



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO. 38 OF 2011
Consolidated with
CRIMINAL APPEAL NO.39 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)

JOHN KAMAU MWANGI.....1ST APPELLANT

PANCRAS MOCHACHE NYAMBETA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

John Kamau Mwangi and Pancras Mochache Nyambeta being the 1st and 2nd Appellants respectively together with 11 other were jointly tried on a charge of robbery with violence with three alternative counts. At the end of the trial, the 1st and 2nd Appellants were convicted for the offence of being in possession of suspected stolen property in violation of Section 323 of the Penal Code. The appellants were each sentenced to serve 14 years imprisonment. The appellants each filed an appeal. Those appeals were ordered consolidated by this court with the concurrence of the parties.

The 1st Appellant put forward the following grounds of appeal:-

1. THAT my Lordships, the learned trial Magistrate erred in both law and fact by basing my conviction on contradicted and inconsistent evidence.
2. THAT my Lordships, the learned trial magistrate further more erred in law and fact by not seeing that the items which were recovered on my side were not identified to be the deceased (Late) properties.
3. THAT my Lordships, the learned trial Magistrate erred in law and fact by not considering that the said material day I was in Prison serving a term of conviction a fact that she didn't consider.
4. THAT my Lordships, the learned trial Magistrate once more erred in law and fact, when she did not overlook that even the inventory was not recorded or produced in court to entice the evidence adduced in court.
5. THAT my Lordships, the trial learned Magistrate erred in law and facts by not considering that the conviction set to the appellant by one single evidence witness was of fabrication and without warning herself adequately with caution that even identification parade was not conducted due to the possibility of error that was not withstanding hence led to secure conviction that was being

- unsafe and unjust to the appellant.
6. That my Lordship, the learned Magistrate erred in law and fact by not considering my unsworn defense as required by the law.

The 2nd appellant on the other hand put forward the following grounds:

1. THAT, the honourable trial court erred in law and facts to convicting I the appellant on mere assertions rather than founded facts.
2. THAT, the learned trial magistrate erred in law and facts by failing to conclusively ascertain the phone contradictory handling and base conviction on co-accused fabrication.
3. THAT, the trial magistrate erred once more in both law and facts by not subjecting the whole evidence in exhaustive strutting before arriving at any due conclusive as required by the law of the land.
4. THAT, the learned trial magistrate erred in both law and facts by failing to observe that the charges were not proved beyond reasonable doubts.
5. THAT, the learned trial magistrate erred again in law and facts in failing to evaluate the defense case alongside the respondent's rights according to Section 169(1) of the CPC.

When the appeal came up for hearing, the appellants relied on written submissions. Mr. Mutai learned Senior Prosecution Counsel conceded the appeals in his oral submissions.

Before considering the merits of the appeal, let me set out the case that was before the trial court against the Appellants. It is the prosecution's case that on 10th December 2009 at about 7.00 p.m. a Catholic priest based at Keongo Catholic Church, Kericho met with James Ngeno (PW1) the church watchman/gardener. PW1 said he handed over Ksh.7000/=, proceeds of sale of some maize before retiring to bed. PW1 woke up at 6.00 a.m. next morning to milk the cows and at that time Catechists started arriving to prepare for Mass. Shortly screams from the faithful rent the air. PW1 and Charles Koskei (PW6) visited father Roche's house and found his lifeless body lying on his bed in a pool of blood. Police were informed and investigations started. The 1st Appellant is said to have been found in possession of a mobile phone make Nokia 1200. It is the evidence of APC. Henry Kimathi that on 26th December 2009 at about 10.00 p.m. he with other colleagues were on patrol in Kericho town when at the bus stage they met the 1st Appellant who on seeing them fled. PW8 and his colleagues gave a chase and caught up with him and had him arrested. Upon searching, the 1st Appellant was found with an axe with blood stains, a knife, a camera and a phone. In cross-examination PW8 stated that he did not indicate in his statement that a Nokia mobile phone was found in his possession. Using Safaricom tracking equipments police managed to arrest Pancras Mochache Nyambeta who led the police to the arrest of another suspect Mike Milton Ocharo. The 1st Appellant alleged in his defence that he was arrested while he was on his way home but was placed in police custody when he failed to raise some amount to bribe the police. The 2nd appellant denied ever selling a mobile phone.

On appeal Mr. Mutai conceded the appeal against the 1st Appellant on the basis that the offence in which he was convicted for was a misdemeanor which attracts a maximum sentence of 2 years yet the learned Senior Principal Magistrate sentenced him to 14 years imprisonment. This court was urged to correct the sentence which in his opinion was harsh and excessive. With respect, I agree with the submissions of Mr. Mutai that the 1st Appellant is serving an illegal sentence. The law provides a maximum sentence of 2 years yet he has been condemned to serve 14 years imprisonment with hard labour. It is clear from the record that the 1st Appellant was a first offender. I allow the appeal on sentence. I think the appropriate sentence for a first offender should be lenient. I hereby set aside the sentence of 14 years and substitute it with an order sentencing the 1st appellant to 12 months imprisonment from the date of sentence. This means that the 1st Appellant has served the sentence in full. He is consequently ordered set free forthwith. I am satisfied Mr. Mutai rightly conceded the appeal.

On the 2nd Appellant, Mr. Mutai conceded that the 2nd appellant was convicted for an offence he was not charged with. With respect, I agree with the submissions of Mr. Mutai that the 2nd appellant was

convicted on the second count yet the 1st appellant was the only person charged in that count. I have on my part re-evaluated the evidence tendered against the 2nd appellant. The evidence relates to the recovery of a mobile phone make Nokia 1200 belonging to the late Father Jeremiah Roche. It is the prosecution's evidence that the 2nd Appellant is a hawker within Kericho Township. One Makori Ondieki, the 10th accused person before the trial court, was arrested and found in possession of the aforesaid Nokia phone 1200 on 9th February 2011. Makori Ondieki led the police to the arrest of Pancras Mochache Nyabeta, the 2nd appellant. Makori Ondieki had told the police that he bought the phone from the 2nd Appellant in the month of April 2010. There was evidence showing that the phone was in possession of one Millicent Robi (11th Accused) from April -July 2010 when Makori Ondieki took it over for his own use. Police recovered it from him on 9th February 2011. Makori Ondieki avers that he has known the 2nd Appellant for over five years and that he was his regular customer and that is why he believed him and bought the Nokia phone from him. The trial court believed the evidence of Makori Ondieki and had him acquitted. The 2nd Appellant led the police to the arrest of Mike Ocharo (13th Accused) who was later acquitted too. The trial Chief Magistrate stated that the 2nd Appellant had failed to explain how he came into possession of the Nokia phone and yet he led the police to the arrest of Mike Ocharo. The trial magistrate formed the opinion that Mike Ocharo was a liar but still went ahead to believe that his evidence proved the case against the 2nd Appellant for being in possession of Nokia 1200 before selling it. I think the findings appear not to be well founded thus raising doubts. In short, there was no cogent evidence to prove the offence. I will give the 2nd Appellant the benefit of doubt. Consequently, the 2nd Appellant's appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant namely Pancras Mochache Nyambeta is hereby ordered set free forthwith unless lawfully held.

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

J. K. SERGON

JUDGE

In the presence of:

- Mutai for Director of Public Prosecutions
- 1st Appellant: present in person
- 2nd Appellant: present in person