.

4. P.W. 2 further testified that she found the same people demolishing the same house on 16th March, 2013 at 7 p.m. when she went back to check on the house. She stated that she was accompanied by another witness **Christine Njoki (P.W.5)**. She further told the trial court that she knew the appellants herein well as they are from the same village. Asked under cross-examination why she had decided to go at night to check on her house, she responded that she did it owing to her own convenience.

5. P.W. 5, (Christine Njoki) told the trial court that she was at the complainant's home when some people broke the gate and entered their house at 2 a.m. on 16th March, 2013. According to her 5 people broke into their house and started threatening them before demolishing the house. She was able to identify the 1st and 2nd appellants from the attackers before fleeing the scene for safety in a neighbour's homestead where they slept. She also told the trial court that she was able to identify them because of the moonlight. She however, told the court that the 1st appellant was the only person known to her prior to the incident and that she did not know the 2nd appellant Benjamin Muriuki Cubi.

6. The investigating officer in the case **Abdi Jabal Omar (P.W.7)** gave evidence at the trial court on how he received a report concerning the crime and visited the scene together with 2 other police officers. He told the trial court that they found the house completely destroyed. He further stated that photographs were taken though he did not say who took the photographs or who processed them but nonetheless he was allowed to produce them as Exhibit 6(a) – (e) and Exhibit 7.

7. In their sworn defence the appellants denied the offence and both raised alibi as their defence. The first appellant on his part told the trial court that the complainant's husband Josphat Muriuki (P.W.1) who was also seriously injured in the attack was his friend as they were in an acrobating group that used to stage shows in various places for a living. He told the trial court that P.W.1 had taken a loan from the group and defaulted in payment which resulted in a suit being filed. He produced a copy of a decree in a civil case No. 76 of 2011 as Defence Exhibit 1 which showed one Milton Mwai Mbunya as the plaintiff and Josphat Kariuki Wainaina as the defendant and judgment debtor. He explained that the said Milton Mwai Mbunya was the chairman of the group. He was however, at pains to explain the nexus between himself and the group as all he could show in court to demonstrate the fact were photographs of the group performing. The prosecution objected the production of the photographs as it did not indicate who had taken them and who had processed them. The objection was upheld by the trial court.

8. The 2nd appellant, Benjamin Muriuki Cubi told the trial court that he was away from his home at Kiratina, Kasarani village at the time and that he had been away in Mbondoni for a month. He accused the prosecution witnesses of lying that he was at the scene of crime at the material time. He stated that he came back home when the house had been demolished by villagers.

9. **D.W. 3 John Muriithi Githina** testified on behalf of the appellants and told the trial court that at the material time he was the village in charge and that on the 14th March, 2013 at night he was attracted by screams of some people at the home of the complainant and on going there he found many people demolishing the house. He could not identify any of the people but confirmed that Josphat Kariuki was being accused for being a thief. He told the trial court that he called the area chief who mobilized Administration Police officers to come to the scene and arrested one Murimi Gikonde. He conceded under cross-examination that he was no longer the area in charge as he was demoted in June 2013. He however, denied that his demotion had anything to do with this case.

10. The trial court upon assessing and evaluating the evidence found the prosecution case had been proved beyond reasonable doubt in regard to the 3rd count of malicious damage to property and convicted the appellants to serve 2½ years imprisonment. In convicting the appellants the learned trial magistrate dismissed their defence as an afterthought. He also overruled the appellant's contention that count III could not stand in law because it was introduced later through an amendment after the eye witnesses had testified.

11. The appellants were dissatisfied with the trial court's finding on conviction and sentence and preferred this appeal citing the following grounds namely:-

- i. *That the trial magistrate erred by shifting the burden of proof from the prosecution to the appellants.*
- ii. *That the learned trial magistrate erred by misinterpreting the provisions of Section 14 in favour of the prosecution.*
- iii. *That the learned magistrate erred by not considering that the offence of malicious damage to property was introduced as a fresh charge which required fresh evidence to be adduced.*
- iv. *That the trial magistrate erred by delivering judgment in the absence of the appellant's counsel and denied the appellants their constitutional right under Article 50 (2) (g) of the Constitution.*
- v. *That the trial magistrate erred by contravening the provisions of Article 50 of the Constitution rendering the prosecution a mistrial.*
- vi. *That the learned trial magistrate erred in law and fact by applying double standards in acquitting the appellant on the first 2 counts and convicting them on the 3rd count on the same evidence.*
- vii. *That the sentence meted out against them was harsh and excessive.*

12. This appeal proceeded by way of written submissions and both counsels were given a chance to highlight their submissions. The appellants in their written submissions filed through their learned counsel M/S Nduku Njuki Advocate submitted that the provisions of **Section 214** of the **Criminal Procedure Code** was misapplied in their case as the amendment introduced a new charge when 2 witnesses had already testified and the two witnesses were never recalled despite their application to recall the witnesses. In their view failure to recall the witnesses meant that the only evidence available to court was the evidence of P.W.3, P.W.4, P.W.5 and P.W.6 and that the evidence of P.W.5 who was the only eye witness required corroboration as per the provisions of **Section 124** of the **Evidence Act** which corroboration was lacking in the prosecution case.

13. The appellants faulted the learned trial magistrate for finding on one hand that the complainant gave contradicting evidence in respect to count two and at the same time found her evidence consistent in regard to count III arguing that both count II and count III was committed in one single process. The appellants contended that the learned trial magistrate used double standards in the two counts which in their view was erroneous.

14. They further faulted the pronouncement of the judgment in the absence of their advocate when they were entitled to legal representation. In their views there was miscarriage of justice when the court disregarded this right.

15. It was further contended that the learned trial magistrate brushed aside the defence put forward by the

appellants without considering it and giving it the same attention it deserved and that had the trial court considered the defence a different conclusion could have been arrived at.

16. The respondent through written submissions made by **E. P. O. Omooria** learned principal prosecuting counsel, opposed this appeal. According to, Mr. Omooria the prosecution proved their case in respect to count III as the evidence adduced were overwhelming. He responded to the appellants' contention that there were contradictions and inconsistencies apparent in the prosecution case by submitting that the evidence of P.W.2 was consistent with the evidence of P.W.1 and went on to demonstrate that the evidence was corroborated with the evidence of P.W.5. The respondent submitted that the appellants were positively identified by P.W.2 and P.W.5 with the help of a moonlight.

17. On the question of recall to the witnesses who had testified before the amendment which introduced the 3rd count, the respondent contended that they were not opposed to the recalling of the witnesses and that the appellants had the liberty to recall them.

18. It was further submitted that the finding of contradictions apparent in count I and II did not substantially affect the charge in count III which in his view was free from contradictions. Mr. Omooria faulted the appellants' counsel for deliberately absenting himself on the date of the judgment yet he was fully informed of date because the date was fixed in his presence. It was contended that the absence of the appellants' counsel did not prejudice them in any way as they were granted their right to appeal within 14 days after the date of judgment.

19. I have considered this appeal and the submissions made by both counsels. I have narrowed down the evidence adduced and submissions made to the relevant facts in respect to the 3rd count for which the appellants were found guilty.

20. To begin with the 6th ground of appeal where the appellant took issue with the fact that judgment was delivered in the absence of their counsel, I have looked at the record and noted that the date for judgment at the trial court was fixed on 16th June, 2014 and the defence had testified and their oral submissions made through their learned counsel. The trial court fixed the judgment date for 16th July, 2014 in presence of both the defence and prosecution and the record shows that the trial court duly delivered the judgment on the scheduled date but the defence counsel was absent and no excuse or reason was given to explain his absence. The appellants also did not raise an objection to the judgment being delivered. It is my finding that the trial court was not at fault in delivery of the judgment on the scheduled date. The delivery of the judgment did not occasion any miscarriage of justice or infringe any of their constitutional right. I agree with the prosecution's contention that the appellant was granted their 14 days right of appeal which they duly exercised by lodging this appeal. That ground of appeal in my view is not well taken and does not hold any water.

21. On the issue of amendment of the charges by the prosecution and the introduction of an additional charge, it is important to look at the purpose and the import of **Section 214 (1) of Criminal Procedure Code** in the context of this appeal. **Section 214 of Criminal Procedure Code** provides as follows:-

“Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case.”

It is therefore apparent that the prosecution (or even a court on its own motion) can at any stage of the proceedings before the close of prosecution case, move to alter the charge even after witnesses have testified like the scenario in this case. There are however, safeguards to an accused person provided under **subsection (i) and (ii)**. Under **subsection (i)** an accused person is required to be called upon to plead to the altered charge as a first step to qualify the operations of **Section 214 (1) of the Criminal Procedure Code**.

22. I have looked at the record and have noted that the trial court in this case complied with this section as the appellants were called upon to plead to the charge which they did by denying the charge. The trial court was in order upto that stage and I find no irregularity in the proceedings or anything unconstitutional about the cited provision of law. The problem in my view at the trial court occurred in the application of the second safeguard provided by law to the appellants. **Subsection (ii)** states as follows:

“Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate.....”

I have noted that when allowing the prosecution to amend the charges facing the appellants the trial court took into account the fact that there were “specific safeguards in such circumstances spelt out in law.” It is also true as the appellant’s counsel submitted that a right to a fair trial under **Article 50** of the **Constitution** include among other things a right to be informed in advance of the charge with sufficient detail to answer to it and be given adequate time to prepare a defence. This right includes a right to cross-examine a witness on the evidence adduced. This Court finds that the legal safeguards provided by the provisions of **Section 214 (1), (2) and (3)** are sufficient and are in line with the above cited constitutional requirements to a fair trial. This Court finds that the trial court fell into error when applying the above cited provision and the constitutional requirements. The appellants duly applied to have the 2 witnesses who had testified recalled but the same though allowed was not effected and this in my view amounted to prosecution by ambush which is abhorred in the Constitution. The prosecution was required by law to recall the witnesses who had earlier testified because when they testified the appellants knew the charges they were facing. This of course changed upon alteration of the charge which introduced 2 additional grounds after the 2 witnesses had already left the dock. The trial court in my view failed to apply the safeguards spelt out in the law and which he had himself noted when allowing the prosecution to amend the charges. This failure resulted to a mistrial because the appellants were not provided with an opportunity to cross-examine the witnesses over the new additional charges. The trial court was obligated to recall the witnesses especially after the appellants applied for the same.

23. I have also considered the issue raised the by appellants about the contradiction findings by the trial court. The trial court in its ruling on whether there was a case to answer found that the evidence of P.W.3 and P.W.5 had credibility gaps. That finding is in my view, irreconcilable with the court’s findings in its judgment when it gave weight to the evidence of the same P.W. 5. I have to agree with the appellants that once a witness is found unreliable on a given fact, such witness cannot be relied upon to find a conviction. It is apparent that the learned trial magistrate applied double standards on the evidence of the witness. I have re-evaluated the evidence given by P.W. 5, Christine Njoki and I find that the trial court had reasons to doubt her credibility. She told the trial court under cross-examinations that she was staying with the complainant but when asked whether she was running away from the Police for being a suspect she first denied but on being shown the Occurrence Book detailing her apprehension by Police, she conceded that she had in fact been arrested on the material date on 16th March, 2013. This in my view casted doubts about her credibility and to the extent that the trial court found her unreliable in respect to count I and II, it was erroneous in law to find her a reliable witness in regard to count III. This error in my view affected the assessment by the trial court of the prosecution case and had the trial court properly directed itself to the anomaly perhaps the conclusion on the guilt of the appellant could have been different.

24. It is also my considered view that the defence put forward was not properly considered particularly in the context of identification. The prosecution witnesses (P.W. 2 and P.W.5) told the trial court that they recognized the appellants with the assistance of the moonlight. It is true that at times a moonlight especially when the moon is full and when the skies are clear can be sufficient for one to be identified at night. However there was no evidence adduced to suggest that these conditions existed. P.W. 5 told the trial court that he did not know the 2nd appellant prior to the incident. If this was true, how did she identify or pick him out from the crowd that was destroying the house? There was no identification parade conducted which if positive could have corroborated her evidence on identification. I have considered what D.W. 3 John Muriithi Gichina told the trial court. He told the trial court that he was at

the material time the village in charge and that when he went to the crimes scene after being attracted by screams he found many people demolishing the house but could not identify any. Although the reasons for not being able to identify any of the people were not interrogated, I find that the conditions for positive identification were not proved beyond reasonable doubt. I also find that the trial court failed to address its mind properly on the question of positive identification. I find the respondent's contention that the identification was positive and beyond reasonable doubt unsupported by evidence adduced. The evidence on identification was not corroborated as required under **Section 124 of Evidence Act**.

25. I also find that there were inconsistencies on the prosecution case at the trial court. The complainant (P.W.2) told the trial court that her house was demolished on 2 occasions on the night of 15th March, 2013 and again on 16th March, 2013. The Charge Sheet however, indicates that the destruction of the house was on the 14th March, 2013. Although I find the inconsistency to be insignificant and curable under the provisions of **Section 382 of the Criminal Procedure Code**, the same when taken in the overall context of prosecution case should have created doubt in the mind of the learned trial magistrate.

26. This Court has also noted from the proceedings that the evidence adduced by P.W.7 P.C. Abdi Jabal Omar, the investigating officer in the case particularly the photographs produced as exhibits 6 (a) – (e) and Exhibit 7 was improper as the provisions of **Section 78 (1) of the Evidence Act** was overlooked. The officer who took the photographs of the scene of crime and the destruction of the house was not given. It was therefore unclear if the officer was duly gazetted to carry out the exercise as required by law. In addition to this anomaly, though the officer who printed the photographs one Mr. Rueben T. Manyara was duly gazetted as per Prosecution Exhibit 8, the investigating officer was not competent to produce the report and the printed photographs as he did not lay basis by showing how long if at all they had worked with the said officer to be familiar with his signature or handwriting. A gazetted officer in my view who had worked with the said officer and who was conversant with his signature should have been summoned to tender the evidence if the officer could not be found for one reason or the other. This was an anomaly which was not addressed in this appeal but which I found necessary to address although the same has not affected the direction of this appeal.

27. In conclusion I find that this appeal has merit. The prosecution case for the reasons highlighted was not proved beyond reasonable doubt. The non-recalling of prosecution witnesses particularly P.W. 2 was fatal to the prosecution case. The evidence of P.W.5 was unreliable and needed corroboration which I found lacking in the prosecution case. The conviction of the appellant in the circumstances was erroneous and it is on that premise that I allow this appeal. The conviction is quashed and automatically having found conviction wanting the sentence cannot stand. The same is reversed and the appellants shall be set free forthwith unless lawfully held. Any security deposited shall be released to the depositor. It is so ordered.

Dated and delivered at Kerugoya this 23rd day of May, 2016.

R. K. LIMO

JUDGE

23.5.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant: 1 - present

2 – present

Interpretation English – Kikuyu

Mwangi for Nduku for appellant present

Sitati for State present

COURT: Judgment signed, dated and delivered in the open court in the presence of Mwangi holding brief for Nduku for appellant and Mr. Sitati for respondent.

R. K. LIMO

JUDGE

23.5.2016