



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 81 OF 2015 & 82 OF 2015

AVID KARIUKI MUNYI.....1st APPELLANT

AND

RICHARD KINYUA MUGO.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR 1401/14 at the Embu Chief Magistrate's Court by Hon. M.N. Gicheru - CM on 6th October, 2015)

JUDGEMENT

1. In these two consolidated appeals, the appellants have appealed against their conviction and sentence of 6 years in respect of the offence of handling stolen property contrary to section 322 (2) of the Penal Code (Cap 63) Laws of Kenya, which was imposed upon them by the court of the Chief Magistrate on 6th October, 2015 at Embu. The 2nd appellant (Richard Kinyua Mugo) alone has appealed against his conviction and sentence on a charge of handling stolen property contrary to section 322 (2) of the Penal Code, which was imposed by the same court on the same date.

2. Ms Mbae on behalf of the respondent supported both their convictions and sentence.

3. The appellants were convicted both on the direct evidence of Ibrahim Juma, the complainant (PW 1) and the circumstantial evidence of PC James Ondiek (PW 3) and Patrick Mwangi (PW 4). The evidence of these two police officers was that they arrested the appellants while on routine duties at Difathas Market. They found the appellants in possession of the stolen motor cycle of the complainant which had been robbed from him a few hours away on the same day. In particular, the two police officers found the two appellants pushing the motor cycle of the complainant at Difathas market.

4. The 2nd appellant gave sworn evidence and described himself as a peasant farmer who also sells farm produce at Kutus market. He further testified knowing nothing about this case. His further evidence was that on the material day he was busy selling tomatoes in Mumbo area in South Ngariama and that after finishing his business of selling he went to his home. Thereafter, he was called at night to a place called Gathoge where he went to collect crates. It is at that place that he saw people chasing one another. Shortly thereafter, he was arrested by PC Mwangi (PW 4) whom he had known before. He was then made to sit down and from there he was taken to the police station with a motor cycle which was loaded onto the said motor vehicle.

5. Finally, he testified that he asked PC Mwangi (PW 4) as to why he was always after him. In response, PC Mwangi told him that his father was a witness in a case where PC Mwangi was the accused. While under cross-examination, he denied knowing the driver who was bringing the crates. The essence of his evidence was that he was innocently arrested at the scene of the crime.

6. David Kariuki Munyi, the 1st appellant, also gave sworn testimony in his defence. He testified that he was a businessman selling miraa at Makutano near Mwea junction. After crossing his business, he went to the bus stage with the unsold miraa and waited for a motor vehicle to take him back to Embu. He boarded that matatu and upon arrival at Difathas market stage he was told to alight from the matatu, because he was an excess passenger. The reason given was that there was a police crack down on motor vehicles at that stage. He then had to wait for another matatu. After waiting for sometime, no matatu arrived on the scene. As a result, he decided to walk towards Gathoge. At Gathoge, he heard people speaking on the right side of the road who told him to stop and he did so. Those people punched him and he fell in a ditch as a result. He realized that one of those people was a police officer who was armed with a firearm. This police officer arrested him and took his touch screen phone and took him to Embu while in handcuffs.

7. Like the second appellant, the essence of his evidence was that he was arrested innocently while walking at Gathoge. He also did not call any witnesses in his defence.

8. Both appellants in their petitions of appeal have raised common grounds in this court. For this reason, I will rely on the petition of appeal of David Kariuki Munyi in Criminal Appeal No. 81 of 2015. Findings in this regard will apply to the appeal of Richard Kinyua Mugo who is an appellant in Criminal Appeal No. 82 of 2015.

9. In ground 1, David Kariuki Munyi has stated the unchallengeable fact that he did not plead guilty. In ground 2, he has faulted the trial court for relying on the contradictory and uncorroborated evidence of the two police officers (PW 2 and PW 4), in respect of the recovery of the motor cycle and other exhibits produced by the prosecution. In this regard, he has attacked the credibility of the two prosecution witnesses. The evidence of the two police officers was that they were on routine duty at the scene of the crime when they saw the two appellants pushing the motor cycle of the complainant (PW 1) at Difathas market. After considering the evidence of these two witnesses, I do not find any contradictions in their evidence and I also find that they were rightly believed as credible witnesses by the trial court. For this reason, this ground of appeal is without merit and is hereby dismissed.

10. In ground 3, the appellant has faulted the trial court for failing to consider that he was arrested at a different place from the alleged recovery of the motor cycle. The evidence of the two police officers in this regard is that they were guarding an accident vehicle along Embu Nairobi Road at Difathas when they saw a motor cycle coming from their direction. Upon approaching a hill, it stopped and the police checked three pillion passengers, two of whom are the two appellants in this case. They told the police officer that the motor cycle they were pushing had ran out of fuel. One of them had a knife, which the police officers picked. The police officers then handcuffed two of them and in the process one who was pushing the motor cycle escaped. The two appellants were arrested at that scene. It is therefore not correct that this appellant was arrested at a different place from where the motor cycle was recovered. It therefore follows that this ground is without merit and I hereby dismiss it.

11. In ground 4, the appellant has faulted the trial court for failing to consider that there was no independent witness to support the evidence given by the two police officers in respect of the recovery of the motor cycle and the other prosecution exhibits. I find that the police officers were not accomplices in this offence and there is therefore no reason to require that their evidence needed independent evidence to support them. In the circumstances, this ground of appeal is without merit and I therefore dismiss it.

12. In ground 5, the appellants have faulted the trial court for failing to consider that the police officers made no inventory of the exhibits recovered at the scene. This according to them shows that nothing stolen was recovered during the arrest. I have considered the evidence of the two police officers and I find that they produced all the exhibits that were recovered from the scene. It is true that the police did

not prepare an inventory of what they recovered from the appellants. I find that the omission to make an inventory of what they collected at the scene of the crime did not in any way prejudice the case of the two appellants. In other words, it is a curable defect within the meaning of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

13. In ground 7, the appellant has faulted the trial court for rejecting his defence without good reasons which he states is in violation of section 169 (1) of the Criminal Procedure Code. I have considered the judgement of the trial court and I find that the appellants were found in possession of stolen properties within a few hours following the commission of the offence. It is also to be noted that both appellants gave sworn testimony. I find that they were rightly disbelieved, which is a finding of fact based on their demeanour in the trial court. It is clear from the findings of the trial court that there are two main reasons why their defences were rejected. The first one being that there was ample evidence which supported the conviction entered against both appellants. The second reason is that the evidence of the two appellants was found to be incredible. And for this reason, I find no merit in this ground of appeal which I hereby reject.

14. It is important to point out that Richard Kinyua Mugo in ground 8 has faulted the trial court for failing to consider that there was a grudge between Patrick Mwangi (PW 4) and his father. It is clear from the judgement of the trial court that the issue of the alleged grudge was considered and rejected. In this regard, the trial court found that the two police officers PW 3 and 4 had no reason to lie against the two appellants, and in particular stated as follows: *“I do not believe that PC Mwangi fixed the accused in this case because of a grudge over the accused's father being a prosecution witness against PC Mwangi in a murder case. I believe that PC Mwangi had previously know (sic) the accused because the accused had other cases that PC Mwangi knew of”*. In the circumstances, I find that the issue of the alleged grudge was considered and rightly rejected by the trial court.

15. This is a first appeal. As a first appeal court I am required according to ***Peters v. Sunday Post Ltd (1958) EA 6*** to reassess the evidence and make my own conclusions based on the evidence produced at trial. I have done so and I find that the two appellants were convicted on ample evidence. They should count themselves lucky to have been acquitted on a charge of capital robbery in view of the evidence that they were found in possession of the stolen motor cycle within hours after the robbery had been committed against the complainant (PW 1).

16. It is equally important to point out that the trial court according to ***Court of Appeal in Kantlal Jivrajv v. R (1962) EA 6*** was required not to make any finding in respect of the charge of capital robbery, because of the conviction that was entered in the alternative counts. In other words, it should have not made any finding in respect of count 1. However, this did not occasion a failure of justice in terms of section 382 of the Criminal Procedure Code (Cap75) Laws of Kenya.

17. In ground 6, the appellant has faulted the trial court for imposing a custodial sentence of six years without giving him the option of a fine. Sentencing in terms of section 28 of the Penal Code is a matter for the discretion of the trial court. In sentencing the two appellants, the trial court took into account that they were first offenders. It also took into account that they had been in remand custody for over one year. That court went further to consider their mitigation. It also took into account that the offences were committed deliberately and were well planned. Furthermore, it also took into account that the violence used against the complainant left him unconscious. I find no misdirection in law or in fact in the sentencing principles followed by the trial court. In the circumstances, the sentence of 6 years imprisonment imposed upon both appellants in the first alternative count was well merited and very lenient. I also uphold the sentence of 3 years imprisonment that was imposed upon Richard Kinyua Mugo in the second alternative count.

18. The upshot of the foregoing is that the appeals of the two appellants are hereby dismissed in their entirety.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **30th** day of **NOVEMBER 2016**

In the presence of both appellants and Ms Mbae for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

30.11.16