



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 176 OF 2010

FRANCIS GACHARIA KAGEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Principal Magistrate at Karatina Law Courts (Hon. L. Mbugua) in Karatina Senior Resident Magistrate's court criminal case No.590 of 2008 delivered on 15/07/2010)

JUDGMENT

FRANCIS GACHARIA KAGEMA, the appellant herein, together with **PATRICK MURIITHI NGATIA** and **ANTHONY NJAU KABUI** hereinafter referred to as the appellant's co-accuseds were jointly tried on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The appellant's co-accuseds were acquitted at the stage of no-case to answer. After undergoing a full trial the appellant was convicted and sentenced to suffer death. Being dissatisfied, the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds of appeal in his petition:

1. **That the learned trial Magistrate erred in both law and fact when failed to put in mind that, to, the instant case first report ought to have been considered.**
2. **That the learned trial Magistrate erred in both law and fact when he gravely failed to consider, evaluate that the instant case was mainly scuffled by family dispute.**
3. **That the learned trial Magistrate erred in both law and fact when he failed to put in mind that the essential witnesses were never failed as prescribed in Section 150 C.P.C.**
4. **That the learned trial Magistrate erred in both law and fact basing a conviction on flimsy and meager prosecution evidence in support of the alleged exhibit.**
5. **That the learned trial Magistrate erred in both law and fact when he disregarded the defendant's defence without disclosing any cogent reason in regard to Section 169 (1) C.P.C.**

When this appeal came up for hearing, the appellant relied on written submissions while Mr. Kaigai learned Principal State Counsel gave oral submissions to oppose the appeal.

Before taking into account the substance of the appeal, we wish to give a brief background of the

case that was before the trial court. The prosecution summoned the evidence of five (5) witnesses in support of its case. It is the prosecution's case that on the nights of 6th and 7th October 2008, **Margaret Wagithi** (P.W.2), the complainant was asleep. P.W.2 and her nephew **Stephen Nderitu Kinyua** (P.W.3) spent the night together in the same house. At around 3.00am, P.W.2 and P.W.3 were woken up by some noise prompting P.W.3 to put on the electric lights. Shortly, the appellant is said to have dropped down from the ceiling. He was armed with a panga and an axe prompting P.W.2 and P.W.3 to flee. It is the evidence of P.W.2 that the appellant caught up with her. He beat her up until she lost her conscience. P.W.3 managed to escape. The police upon being informed visited the scene and took P.W.2 to hospital for treatment. **Patrick Wachira Kagema** (P.W.5), the appellant's brother told the trial court that on 7/10/2008 at 8.00am, he saw the appellant at their gate carrying a T.V set. He said the appellant placed down the T.V. P.W.5 said he was ordered by the appellant to leave and he complied. P.W.3 stated that he got a tip off where the appellant was. He together with members of the public managed to trace and apprehend the appellant. The T.V was found, photographed and identified by P.W.2 to be hers. In her judgment, the learned trial Principal Magistrate did not refer neither did she refer to the appellant's defence. She completely ignored the appellant's story while concentrating on the case of the prosecution. The record shows that the appellant denied the offence by giving a sworn testimony. He stated that on 13/10/2008 while on his way back home he was found by a mob who beat him up before taking him to Kiamachimbi Police Station without being told why he was under arrest. The appellant alleged that P.W.2 was his elder brother's girlfriend hence she implicated him as a revenge over a dispute they had over land. The appellant further alleged that his father wanted to sell land to boost his business but the appellant objected. Nevertheless, the appellant's father is said to have ignored the appellant's objection by selling the land and boosting P.W.2's business and that of P.W.5. A dispute arose between the appellant and P.W.5 over who was responsible for the death of their father. The appellant avers that P.W.5 implicated him. The appellant alleged that the complainant lied when he claimed he knew him for over two years yet in her statement to the police she never mentioned his name. The appellant challenged the evidence of photographs of the T.V which was produced as evidence. It is the evidence of the appellant that P.W.2 did not identify the T.V to be hers before being released to her. In short, the appellant alleged that he was implicated by P.W.2 and P.W.5 so as to disinherit him.

We now turn our attention to the substance of the appeal. We have already enumerated the grounds of appeal put forward by the appellant. We have re-evaluated the evidence and considered the submissions from both sides. We have critically examined the five grounds of appeal and we think the same can be summarized to two grounds namely:

First, that the prosecution's case was not proved to the required standards.

Secondly, that the appellant's defence was rejected without due regard.

On the first ground, we have been called upon to examine whether the case against the appellant was proved to the required standards. It is the evidence of **P.C Gacheru** (PW4), that on 14/10/08 the appellant was arrested by members of the public who took him to Kiamachimbi Police Station. It is also his evidence that the T.V set was later recovered by members of the public from someone who had bought from the appellant. P.W.4 stated that the T.V set was photographed and returned to the owner. At the hearing P.W.4 merely produced photographs and not the T.V set. We have keenly considered the evidence of P.W.4 and we have come to the conclusion that his evidence falls short of the expected standard in criminal cases. To begin with, the actual T.V set was not produced in court as an exhibit. What was produced were photographs taken by scenes of crime officers. The complainant did not present documents to establish ownership of the T.V set. This was a poorly investigated case. It would appear the investigation was meant to fail the case. According to the evidence of P.W.4 the T.V set was recovered from someone who had bought it from the appellant. That person was not summoned to testify. We do not comprehend why the police did not deem it fit to summon such a crucial witness. It would appear from the evidence of P.W.4 that members of the public whom he did not name were the ones who actually recovered the T.V. The learned Principal Magistrate stated in page 3 of her judgment in part as follows:-

“Accused has not rebutted the evidence of P.W5 and he has not told the court why he

was having a T.V at the gate of their home and he chased his brother away. That evidence can only imply that this is the T.V which had been stolen from P.W.2's house.”

With great respect, the learned Principal Magistrate fell into error when she made such a grave inference. It was the duty of the prosecution to present evidence linking the appellant to the offence. There was no credible evidence to identify the T.V as belonging to P.W.2. There was also no reliable evidence to show that the appellant was in possession of the .TV. There was also no evidence of identification of the actual existence of the TV.. For the above reason, we agree with the appellant that the evidence tendered did not prove the offence against him to the required standard of beyond reasonable doubt.

The second ground ably argued on appeal is to the effect that the appellant's defence was never considered. We have critically examined the trial court's judgment and it is apparent that the appellant's defence was not considered. We have on our part considered the same and we think the appellant raised very serious issues in his defence which should have been taken into account by the trial court. We are satisfied that there was a family dispute over land pitting the appellant and his brother. There is also a serious allegation that the complainant in this case was a girlfriend of the appellant's brother. It is therefore possible for the duo to frame up the appellant due to the land dispute. In the circumstances, we think the defence raised by the appellant cast some doubt on the credibility of the case against the appellant.

In the final analysis, we are satisfied that there is need to give the appellant the benefit of doubt. Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated, signed and delivered this 20th day of February, 2014.

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J.K.SERGON

JUDGE

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J. WAKIAGA

JUDGE