



IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.40 OF 2011

Consolidated with

CRIMINAL APPEALS NOS.41 & 42 OF 2011

(From original conviction and sentence in Criminal Case No.411 of 2011 of the Chief Magistrate's Court at Kericho delivered on 23rd August 2011 by Hon. J. Kwena – Principal Magistrate)

ISAAC KIPNGETICH BETT alias KAREDIO - 1ST APPELLANT

JACKSON CHERUIYOT KOSKEI alias Ashara - 2ND APPELLANT

JOSHUA MARANGA MAKORI alias BONNY - 3RD APPELLANT

VERSUS

REPUBLIC - - - - - RESPONDENT

JUDGMENT

Isaac Kipngetch Bett alias Karedio, Jackson Cheruiyot Koskei alias Ashara and Joshua Maranga Makori alias Bonny being the 1st, 2nd and 3rd Appellants herein together with 10 others were jointly tried on a charge of robbery with violence contrary to section 296(2) of the Penal Code. The 1st and 2nd Appellants individually faced an alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. The particulars of the charge on the main count were that:

“On the night of 10th and 11th December 2009 at Keongo Catholic Church Kericho in Kericho District within Rift Valley Province jointly while armed with dangerous weapons namely machetes, axes, iron bars, pangas and rungas robbed Father Jeremiah Roche Gerard of a computer laptop make Toshiba, two mobile phones make Nokia 1200 Serial number IMEI-359554013023315 and Nokia 2323 serial number IMEI -351952032257039, one digital camera, one CD player, one DSTV remote controller, one LG television remote controller, one Safaricom modem and one black torch all valued at Ksh.18,000/= and at or immediately before or immediately after the time of such robbery used actual violence thereby killing the said Father Jeremiah Roche Gerard.”

At the end of the trial the Appellants were convicted and each sentenced to suffer death on the main count. Being aggrieved, each Appellant preferred an appeal which appeals were later ordered consolidated. It is appropriate at this juncture set out the grounds put forward by each Appellant as

follows:

1st Appellant – Isaac Kipngetich Bett:

1. The learned magistrate misdirected herself in fact and law by subjecting the 1st Appellant to a 2nd trial hence exposing him to double jeopardy which in itself is oppressive and violates the 1st Appellant constitutional rights.
2. The learned magistrate misdirected herself in fact and law by trying, convicting and sentencing the 1st Appellant without the benefit of legal representation taking into consideration the seriousness of the charges facing the 1st Appellant.
3. The trial magistrate erred in law and facts by convicting the 1st Appellant on the basis of circumstantial evidence.
4. That the evidence leading to recovery of alleged exhibits and documentary evidence do not link the 1st Appellant to the crime.
5. The learned magistrate erred in law by failing to note that the charge sheet was fatally defective in form and not in tandem with the evidence adduced by the prosecution.
6. The trial magistrate failed to consider the credible defense raise by the 1st Appellant.
7. The learned magistrate misdirected herself in fact and law by convicting and consequently sentencing the Appellant on the erroneous/wrongful basis that the 1st Appellant's Sim card for his cell phone number 0717287383 was inserted in the deceased priest phone and not appreciating that the evidence of PW11 clearly indicated that the 1st Appellant's said number was not among those inserted in the priest's phone.
8. The learned magistrate misdirected herself in fact and law by convicting the Appellant on the basis of Exhibit 31 and not attaching the requisite weight to the Appellant objection to its production and further not appreciating the fact the alleged endorsements thereon by the Appellant were inconsistent and unequivocal.
9. The learned magistrate misdirected herself in fact and law by allowing the production of exhibits 2 and 5 before the same were properly identified by their serial numbers.
10. The learned magistrate misdirected herself in fact and law by convicting the 1st Appellant on the basis of Exhibit 2 and 5 which were obtained without a search warrant.
11. The learned magistrate misdirected herself in fact and law by concluding that the Appellant was found in possession of exhibit 2 and 5 and not attaching the requisite weight to the Appellant's submission that the said exhibits were never a subject matter of the earlier trial in Criminal Case number 793 of 2010 nor were they mentioned by PW1 in the said earlier trial and that their production at the 2nd trial was entirely an afterthought tailored towards framing the 1st Appellant.
12. The learned magistrate misdirected himself in fact and law by not attaching the requisite weight to the circumstantial evidence that the 1st Appellant was simply a landlord and that he had no control over the conduct of his tenants.
13. The learned magistrate misdirected herself in fact and law by inferring that the 1st Appellant was among those robbed and killed the deceased priest.
14. The learned magistrate misdirected herself in fact and law by not attaching the requisite weight to the fact the 1st Appellant was framed and that the police was simply out to fix him.
15. The learned magistrate misdirected herself in fact and law by convicting the 1st Appellant on the basis of prosecution evidence which fell below the standard of proof for a capital offence.
16. The learned magistrate misdirected herself in fact and law by passing the sentence of death against the 1st Appellant which was overtly excessive, inhuman, oppressive and malicious and violates his constitutional rights.

2nd Appellant – Jackson Cheruiyot Koskei alias Ashara:

1. That I was not accorded a fair and impartial trial as enshrined in the Constitution and code as the subordinate court contravened Section 214(1) (i) – (ii) of the CPC hence the proceedings are flawed, I contend this is not a procedural irregularity conrable under Section 382 of the code.

2. That the learned trial magistrate misapprehended law and facts by applying wrong legal principles.
3. (a) That the learned trial magistrate erred in law and facts and misdirected herself by convicting me the appellant in the absence of proof ownership of the alleged Exhibit 4 by PW1.
 - (b) In the absence of proper identification Exb.4 by PW1.
 - (c) In the absence of proof or to the value of the particularized items on the charge sheet.
 - (d) By failing to note and acknowledge that Exhibit 4 was in the hands of the police on 23rd December 2009 prior to the appellant's arrest on 18/1/10 as the general worker (James Ng'eno) of the deceased recorded in his statement of the material date as well as proceedings vide Criminal Case No.793/10 production on the hearing of this appeal pursuant to Section 358 of the CPC, rule 29 of the Court of Appeal Rules and Section 34 of the Evidence Act. Further, I contend the prosecution avoided to summon again the aforesaid worker as to cover up the truth hence Section 150 of the CPC contravened.
 - (e) No documentary proof was entered in evidence.
 - (f) PW1 was not trustworthy witness if considered in the right of Criminal Case No.793 of 2010 evidence.

4. That the learned trial magistrate erred in law by convicting me the appellant consequently imposing death sentence up on the appellant not supported by appropriate legal findings on the evidence tendered before court.
5. That the Appellant's arrest was not satisfactory, nor does prove to my participation into the commission of the offence charged and the entire case for the prosecution was not proved beyond any reasonable doubt.
6. The trial court contravened sections 38 of Police Act and 177 (a) of the CPC.

3rd Appellant -Joshua Maranga Makori alias Bonny:

1. That the learned trial magistrate erred in law and fact and misdirected herself having warned herself as in regards to the way of approaching circumstantial evidence by failing to analyze and re-evaluate the entire evidence before her as regards to the alleged blood stained and soil jungle trouser (Exb.22) recovery, note and acknowledge that there were co-existing circumstances weakling or destroying the inference of guilt against the Appellant in that:
 - a. No order in compliance to section (122A) of the Penal Code is available in the entire proceedings as to deceased's blood to be collected from the scene of crime, and or at Siloam Hospital was made by the prosecution hence PW14 (Cpl. George Murunga) nor PW13 (PC. Kipkurgat Langat) was valid for DNA sampling.
 - b. PW14 pg 73 line 4 confirmed that they were arresting people (suspects) on suspicion.
 - c. PW14 never corroborated with PW13's claims that I, the appellant refused to open the door.
 - d. Nowhere did PW7 stated that he extracted blood from the deceased body during the Autopsy (postmortem).
 - e. By the time the postmortem was done no information was as to the present claims hence PW13 and 14 claims was an Orthodox to fabricate me the Appellant into an offence I knew not.
 - f. It defeats reasons as to where and what PW13 and 14, had kept the deceased blood doing with it from 11/12/2009 to 12/1/2010 (29 days). What were they waiting for if their claims are not mere fabrications?
 - g. It defeats reason, how a suspect could retain Exh.22 in his custody in such a condition for a period of over two weeks.
 - h. PW14 vide pg 78 lines 19-20 admitted that he never recorded in his statement about recovery of Exhb.22 nor prepared an Inventory of the same.

2. That the circumstantial evidence surrounding my arrest was not satisfactory nor does not prove to my participation into the commission of offence charged and the entire case for the prosecution was not proved beyond reasonable doubt (both grounds argued together).

Before considering the substance of the appeal, we wish to set out in brief the case that was before the trial court. It is the prosecution's case that Father Jeremiah Roche Gerard, a Catholic priest based at Keongo Catholic Church, Kericho lived alone in a house on the church compound just 10 metres away from the house of the church watchman/gardener, James Ngeno (PW1). PW1 stated that on 10th December, 2009 at about 7.00 p.m., he handed over Ksh.7000/= being the proceeds of the sale of maize to Father Roche. PW1 left for his residence to sleep and woke up at 6.00 a.m., to milk the cows after which he returned to his house to prepare tea. Catechists arrived to prepare for morning Mass. Shortly, screams rent the air from the church. PW1 together with Charles Koskei (PW6) rushed to the deceased's house where they found Father Roche's lifeless body lying on the bed with deep cuts on the neck and with blood all over the head. The deceased's hands were tied with a rope. The house was locked and police were informed. The items PW1 identified to be missing included Agreement files, C.D Player, remote control, laptop, two mobile phones Nokia 1200 and Nokia 2323, cash, blood pressure machine and apple gram machine. It was discovered that the intruders gained entry through a broken window near the main door. A total of 14 witnesses testified in support of the prosecution's case. The police using Safaricom tracking system managed to find that mobile phone belonging to Father Jeremiah Roche was active and that on 11th December 2009 at 8.17 a.m. the gadget was used to call the line of Isaac Kipngetch Bett *i.e.* line number 0717287383. CPL. Murunga PW14 stated that following a tip-off, he together with other police officers visited the house of the 1st Appellant and therein, they recovered the following items:

- Metal bar
- Brown leather wallet
- Pressure detector
- One applegram detector
- 3 photographs
- Panga
- Slasher
- Several Sim cards and one belonging to 0717287383.

The 1st Appellant signed the inventory. PW14 further averred that chumaline metal bar which had bloodstains was taken for analysis. The 1st Appellant gave police the mobile phone number of the 2nd Appellant. PW1 was called to identify the items and he positively identified Applegram and the pressure detector to belong to the late Father Jeremiah Roche Gerard.

On 26th December 2009, PW14 said, the police arrested John Kamau Mwangi and upon search a camera, a mobile phone and an axe were recovered from him. John Kamau could not explain how he got hold of those items but he managed to allude that the 1st Appellant had given them to him. Police raided the home of the 1st Appellant. Next to the house of the 1st Appellant was a locked house which PW14 said the police were forced to break in. Inside that house, the police found Joshua Maranga Makori, the 3rd Appellant. Inside that house, police recovered a blood stained trouser, a Somali sword and a panga. PW14 further told the trial court that the 2nd Appellant was arrested at Litein.

When placed on his defence, the 1st Appellant gave unsworn statement claiming he was arrested at his shamba. He stated that he was forced to name people he knew by PW14, the Investigating Officer. He claimed that when he refused he was senselessly beaten up. He stated that he was charged with an offence he did not commit.

The 2nd Appellant on his part equally denied committing the offence. He claimed he was arrested, locked up and badly beaten up. He alleged he was forced to admit that, line number 0719179912 belonged to him. The 3rd Appellant in an unsworn statement denied committing the offence. He claimed he was arrested by police while he was on his way home from having a drink. He alleged that the police

preferred the charge against him because he refused to bribe them. The learned Chief Magistrate considered the evidence and proceeded to convict the Appellant.

On appeal, the Appellants put forward near similar grounds. However those grounds were argued together.

Mr. Onesmus Langat, learned advocate for the 1st appellant argued that the police did not carry out serious investigations against his client but instead framed up his client. He further argued that the 1st appellant was under two trials. The first trial was withdrawn and a fresh one instituted. The learned advocate was of the view that the 1st appellant did not get a fair trial. Mr. Langat averred that there were no cogent evidence to connect the 1st appellant with the offence. Mr. Mutai learned Senior Prosecution Counsel urged this court to reject the submission that the 1st appellant was subjected to double jeopardy. With respect, we agree with Mr. Mutai that the doctrine of double jeopardy could not be raised in this case in that the initial trial was withdrawn under Section 87A of the Criminal Procedure Code which gave the prosecution a leeway to prefer a fresh charge(s) against the 1st appellant and others. Mr. Mutai further pointed out that there were strong circumstantial evidence which linked the 1st appellant to the offence. We have on our part re-evaluated the evidence presented by the prosecution to link the 1st appellant to the offence. We wish to state from the outset that the evidence relied by the prosecution against the 1st appellant is circumstantial. There is strong evidence *i.e* of PW10 and PW14 that line no.0717287383 belonged to the 1st appellant and was used on the deceased handset make Nokia 1200 serial No.359554013023310. A sim card plate for the aforesaid No.0717287383 serial No.89254028701002873832 was among the items recovered from the 1st appellant's house. It is clear to us that on 11th December 2009 at about 8.17a.m., the aforesaid line was in communication with line No.0719179912 which had been inserted in Father Jeremiah Roche's Nokia 1200 phone. We are satisfied that the police did a thorough investigation which actually linked the 1st appellant to the offence he was charged with. We are therefore not persuaded by Mr. Langat's arguments. We have been urged by Mr. Langat to find that the 1st appellant was forced by police to sign the inventory since that defence was not given serious attention. Mr. Mutai did not address us on this issue. We have re-examined the evidence on record and we are satisfied that there is no evidence to support the 1st appellant's contention that he was forced to append his signature on the inventory. The 1st appellant's wife who testified did not allude that she was forced to sign the aforesaid inventory. We have not found any trace of evidence to show that the 1st appellant was framed up because he was a known notorious criminal. We are also satisfied that the items found in the 1st appellant's house belonged to the deceased priest having been positively identified by PW1.

The 2nd appellant on his part filed written submissions. In his first ground of appeal, he argued that he did receive a fair trial. He claimed that the charge was amended under Section 214 of the Criminal Procedure Code. By that time all the prosecution witnesses had testified. Mr. Mutai, did not address us on this issue. We have on our part looked at the record and it is clear that the prosecution applied to amend the charge sheet to change the make of the CD player to read L.G and instead of Sony. We are satisfied that the learned Chief Magistrate correctly applied her discretion under Section 214 of the Criminal Procedure Code to allow the amendment. The amendment in our view did not cause any prejudice to the 2nd appellant. We find the 2nd appellant's first ground of appeal to be without merit.

The 2nd appellant argued in his second ground that the exhibit linking him to the offence was not properly identified to belong to the deceased. Again, Mr. Mutai did not address us on this issue. We have re-evaluated the evidence presented before the trial court. It is apparent from the evidence of PW13, that the 2nd appellant was arrested at Litein Township on 19th January 2010 and upon a search being conducted in his house, an L.G CD player belonging to the deceased was recovered from the 2nd appellant's house. It is clear from the record that the 2nd appellant refused to sign the inventory. It is the evidence of PW14 that the CD player was positively identified by PW1. We are satisfied that the CD player was recovered from the 2nd appellant's house and that PW1 positively identified the same to belong to the late Father Jeremiah Roche Gerard. We find no merit in the 2nd appellant's contention. We are satisfied that the

doctrine of recent possession links the 2nd appellant to the offence.

The 3rd appellant has argued that the circumstantial evidence which was used to link him to the offence did not meet the required standards. Mr. Mutai argued that the evidence was strong enough to link the 3rd appellant to the offence. We have critically examined the evidence on record. It is the evidence of PW13 and PW14 that the 1st appellant was the 3rd appellant's landlord at Motobo estate, Kericho. Police were made to use force to open the 3rd appellant's door when he refused to open. Inside that house, the police found the 3rd appellant. A blood stained trouser was recovered therein. The trouser was taken for analysis at the Government Chemist. The deceased's blood samples and that of the 1st and 3rd appellant were also analyzed. Henry Kiptoo Sang (PW8) the Government analyst formed the opinion that the DNA profiles generated from the blood in the cotton wool and the long trouser matched that in the blood sample of Father Jeremiah Roche Gerard, deceased. We are satisfied that there was cogent evidence linking the 3rd appellant to the offence.

After a careful re-consideration of the entire case we find no merit in the appeal. We hereby dismiss the consolidated appeals.

Dated, Signed and delivered in open court this 31st day of July 2014.

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J. K. SERGON

JUDGE

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H. OMONDI

JUDGE

In the presence of:

- O. Lang'at for 1st Appellant
- 2nd and 3rd Appellants in Person
- Mutai for Director of Public Prosecutions