REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 168, 165, 169 & 170 of 2012

ALEX MUGENDI NYAMU..1ST APPELLANT

JULIUS KIRIMI MUGAMBI......................................2ND APPELLANT

REUBEN KAMUNDE NJERU...............................3RD APPELLANT

MOSES MUGO NYAMU..4TH APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal from the Sentence and Conviction of J.P. NANDI Resident Magistrate Runyenjes in Criminal Case No. 827 of 2012 on 13th November 2012)

J U D G M E N T

ALEX MUGENDI NDWIGA, JULIUS KIRIMI MUGAMBI, REUBEN KAMUNDE NJERU & MOSES MUGO NYAMU hereinafter referred to as the 1st, 2nd, 3rd & 4th appellant were charged with the offence attempted escape from Lawful Custody contrary to **Section 124(a) of the Penal Code.** The particulars as stated in the charge sheet were as follows:-

On the 11th day of September 2012 around 2030 hours at Runyenjes police station cells within Embu County, jointly attempted to escape from lawful custody of No. 31969 PC MBUGUA NJOROGE and No. 79741 PC JAMES NJIHIA by attempting to cut the ventilation grill.

The matter proceeded to full hearing and all the appellants were convicted and sentenced to 2 years imprisonment each on 13/11/2012. They were aggrieved with the judgment and appealed against both the conviction and sentence. They have raised the following common grounds:-

1. ***The learned trial Magistrate erred in law and in facts by convicting them on evidence that was inconsistent and uncorroborated.***
2. ***No independent witness from the police cell was called to testify.***
3. ***None of the cutting tools was found in possession of them.***
4. ***The alleged threats to the cell mates were not established.***
5. ***There was delay beyond the 24 hours to present them to court.***
6. ***They were denied witness statements.***

When the appeals came for hearing the same were consolidated. The appellants presented the court with written submissions which they relied on. The 2nd, 3rd and 4th appellants made some mitigation for the court's consideration.

The learned state counsel opposed the appeal. She submitted that a cell register confirming the appellants were in the cells had been produced (EXB3). They were produced in court within 24 hours. She further stated that the evidence of the witnesses was corroborated. A piece of hacksaw was recovered from the cell where the appellants sat and another piece recovered from the 1st appellant's buttocks.

Finally an order for issuance of witness statements had been made following their application for the same. The appellants further submitted that at the time of being charged they were facing other charges for which they were in prison remand.

This being a 1st appeal this court is enjoined to reconsider and reevaluate the evidence on record and come to its own inclusion while bearing in mind that it never saw nor heard the witnesses. I am guided by the following cases:-

1. ***OKENO VS REPUBLIC [1972] EA 32***

2. ***NGUI VS REPUBLIC [1984] KLR 729***

The prosecution called 3 witnesses who are police officers. They did confirm that the appellants were at a cell at Runyenjes police station on the night in question i.e. 11/9/2012. Noises and singing was heard from the cell about 8.30 p.m. and the officers quietly went there. They conformed the singing and cutting of the grills. They opened the cell and found the appellants sitting on a blanket. A piece of hacksaw blade was found there under. The 4 appellants were taken out of the cell and asked to strip naked and searched. The 1st appellant removed his 2 under pants. As he removed the 2nd one, another piece of the hacksaw blade came out of his buttocks. The learned trial Magistrate pieced the two pieces of the blade and found them to match very well and formed one big piece. The scene was also visited and cut grills seen.

All the appellants gave unsworn defences denying the charges. They denied having been found in possession of any hacksaw blades. The 1st appellant said a hacksaw was recovered at the ventilation in the cells. From the submissions of the appellants, I did note that all the appellants had pending cases at Runyenjes Law courts at the time of this case. Among them were:-

1. ***Runyenjes Criminal Case No. 438/2012 (4th appellant)***

2. ***Runyenjes Criminal Case No. 632/2012 (1st, 2nd and 3rd appellants)***

3. ***Runyenjes Criminal Case No. 633/2012 (1st appellant)***

I called for the said files and upon perusal I noted that all the 3 matters were coming for hearing before the said court on 11/9/2012. I further noted that none of them proceeded. Instead there was an order by the Ag. Senior Resident Magistrate Mr. Nandi to the effect that all the said matters be heard the next day i.e. 12/9/2012. The appellants were in remand prison in all these cases.

I have also noted that the learned trial Magistrate did not in any of the files direct that the appellants should be remanded at Runyenjes police station. So under what circumstances were the appellants remanded at Runyenjes police station? Was it a ploy by some court officers and the police to assist them escape?

The record also shows that during the time of hearing the learned trial Magistrate visited the scene on 10/10/2012 where PW1 testified from. And these were his observations:-

"The Court has seen the half cut grill and the mesh wire".

The scene is at Runyenjes police station police cell. This is where arrested people facing all manner of charges are kept. The grill and mesh wire were allegedly cut on 11/9/2012 night. And the prosecution

wanted the court to believe that from 11/9/2012 to 10/10/2012 when the court visited the scene there had been no repair done to this ventilation. Is that possible? Such a sensitive place being left with a cut grill and wire mesh for a whole month! It could only be true if there had been no arrests made for the whole of that month.

The two above issues were not raised by the Court and the prosecution did not give any explanation.

The cell had 6 (six) occupants. Two of them who could have made very good key witnesses were said to have declined to record statements because of threats by the appellants. There was no evidence of such threats produced. Under the Evidence Act Section 125(1) and 128 these were competent and compellable witnesses who ought to have been compelled to appear before the Court and testify as to matters related to this case.

The prosecution again did not apply to the court to have them compelled to appear and testify. The typed proceedings show the date of incident as 1/9/2012. This is a typing error. The original record shows it as 11/9/2012. Further there was no violation of the appellant's right to appear in court within 24 hours. They were arrested on the night of 11/9/2012 and were arraigned in Court on 12/9/2012.

The evidence of PW1- PW3 tended to really connect the appellants with this offence. A perusal of the record however shows that besides the date of plea it is nowhere indicated which language was used in Court by both the witnesses and the appellants. This is exhibited at page 4-9 of the record of appeal. This was not raised as a ground of appeal but it is the duty of this Court in re-evaluating/reconsidering the evidence to ensure that all processes and procedures are adhered to. Section 198(1) of the Criminal Procedure Code provides:-

"***Whenever any evidence is in a language other than English not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."***

Section 198 (4) of the Criminal Procedure Code provides that the language of the High Court shall be English while that of the subordinate court shall be English or swahili. For avoidance of doubt the Court must indicate the language used in proceedings. Under Article 50(2)(m) of the Constitution an accused must have access to interpretation where the language used is not understood by him. In this case what was the language used in the court below?

This present case can be well distinguished from the case of ***GITHUKU VS REPUBLIC [2007] 1 EA 83*** where the Court of Appeal held that Evidence and cross examination having been done in Kiswahili, the accused could not be said to have been prejudiced because there was nothing on record to suggest that the appellant was not able to understand kiswahili. In that case the record clearly showed that the evidence was given in kiswahili. In present case there is nothing to suggest the language that was used by the witnesses and the accused. Was it English or kiswahili or kiembu? This to me is a violation to the appellants right to interpretation.

My finding is that the four issues emerging and which I have explained at length viz:-

(i) The appellants presence in a cell at Runyenjes police station when they were supposed to be at the GK prison;

(ii) The cut grills/mesh wire of a police cell being left in that condition for a month;

(iii) The undisclosed language used in the court below;

(iv) Failure to call the two suspects who were in the cells;

go a long way to show that there was more to this case than met the eye.

The appellants in their defence were asking how the hacksaw found its way in the cells yet they had been searched prior to being placed in the cells. There was no answer given for this.

I therefore find that the charges as laid were not proved to the required standard and there was also violation of the appellants right to interpretation. The result is that the appeal must succeed. I allow it. I quash the conviction and set aside the sentence of 2 years imposed against each appellant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF APRIL 2013.

H.I. ONG'UDI
JUDGE

In the presence of:-

Mr. Miiri for State

All Appellants

Njue CC