



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 259 OF 2010
JAMES MWANGI MAINA.....APPELLANT
versus
REPUBLIC.....RESPONDENT
CONSOLIDATED WITH
HIGH COURT CRIMINAL APPEAL NO. 257 OF 2010
DAVID MWAURA NJARAMBA.....APPELLANT
versus
REPUBLIC.....RESPONDENT
AND
HIGH COURT CRIMINAL APPEAL NO. 256 OF 2010
MOSES GITAHI MWANGI.....APPELLANT
versus
REPUBLIC.....RESPONDENT
(arising from the judgment of Hon. M. Nyakundi Senior Resident
Magistrate Nyeri in Criminal Case No. 1224 of 2008)

JUDGMENT

1. The Appellants herein JAMES MWANGI MAINA, DAVID MWAURA NJARAMBA and MOSES GITAHI MWANGI were all charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on 15th day of January 2005 at around 1.00 am with

others not before the court while armed with dangerous weapons namely pangas and axes robbed MOSES WANJOHI KAMOTHO shop goods, utensils, pangas, power saw, thermos, plates, wrist watch, and cash Ksh. 5000/- all valued at Ksh. 150,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said MOSES WANJOHI KAMOTHO.

2. They each faced alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code.

3. The appellants were tried, convicted and sentenced to death on the main charge. Being aggrieved by the conviction and sentence they each filed individual appeals which appeal at the hearing hereof we consolidated.

4. At the hearing of the appeal Mr. Njue appeared for the state and opposed the appeals while each appellants filed amended grounds of appeal and written submissions which they relied upon.

5. The first appellant in his amended grounds of appeal stated that he was convicted on the unsafe testimony of a single identifying witness in circumstances which did not form identification. It was stated that the identification parade was conducted in contravention of the Forces Standing Orders Cap 46 Laws of Kenya. The prosecution case was not proved beyond reasonable doubt and his defence was rejected without complying with section 169(1) of CPC.

6. It was submitted by the 1st appellant that the circumstances did not favour the identification of the robbers by P.W.1 and in support thereof the case of CLEOPHAS OTIENO WAMUNGA v R Cr. APPEAL NO. 424 [1989] KLR was submitted. It was further submitted that the intensity of the light was not given by the complainant.

7. It was submitted that the ID Parade was not conducted in compliance with the Standing Orders and that the investigation officer who requested P.W.10 to conduct the identification parade was never called as a witness and that the same was unfairly conducted. The case of PETER NJOGU KIHAIKA & OTHERS v. R. CR. APPEAL NO. 141 OF [1988] wherein it was stated that

“the ID Parade conducted against the appellant was also unsatisfactory because the four witnesses were not asked to give his features...”

8. It was further submitted that the charge sheet was not supported by the evidence tendered. It was submitted that no any receipts were produced before the court to confirm ownership of the items, it was submitted that the appellants unsworn defence as to how he came into possession of the items were rejected without giving reasons.

9. On behalf of the 2nd appellant it was submitted that he was convicted on insufficient evidence of P.W.2, 3 and 5 and that the dock identification was unworthy to had been relied. It was submitted that he was convicted on purely circumstantial evidence against the holding in MWANGI v R.

10. In respect of the alternative charge it was submitted that P.W.4 under cross examination stated that nothing was recovered from the appellant and that the sales agreement between P.W.2 and P.W.3 was not signed by him. It was submitted that the case against him was not proved to the required standard and that there was no any adequate investigations conducted. It was submitted that no evidence was adduced or produced by the investigating officer and that since the accused person is under no obligation to prove his own innocence on the authority of STEPHEN MUNGA MACHARIA v R CR. APPEAL 194 CA his appeal should be allowed.

11. On behalf of the 3rd appellant it was submitted that the charge sheet was defective since the number of the items stolen were not disclosed. That the use of the word shop goods was not enough to constitute the elements in the charge. It was submitted on the authority of the case of CHARLES KIBARA MURAYA v R COURT OF APPEAL AT NYERI CR. APPEAL NO. 330 OF 1987 the more serious the charge the heavier the burden of proof on the prosecution.

12. It was further submitted that the prosecution evidence was not credible and that there were contradiction in the prosecution evidence. He submitted that his defence was never considered by the trial court.

13. On behalf of the state Mr. Njue submitted that the trial court convicted the appellant both on the main count and the alternative charge which was in error. He conceded that there were material contradiction on the evidence of the police officers who recovered the items.

14. It was submitted that the appellants were properly identified by P.W.1 who was able to pick up the appellants at the then identification parade and therefore the identification was proper and safe to sustain a conviction. It was further submitted that the 2nd appellant was convicted on the basis of recovery and the doctrine of possession of recently stolen goods which were identified by the complainant. It was submitted that the defence of the appellants were considered but did not displace the prosecution case.

15. This being a first appeal we are in law required to reassess the evidence tendered before the trial court and to come to our own conclusion though taking into account the fact that we did not have the advantage as the trial court of seeing and hearing witnesses.

HISTORY

16. The appellants where initially charged in criminal case No. 4634 of 2005 they were tried convicted and sentenced to death to which they filed NYERI HIGH COURT CRIMINAL APPEAL NO. 28 OF 2008 and on 29th day of October 2008 MARY KASANGO J and M.S.A. MAKHANDIA J as he then was ordered a retrial.

17. At the retrial herein P.W.1 MOSES WANJOHI KAMOTHO's evidence was that on 15th January 2005 at about 1.30 am he was asleep in his shop and was robbed of items valued at Ksh. 100,000/- which items he identified at the CID flying squad Karatina. It was his evidence that he did not know those who robbed him and did not describe them but he was able to physically identify the one whom he saw. All the items stolen and recovered had his initials on them.

18. It was further evidence of P.W.1 that he was able to identify the first appellant since he had bright solar light on.

19. On 9th November 2009 the 1st appellant ask for stay to enable him make an application to the High Court. On 12th January 2010 the 1st appellant urged the court to proceed with the matter and from proceedings there is no evidence that the appellant cross examined P.W.1 further.

20. P.W.2 FRANCIS MWANGI's evidence was that on 18th January 2005 a lady known as mama Njau approached him in the company of the first appellant with a power saw which he wanted to sell and that they agreed on a price of Ksh. 15000/- after which he took their particulars of the Id cards and an agreement executed.

21. P.W.3 JOHN MUGO KARU stated that the 2nd appellant and P.W.2 came to him with a power saw for sale which he purchased at an agreed sum of Ksh. 15000 and that when the 2nd appellant could not produce his identity card the lady he was with stood security. The lady was called Sophia Muthoni Id no. 307360166.

22. P.W.4 STEPHEN KINYUA MUNDIA stated that he rented the houses to the 1st and 2nd appellants that a week after the police came for him and he took them to his rented houses where inside a panga and a crowbar were recovered in the presence of the 1st appellant on cross examination he confirmed that nothing was recovered from the 2nd appellants house. P.W.5 ZACHARY MATHENGE KARIMI an employee of the complainant was able to identify the power saw which he had used for two years.

23. P.W.6 MUSA KIPTOO the arresting officer stated that in the first appellants house they recovered one panga, 11 batteries size A and five cups. In the 2nd appellants house they got the steel wool, one

radio speaker while in the 3rd appellants house they recovered one panga and one small radio, eight steel wool and one Geisha soap which were positively identified by the complainant. They were also able to recover the power saw and the agreement on the same. This evidence was confirmed by P.W.7.

24. P.W.10 JEREMIAH DUBAI confirmed that the identification parade was that P.W.1 was able to identify the 1st appellant. When put on their defence first appellant testified that he was arrested and all the items for sale taken. 2nd appellant testified that he was a maternity attendance at Jamii Hospital. On 23rd January 2005 he testified that after his arrest the police conducted a search took his wall clock and mobile phone. He further stated that he was not identified at the parade.

25. The third appellants defence was that he was given the items by his grand mother and that the woman who claimed to had given him the power saw was never called to testify.

26. In convicting the appellants the trial court had this to say:

“The evidence of P.W.2, P.W.5, P.W.3 who were eye witnesses when 2nd accused sold power saw to P.W.3 is over whelming and directly points at the 2nd accused being involved in the said crime. The evidence of P.W.2, P.W.4, P.W.6, P.W.7,P.W.8 and P.W.9 points to the 1st accused and 2nd 3rd accused persons having been involved in the said robbery. The evidence of P.W.10 the identification parade officer and P.W.1 the identifying witness is directly pointing to the 1st accused person.”

27. From the proceedings and submissions herein we have identified the following issues for determination.

1. Whether the appellants were properly identified.

2. Whether the trial court was wrong in convicting the appellants on both the main and alternative charges.

3. Whether the prosecution case against the appellants was proved beyond reasonable doubt.

28. On the issue of identification we agree with the finding of the trial magistrate on fact that the 2nd appellant was positively connected with the offence since he sold the power saw which was recently stolen from P.W.1 to P.W.3. From the evidence of P.W.1 it is clear that he was able to identify the 1st and 3rd appellants through the use of solar light and this was confirmed by his ability to pick them up at the identification parade.

28. From our analysis of the evidence tendered before the trial court we are of the considered view that the prosecution case against the appellants was proved beyond reasonable and therefore find that their conviction was safe and therefore dismiss the appeal.

29. We however find fault with the trial courts conviction of the appellants on both the main charge and the alternative charge and therefore quash the appellants conviction on the alternative charge of handling stolen property.

Dated, signed and delivered at Nyeri this 19th day of September 2014.

J. WAKIAGA

JUDGE

J. NGAAH

JUDGE

Court: Judgment read in open court in the presence of Miss Maundu for the state and appellant in person.

J. WAKIAGA

JUDGE

J. NGAAH

JUDGE