REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 87 & 88 of 2011

STEPHEN MUGAMBI KITHAKA..... 1ST APPELLANT

JOHN NJIRU MBOGO …..... 2ND APPELLANT

VERSUS

REPUBLIC…….....…..…..RESPONDENT

From original conviction and sentence in Cr. Case No. 857 of 2009 at the Principal Magistrate's Court Siakago by S.M. MOKUA – Principal Magistrate on 6th June 2011

JUDGMENT

STEPHEN MUGAMBI KITHAKA & JOHN NJIRU MBOGO hereinafter referred to as the 1st and 2nd Appellants were charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

1. PHILIP MUTUA KIOKO 2. JOHN NJIRU MBOGO: On the 16TH day of September 2009 at Embu Law Court, Municipality Location in Embu District within Eastern Province jointly with others not before Court robbed ELIUD MUREITHI NJAGI of ks.500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ELIUD MUREITHI NJAGI.

The matter proceeded to full hearing and they were both convicted and sentenced to death.

Being aggrieved by the Judgment they filed this appeal against both conviction and sentence. They each raised the following grounds;

1st Appellant's grounds;

1. That the learned trial Magistrate erred in law and facts when he convicted the 1st Appellant ignoring the fact that the case had no investigating officer.

2. That the learned trial Magistrate erred in law and facts when he failed to consider the fact that no exhibit or weapon was produced in Court in relation to this case.

3. That the learned trial Magistrate erred in law and facts when he failed to consider the facts

that the Prosecution side relied only on hearsay evidence.

4. That the learned trial Magistrate erred in law and facts when he failed to explain adequately why he rejected the 1st Appellant's defence.

2nd Appellant's grounds;

1. That the learned trial Magistrate erred in law and facts when he convicted the 2nd Appellant on a capital offence which had no investigating officer.

2. That the learned trial Magistrate erred in law and facts when he failed to consider the fact that the prosecution side failed to produce any exhibit or weapon to support their case.

3. That the learned trial Magistrate erred in law and facts when he failed to erred in law and facts when he failed to consider the fact that the Prosecution side relied wholly on hearsay evidence.

4. That the learned trial Magistrate erred in law and facts when he failed to explain in his judgment why he rejected the 2nd Appellant's defence which was the truth.

The facts of the case are that on 16/9/2009 PW1 and others were brought to Embu Law Courts from Embu Police Station as suspects and for plea to be taken. The two (2) Appellants who were remand Prisoners at Embu G.K. Prison were also brought to Embu Law Courts for hearing of their cases. Before they were taken to Court PW1 and others were placed in cells. While in the cells PW1 claimed that the two Appellants had robbed him of shs.500/=. They were arrested and taken to Embu Police Station. No recovery was made.

When the appeal came for hearing the Appellants presented us with written submissions. Mr. Miiri the learned State Counsel submitted and conceded to the appeal on the following grounds;

1. The investigations were poorly conducted.

2. A thorough search was not done on all remandees

3. ***There was no evidence to prove that the Appellants committed any offence.***

We have considered the submissions by the Appellants and the learned State Counsel. We have equally analysed the evidence on record. We are alive to the fact that we did not have the chance to see or hear the witnesses. It is our duty to analyse the evidence on record and come to our own conclusion. The duty of a 1st appellate Court was well stated in the case of ***MWANGI -V- REPUBLIC [2004]2 KLR 28;***

1.An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.

2.The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.

3.It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's evidence and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witness.

4.***The manner in which the Appellants' appeal was dealt with by the first Appellate Court fell short of its duty in re-evaluating the evidence. It is not enough for a first appellate Court to merely state that it has analysed the evidence adduced. That analysis of evidence must be seen to have been undertaken than simply stated.***

The first issue we shall address is whether the offence of Robbery with Violence was established.

The first ingredient of this offence is stealing. PW1 indicated that shs.500/= was stolen from his while in the cells. He said the money was in a wallet and the wallet was recovered. This wallet was not produced as an exhibit. Besides his word of mouth there was no other evidence to confirm that he had any money on him. The 2nd set of ingredients is as set out in section 296(2) of the Penal Code which provides;

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any".

Any one of these ingredients if proved would establish the charge of Robbery with Violence. Unfortunately there was no evidence to prove that any of the said circumstances in section 296(2) of the Penal Code existed. Our finding therefore is that if any offence occurred it was theft from person contrary to section 279(a) of the Penal Code.

The next issue to determine is whether the Appellants were involved in the commission of any offence that may have occurred.

This offence is said to have occurred at the Embu Law Court cells. This is a place that is guarded. Infact PW1 and PW2 told the Court that there were police officers guarding the prisoners in the cell where this incident allegedly took place. The said officers did nothing as this went on. Furthermore they were never called to testify on what took place. Instead it is PW2 and PW3 who were outside the cell who were called to testify. There were other prisoners in the cell who were potential witnesses. They were not called by the Prosecution. The failure by the Prosecution to call these witnesses would be interpreted to mean that if called they would give adverse evidence to the Prosecution. This was the holding in the case of ***BUKENYA & OTHERS -V- UGANDA*** where the Court of Appeal held;

"The Prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent".

This was the same holding in ***JUMA NGODIA -V- REPUBLIC [1982-88]1 KAR 454***. The Court of Appeal held;

"The Prosecutor has in general a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced, have been unfavourable to the Prosecution".

PW2 testified that they carried out a search but the money and mobile were not recovered. Thats when the Appellants were taken to the Embu Police Station. It's quite obvious that had PW3 organized for a proper search on the Prisoners present she would have made recoveries. Where could the thieves have hidden the ks.500/= and the money within that short time and in that cell without being seen?

PW1 also stated that his trouser and that of one Kennedy Wamae were torn. These trousers were never produced as exhibits.

The State through learned State Counsel conceded to the appeal saying there was no evidence that the Appellants committed any offence.

After analysing the evidence before us we find that the appeal has merit. The result is that the same is allowed. The conviction is quashed and the sentence of death set aside. Both Appellants to be released unless otherwise held under a separate lawful warrants.

SIGNED AND DATED THIS 31ST DAY OF MAY 2013 AT EMBU.

LESIIT J.
J U D G E

H.I. ONG'UDI
J U D G E

Delivered in open Court in the presence of;

…..... for State
Appellants

Njue – C/c