



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 107 OF 2011

JOHN KABORO KIMONJO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(APPEAL FROM CONVICTION AND SENTENCE IN MURANG'A SENIOR RESIDENT
MAGISTRATE'S COURT (HON. E.J OSORO (SRM) DELIVERED ON 9TH JUNE, 2011).*

JUDGMENT OF THE COURT

1. The appellant and two others were charged in the court below with the offence of attempted robbery with violence contrary to section 297 (2) of the penal code.
2. The particulars were that on the 9th day of May 2010 at Ngerere Thubotho village, Kahuro sub-location in Muranga District within central province, jointly being armed with a panga, and axe and a rungu attempted to rob Anthony Macharia Kariuki of money and at or immediately after the time of such attempt used actual violence to the said Antony Macharia Kariuki.
3. Count II – Assault causing actual bodily harm contrary to section 251 of the Penal Code, which was against the appellant only, were that the appellant on 9/5/2010 at Ngerere Thumbotho village in Murang'a District within Central Province unlawfully assaulted Simon Mwangi Kamau thereby occasioning him actual bodily harm.
4. Count III – Being in possession of cannabis contrary to section 3(i) (ii) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994, also against the appellant was that on 9/5/2010 at Kiumbe village in Murang'a District within Central Province was found in possession of one roll of cannabis.
5. In support of it's case the prosecution called a total of 5 witnesses at the conclusion of which the trial court found the appellant and his two co-accused with a case to answer and placed them on their defence. However at the conclusion of the defence hearing, the Court acquitted the appellant's two co-accused but convicted him on counts I, II and III and sentenced him to suffer death on count I and to suffer 2 years imprisonment on count II and 2 month's imprisonment in respect of count III. The trial magistrate however ordered the sentence on count II and III to remain in abeyance in view of the conviction and the nature of sentence in count I.
6. It is this conviction and sentence that the appellant has appealed against arguing that:

- a) The trial magistrate erred in convicting him to suffer death sentence which contravenes the supreme law.
 - b) That she erred in failing to find that the charges were fabricated against him due to a deal gone sour.
 - c) That the trial magistrate erred in law and fact in failing to find that his fundamental rights were violated in that he was tortured physically and psychologically and was not accorded any medical attention.
 - d) That the trial magistrate erred in law and in fact in disregarding his defence in contravention of section 169(1) of the CPC.
7. This Court will consider the second, third and fourth grounds of appeal jointly and revert to the first ground of appeal thereafter.
 8. The appellant complains that the trial magistrate erred in failing to find that the charges against him were fabricated and that the trial court failed to find that his fundamental rights were violated in that he was tortured both physically and psychologically and that the trial court disregarded his defence.
 9. These complaints concern the circumstances of the appellant's arrest and his evidence at the trial. The circumstances of his arrest as recorded by the trial magistrate may be summarised as follows.

On the night of 8/5/2010 PW1 was asleep at his house when he heard a bang, he got up and sat on his bed to listen whether his children were fidgeting, he saw a flash light, then a continuous flash light. PW1 inquired who it was then the people from outside answered that they were thugs and they demanded for money. PW1 answered them back that he did not have the money, PW1 asked his wife to scream which she did, the thugs ordered to her to be silent which she obliged. PW1 armed himself, the thugs hit the window breaking the glass. PW1 and his family raised alarm, after a loud bang things went silent. PW1 heard his brother PW1 calling him out that he had caught one of the thieves.

PW1 got out and found PW2 lying on one man. Next to him he saw an axe. PW2 and the man were in a struggle, PW1 went to assist his brother as the robber was armed with a panga. The evidence of PW1 and PW2 was that the man they intercepted and arrested was the 1st accused. The evidence of PW1 and PW2 is that in the struggle accused wounded both of them. The evidence of PW2 one Simon Mwangi Kariuki was that on the night of 8th and 9th May at 3.00 am he was asleep at his house when he heard a bang at his brother (PW1's) house. Then he heard PW1 and his family screaming. PW2 armed himself with a jembe handle and got out, he saw a man running at a distance. When he got closer PW2 ordered him to stop, the person flashed a torch at PW2 and PW2 saw that the man was armed with an axe which he raised up to cut PW2.

PW2 hit the man with the jembe handle, the axe and the torch fell down. PW2 got hold of the man and they began to struggle until PW1 arrived to assist PW2. After much struggle PW1 and PW2 overpowered the man whom they both identified as accused 1, according to the complainant they struggled with accused 1 for about 15 minutes from the compound until the coffee farm when they managed to outweigh the 1st accused and took him back to the homestead and tied him to an electricity pole.

10. From the summary of the evidence, it is clear that injuries to the appellant, PW1 and PW2 were sustained as a result of the struggle to subdue the appellant who was armed with a panga and an axe. It is therefore not correct that he was tortured.
11. Concerning the claim that the charges were fabricated against him, the trial magistrate after analysing the testimony and evidence observed as follows:

“As for the 1st accused there is no dispute that he was at the scene, he admits being there and this is the place where the investigating officer PW5 found him, the only issue for this court's determination is whether the accused was intercepted by PW2 as he fled from the scene or he was invited by PW1 to his home and he (PW1) later turned against him.

If indeed the 1st accused was invited by PW1 to his home as per his version then it means only the 1st accused was assaulted. However from the evidence of PW5 and the clinical officer he treated PW1 and PW2 of injuries they had sustained...If at all PW1 and PW2 implicated the 1st accused then PW1 could not be found with the injuries they sustained. The evidence by PW1 and PW2 is well corroborated by that of PW3, PW4 and PW5 and I am certain that all the prosecution witnesses were candid...The allegation that PW1 and PW2 assaulted the 1st accused and that PW1 ripped off his own window grill is a made up story....Accused 1 struck this court to be less candid and was evasive...I have looked at his submission and in a nut shell I find that the defence by 1st accused is rejected and dismissed. The 1st accused was caught red handed and intercepted by PW2 as he fled from the scene.

12.As the first appellate court, we are duty bound to reassess evidence on record, re-evaluate it and make our own conclusions remembering to warn ourselves that the trial court had the advantage of listening to witnesses and observing their demeanour. In this particular case we have evaluated the testimony of prosecution witnesses as well as the appellant's defence vis-a-vis the analysis and conclusions reached thereon by the trial court and are persuaded that the trial court was justified in reaching the finding it did. We therefore think the conviction was safe and refuse to disturb it.

13.We now revert to the issue the sentence meted out to the appellant. That is the death penalty. The appellant argues that death penalty is contrary to the supreme law which though he does not name but we presume is the constitution.

14.The legality of the death sentence has lately been a subject of fierce debate in human rights circles with human rights advocates advocating for its abolition while state authorities and to some extent a considerable number of lawyers arguing that it still has a role in the criminal justice system. These emerging debates are healthy for the development of jurisprudence in this area of criminal justice.

15.However the Court of Appeal in the recent case of **Joseph Njuguna Mwaura & 2 others vs. Republic Criminal Appeal No. 5 of 2008** stated in this regard as follows:

“...the Constitution, both of the former epoch and the current, clearly envisage that the right to life is not absolute, the state can limit it in accordance with any written. The law in this case is the Penal Code.”

16.Article 26 of the Constitution provides that:

(1) Every person has a right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, **except to the extent authorised by this Constitution or other written law. (emphasis ours)**

17.To this extent it is clear that the supreme law, read the Constitution, which the appellant argues prohibits death sentence actually permits it ***to the extent authorised by the Constitution itself or other written law.*** We therefore find no merit in this ground of appeal and disallow it.

18.In conclusion, having reevaluated both the prosecution and defence evidence and the rendering thereon by the trial magistrate, we are persuaded that the appellant's conviction was safe and we therefore decline to disturb it with the consequence that this appeal is dismissed.

19.It is so ordered.

Dated and delivered at Nyeri this 19th day of December, 2013.

OUGO R.E

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JUDGE

ABUODHA N.J

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JUDGE

*Delivered in open Court in the presence of..... for the Appellant and.....
for the Republic.*