



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 148 OF 2013

PETER MURIGE MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Kangema Senior Resident Magistrate's Court Criminal Case No. 27 of 2010 (Hon. D.Orimba) on 1st July, 2010)

JUDGMENT

The appellant was charged with the offence of house breaking contrary to **section 304 (1)** and stealing contrary to **section 279 (b)** of the Penal Code. From the particulars of offence, the appellant is said to have broken and entered the dwelling house of Samuel Kanyoro Murigia with intent to steal and did steal therein two cocks worth Kshs 2000/- the property of the said Samuel Kanyoro. This happened on 18th January, 2010 at Katharaini in Murang'a district within central province.

In the alternative, the appellant was charged with the offence of handling stolen goods contrary to **section 322(2)** of the Penal Code. Initially, this count had been entered in the charge sheet as a second independent count. It was alleged that on 18th January, 2010 at Katharaini in Murang'a district within central province otherwise in the course of stealing the appellant dishonestly retained two cocks the property of Samuel Kanyoro Murigia knowing the same to be stolen.

The appellant also faced the second count of assault causing actual bodily harm contrary to **section 251 of the Penal Code**. This count was included by way of amendment to the original count. In this particular count, it was alleged that on 18th January, 2010 at Katharaini in Murang'a district within central province, the appellant unlawfully assaulted Samuel Kanyoro Murigia thereby occasioning him actual bodily harm.

The learned magistrate convicted the appellant and committed him to jail for five years under **section 304 (1)** of the **Penal Code** and seven years under **section 279 (b)** of the **Penal Code** on the first count. On the second count the appellant was jailed for three years. All these sentences were to run concurrently.

The appellant appealed to this court against these convictions and sentences. In his grounds of appeal, the appellant contended that the learned magistrate erred both in law and in fact for relying on contradictory

evidence of the prosecution witnesses. In the appellant's view, the charges against him were not proved beyond reasonable doubt and in any event he was denied the opportunity to cross-examine the complainant upon after the prosecutor amended the charges against him. The learned magistrate is also faulted for failing to take cognisance of the fact that the appellant's constitutional rights under **section 72** of the Constitution had been violated. The appellant also argued that the learned magistrate should have considered the fact that the appellant was injured while being arrested. Finally, the appellant took issue with the learned magistrate's failure to consider his defence.

The state opposed the appeal and asked this court to uphold both the conviction and the sentence. Ms Maranga for the state submitted that the prosecution evidence was consistent that the complainant broke into and stole from the complainant's house. As for breach of the appellant's constitutional rights under section 72 of the old constitution, counsel argued that the appellant could sue for damages rather than an acquittal.

At the trial, the complainant testified that on 18th January, 2010 at around 2.30 am, he was awoken by a commotion in his poultry house. When he opened the door to check he was attacked by the intruder who cut him on the head right, right hand and leg before he took off. The complainant screamed for help as a result of which members of the public joined him and managed to arrest the appellant. He was caught carrying two chicken which he had apparently stolen from the appellant's home. According to the complainant, the members of the public set on him and seriously injured him. The chicken were recovered and the appellant was arrested and handed over to the police. The complainant was issued with a P3 form and he was treated at Othaya. He identified in court the form and the treatment notes.

The complainant's brother **John Kariuki Murigia (PW2)** was one of the people who responded when the complainant raised alarm that he had been attacked. He said that on 18th January, 2010, at about 2.30 am, he heard his brother screaming for help. He joined the complainant and other members of the public and pursued the appellant. They caught up with the appellant and recovered the chicken the appellant was carrying in a sack. The appellant is said to have pleaded with the witness to calm the members of the public whom he feared would lynch him.

Dr Mark Nganga (PW3) produced the P3 form which was filled by Dr Njoroge who examined the complainant. Dr Nganga said that he knew Dr Njoroge's handwriting as he was his colleague. According to his findings, the complainant had a deep cut on the forehead, a cut on the right thumb and as at the time the complainant was examined the injury was seventy days old. The degree of the injury was described as harm. The form which was filled on 29th March, 2010 was together with the treatment notes produced and admitted in evidence as prosecution exhibits.

The investigating officer police constable **William Kipsang (PW4)** testified that on 18th January, 2010, he was at Nyakianga police station when he received the report on the break-in and stealing of the complainant's chicken and also the injury the complainant sustained at the material time. The witness testified that he took both the appellant and the complainant to hospital. He produced in evidence the photographs of the chicken that were recovered from the appellant.

The appellant on his part opted to give unsworn statement when he was put on his defence. He said that on 17th January, 2010, he was at home with his children when some people came knocking at his door in the middle of the night. These people threatened to burn his house if he did not open and since he smelt petrol he gave in to their demands and opened the door. It is then that he was arrested on the pretext that he had incited people to resist payment security levies. According to him, one boy from that group of people entered the complainant's home and came back with the chicken which the appellant is said to have stolen. It is then that he was taken to the police station. He confirmed that he was beaten by the members of the public.

In my view, the main ground upon which this appeal turns is the omission by the learned magistrate to recall the complainant for cross-examination after the court admitted the amended charge sheet.

It is quite clear from the record that at some point in the proceedings, the prosecution applied to amend the charge sheet the effect of which was to alter the first count and to include the second count; his application was allowed and the amended charge sheet which included the additional charge was read to the appellant afresh. He entered a plea of not guilty to both counts. Apparently exercising his right under **section 214(1) (ii)** of the **Criminal Procedure Code**, the appellant applied to have the complainant recalled for cross-examination in the light of this development. The record shows that the application was granted and the learned magistrate ordered that the complainant to be recalled.

However despite the court's order allowing the application the complainant did not show up for cross-examination when the case resumed for hearing; on that occasion the prosecutor asked for more time to avail the complainant. The court indulged him but when the case resumed on the rescheduled date the complainant did not appear. The prosecutor neither offered any explanation of the whereabouts of the complainant nor did inform the court whether he had made any efforts to trace him. The prosecution therefore closed its case without giving the appellant the opportunity to cross-examine the complainant after the charges against him had been amended.

There is no doubt that the appellant was prejudiced because the omission by the court to summon the complainant after the appellant had rightfully made an application to have him recalled for cross-examination not only infringed the provisions of section 214 (1)(ii) of the Criminal Procedure Code but it also, in my view, impacted negatively on the appellant's right to a fair trial as contemplated under 50(2) of the Constitution.

The omission by the trial court led to what can clearly be regarded as a mistrial and this could have been cured under section 354(3)(i) of the Criminal Procedure Code by ordering a retrial of the appellant by court of competent jurisdiction. It is now, however, almost four years since the appellant was convicted. Witnesses may not be easily traced or accessed. The appellant himself has served more than three years of a sentence of a conviction that was based on a mistrial. Before the conviction, he was in custody for almost seven months. It will not serve the course of justice to subject him to a fresh trial. It would be appropriate to allow his appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is lawfully held under a separate warrant. I so order.

Signed, dated and delivered in the open court this 25th day of February, 2014.

Ngaah Jairus

JUDGE