REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 189 of 2010

PETER MUNDIA MURIGO ....……..…APPELLANT

Versus

REPUBLIC ….....……..……..…RESPONDENT

(arising from the judgment of Hon. S. Muketi Chief

Magistrate Nyeri, in CriminalCase No. 609 of 2009)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal code the particulars of which were that on 13th June 2009 at Othaya approved school compound Nyeri district within Central Province jointly with others not before the court while armed with dangerous weapons namely AK 47 rifle, metal bar and axes robbed JONAH KIMANZI NZAU a ceska pistol serial number G6169 loaded with 15 rounds of ammunition valued at Ksh. 58000/- and immediately before or immediately after the time of such robbery fatally wounded the said John Kimanzi Nzau.

2. He pleaded not guilty was tried convicted and sentenced to death and being aggrieved by the said conviction and sentence filed this appeal raising the following grounds of appeal.

1. ***The learned magistrate erred in law and in fact in convicting and sentencing the appellant for the offence of robbery with violence contrary to the evidence on record.***

2. The learned magistrate erred in law and in fact in convicting and sentencing the appellant without sufficient evidence as to meet the requirement of beyond reasonable doubt as required by law.

3. The learned magistrate erred in law and in fact in convicting the appellant on circumstantial evidence in absence of the requisite corroboration and /or at all.

4. The learned magistrate erred in law and in fact in considering extraneous matters and/or evidence which was not availed during the trial.

5. The learned magistrate erred in law and in fact in failing to consider the glaring contradictory evidence rendered by the prosecution and thus convicting and sentencing the appellant on unsound evidence.

6. The learned magistrate erred in law and in fact by failing to appreciate the circumstances of the case as per the evidence adduced which was inconsistent with the guilt attributed to the appellant.

3. At the hearing hereof the appellant was represented by Mr. Muchiri while Mr. Kaigai appeared for the state.

4. It was submitted on behalf of the appellant that the trial magistrate in evaluating the evidence made an error and that the prosecution case against the appellant was not proved beyond reasonable doubt.

5. It was submitted that the charge sheet indicated that the date of he offence was 13th June 2009 while the evidence tendered showed that the deceased died on 12th June 2009 and that the appellant was not on duty at the said time therefore there was no evidence that the offence was committed on the said date raising a doubt the benefit of which should have been accorded to the appellant

6. It was further submitted that there was contradiction on the pair of shoes which is said to have linked the appellant with the offence as to whether they were new or old shoes that had been washed and that P.W.8 the Government analyst gave evidence to the effect that if the boots had been washed he would not have found evidence on the same.

7. That the benefit of doubt raised on the state of shoe should have been given to the appellant since the exhibit memo indicated that the other exhibits were found at Othaya police station on 12th June 2009 while the appellant was arrested on 17th June 2009 and no boots was found in his house.

8. The appeal was opposed by Mr. Kaigai on the basis that the prosecution evidence was overwhelming and watertight to sustain a conviction.

9. It was submitted that the case was based on opportunity and that P.W.1 P.W. 2 and P.W.3 confirmed that the appellant was not at his station of work which was supported by P.W.4 and P.W.5 and that the boots were recovered from the appellant's house on 17th June 2009 and the DNA matched the blood of the accused.

10. It was submitted that the error on the date of the offence was curable under section 382 of the C.P.C.

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

12. The prosecution case against the appellant was that on 12th June 2009 he was not at his place of work and that P.W.1 pc Phylis Osige whom he was supposed to work with was all alone and that at 10 pm she left the appellant at the work station only for pc Koech P.W.2 to call her after 5 minutes that there was no body at the report desk.

13.P.W.3 Sgt Julius Mwathe testified that he was the duty officer on 12th June 2009 at that at 10.00 pm. He found a reportee who was not being attended to and that when the went to the appellant's house and knocked there was no response. He proceeded on with his duties and on 17th June 2009 police officers from the provincial Investigation Team came with the appellant and they did a search at his house. Under cross examination he confirmed that the distance between chinga and Othaya was 3 to 4 Km.

14. P.W.4 the deceased's wife and P.W.5 his son testified that they heard gun shots at 11.30 pm and that they called the deceased but he did not answer and at about midnight they decided to go check for the deceased only to find him at the gate dead.

15. P.W.6 Joseph Kahuga Gichuki testified that on 12th June 2009 at 10 a.m. The deceased who was a CID officer and who was his customer took to him shoes for polishing and at 4 pm came for them but did not find him. When he called him on his cell phone he was told to carry them on his boda boda motor cycle and that at 11 pm he called him to take him home but unlike before he told the witness to leave him before the gate and as he was turning to go to his house he heard gun shots. He thereafter called the deceased who did not answer and he therefore called he deceased son and asked him to tell the deceased to call him.

16. P.W.8 Kiptoo Sang the Government analyst confirmed that the blood stain found on the boots matched the deceased blood type.

17. P.W.9 Sgt Jacob Mureithi testified that they received information that the appellant who was then attached to Chinga Police station was overheard stating that they had completed the mission of eliminating the deceased and that they looked for him but he could not be found until 17th June 2009 when he was arrested.

18. When put on his defence the appellant stated that he was on duty at Chinga police station from 8 pm to midnight and that when P.W.7 went to her house for super he told her that he would also retire to his house for super and to take medication having been earlier admitted at Karatina hospital and that he may have fallen asleep due to fatigue.

19. He stated that his shift had been changed by the OCS since he was attending computer classes and that he was on duty from 13th to 16th when he was arrested.

20. From the the petition of appeal the submissions and evidence tendered before the trial court the following issue arise for our determination.

a. was the charge sheet defective?

b. was there sufficient evidence to convict the appellant?

21. We have analysed the evidence tendered before the trial court and are of the considered opinion that the inconsistence of the date of the offence did not make the charge sheet defective noting that the evidence tendered confirmed that the offence was committed on the night of 12th June 2009 and that the deceased was found by P.W.4 and P.W.5 at about 1.30 a.m. We therefore find no fault with the trial court holding on the same.

22. It is clear from the evidence on record that the appellant was convicted on purely circumstantial evidence and therefore the issue for our determination is whether the said circumstantial evidence was weighty enough to sustain the appellant's conviction.

23. The principle to be considered before circumstantial evidence is used as a basis for conviction are that a conviction can only be founded on the same if that evidence irresistibly points to the suspects guilty to the exclusion of any other person and that there is no co-existing factors or circumstances that may weaken or destroy the inference of the suspects guilt as was stated in the cases of R v KIPRERING ARAP KOSKEI & ANOTHER [1949]16 EACA and SIMEON MUSOKE Vs R [1959] EA 715.

24. In this appeal we have identified the following circumstances that the prosecution relied upon:-

i. ***The appellants was not at his place of work and his house on the material day.***

ii. the blood stain found on the appellant boots matched the blood type of the deceased.

iii. The appellant went underground after the commission of the offence.

iv. There was information that the appellant was heard stating that he completed the mission of eliminating the CID.

25. To our mind we note that some of these circumstances do not point exclusively to the appellant as the person who was involved in the alleged offence.

26. We have noted that there was an alleged theft of money from the deceased office for which some police officers were arrested and there was no evidence tendered before the court as to why there were

eliminated from this offence. There is also further evidence that the watchman at the gate of the school where the deceased was killed was interrogated but the same was never called as a witness and this raised the question as to why the same was never called.

27. As regards the information allegedly received we note that the same does not support the offence the appellant was charged with as it raises the issue of elimination of the deceased which to our mind could only support the offence of murder. It is also inconsistence with the prosecution's case to the effect that the appellant went underground.

28. We have also noted that there is a doubt raised on the issue of the boots which was never answered by the prosecution. Did they belong to the deceased or the appellant and was the appellant's blood type analysed to eliminate the possibility of the same sharing a blood type with the deceased.

29. Whereas the conduct of the appellant was suspicious it is a trite principle of law that mere suspicion alone is not enough to convict one of a criminal offence.

30. We are of the considered opinion that there were a lot of doubt raised on the prosecution case. We have further noted that the appellant was not under any duty to account for his whereabout even though the same stated that he was on duty through out his shift having been changed by the OCS.

31. We have also noted that there was a lot of gaps left in the prosecution case and thereafter agree with the appellant's submission before the trial court to the effect that this case was not properly investigated as it is clear from the evidence of P.W.6 that the deceased was meeting somebody before going home which evidence should have been found from the deceased mobile phones.

32. We are therefore of the considered opinion that the appellant's conviction herein was not safe and therefore allow the appeal herein quash the conviction and set aside the sentence.

33. The appellant should be released from custody forthwith unless otherwise lawfully held.

Dated at Nyeri this 19th day of December 2012.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE

Delivered on 7th February 2013.

J. WAKIAGA
JUDGE