



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 40 OF 2013

(Formerly Nairobi Criminal Appeals No. 252 & 260 of 2008)

GAMALDENE ABDI ABDIRAHMAN1ST APPELLANT

ABDILLAHI DUALE BUNO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 1061 of 2007 in the Senior Principal Magistrate's Court at Garissa - S. M. Kibunja (SPM) on 21st December, 2007.)

JUDGMENT

Gamaldene Abdi Abdirahman (the 1st Appellant) and Abdillahi Duale Buno (the 2nd Appellant) were the 2nd and 1st accused persons respectively in Garissa Senior Principal Magistrate Criminal Case No. 1061 of 2007. After the trial they were convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence had stated that on 27th September, 2003 at Ifo Refugee Camp in Garissa District within North Eastern Province the accused persons jointly with others not before court robbed O M O of his Nokia 1600 mobile phone valued at kshs.4,000/= and at or immediately before the time of such robbery used actual violence on the said O M O.

The appellants were dissatisfied with the decision of the trial court and they proceeded to file separate appeals in the High Court at Nairobi. The 1st Appellant's appeal was No. 260 of 2008 and that of the 2nd Appellant was registered as No. 252 of 2008. The two appeals were on 5th March, 2013 transferred to this court and one file opened being Criminal Appeal No. 40 of 2013. It appears these two appeals were not formally consolidated but the appellants proceeded as if the appeals were consolidated. We will treat the two appeals as duly consolidated.

The 1st Appellant's petition of appeal was filed on 28th July, 2008. The 2nd Appellant filed his petition on 1st August, 2008. The two petitions were filed by the same advocate and the 2nd Appellant's petition is a replica of the 1st Appellant's petition.

The appellants faults the decision of the trial court on the following grounds:-

- a. **The trial magistrate erred in law in failing to address his mind to issues of the apparent violation of the Appellant's constitutional rights by the arresting and detaining authorities as**

- protected by Section 72(3) of the Constitution.
- b. **The trial magistrate erred in failing to guarantee the accused persons' constitutional rights as protected by Section 77(2) of the Constitution by conducting proceedings in a language the accused person did not understand without the facilities of an interpreter.**
 - c. **The trial magistrate erred in law and in failing to put into consideration the accused person's defence in reaching his findings.**
 - d. **The trial magistrate erred in convicting the accused persons on highly inconsistent evidence, hearsay evidence and inadmissible and insufficient evidence by the prosecution.**
 - e. **The trial magistrate erred in failing to put into consideration the age of the appellant in sentencing the appellants.**
 - f. **The trial magistrate erred in failing to conduct a voir dire on the complainant who was a child in law.**

At the hearing of the appeal, counsel for the appellants indicated that he would rely on the written submissions filed on 17th October, 2013.

The appellants' first argument is that the trial magistrate erred in law by failing to address his mind to the issue of the apparent violation of the appellants' constitutional rights. It was submitted that the appellants were arrested on 30th September, 2007 and taken to court on 17th October, 2007 thus breaching Section 72(3) of the previous Constitution of Kenya which allowed for the detention of a suspect of robbery with violence for a period not exceeding 14 days. The appellants submit that no explanation was given for their prolonged detention and this renders the entire trial an abuse of their constitutional rights.

In response Mr. Mulama for the state admitted that the appellants were indeed brought to court outside the maximum 14 days provided by the Constitution. He, however, argued that the failure could not lead to a nullification of the proceedings since the appellants could seek compensation for the violation of the Constitution through civil proceedings.

We have looked at the law and confirm that the assertion of Mr. Mulama is valid. This was the position taken by the Court of Appeal in **JULIUS KAMAU MBUGUA v REPUBLIC [2010] eKLR** when it stated that:-

“Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.”

We therefore find and hold that the violation of the appellants' constitutional rights did not void the criminal proceedings.

The second argument by the appellants' counsel is that no interpreter was availed to the appellants and that meant Section 77(2) of the repealed Constitution had been breached. The Constitution did indeed provide for the right of an accused to have an interpreter to translate the proceedings in a language understood by the accused. Mr. Mulama argued that a perusal of the court proceedings shows that the appellants fully participated in the trial and they were aware of what was happening.

We have perused the court proceedings and we note that when the plea was taken the court record indicates that the language was English/Somali. During the hearing, the court record only shows the languages used by the witnesses. We note that the appellants cross-examined all the witnesses at length. It cannot therefore be said that they did not understand the proceedings.

In the recent decision in **Criminal Appeal No. 302 of 2007 GEORGE MBUGUA THIONGO v REPUBLIC** the Court of Appeal stated that:-

“For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice.”

We agree that once the record shows that an accused person actively participated in the trial, he cannot be heard to say that he was prejudiced for the simple reason that the language used in the trial is not shown in the court proceedings.

The third issue raised by the appellants is that the trial magistrate did not conduct a *voir dire* on the complainant who was a child aged 13 years at the time he testified. On this one, Mr. Mulama for the state contended that the complainant not being a child of tender years, a *voir dire* examination was not legally required. He argued that a child of tender years is defined by Section 2 of the Children Act, 2001 as a child under the age of ten years.

The principles that have been applicable when it comes to a child of tender years are summarized at pages 54-57 of the **JUDICIARY BENCH BOOK FOR MAGISTRATES IN CRIMINAL PROCEEDINGS**. The first principle is that where a child of tender years is called as a witness, the court must first conduct a *voir dire* examination before allowing the child to testify. This is meant to find out whether the child understands the meaning of an oath. Where the court finds that the child does not understand the nature of an oath but is possessed of sufficient intelligence and understands the duty to tell the truth, the child may give unsworn testimony.

The second principle is that whether the child is of tender years is a matter of the good sense of the court. In **KIBANGENY ARAP KOLIL v REPUBLIC [1959] EA 92** it was held by the Court of Appeal that the term tender years meant a child under the age of 14 years.

Does the definition of a “child of tender years” by the Children Act, 2001 therefore oust the jurisprudence that has been developed in criminal trials? The first thing to note is that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children. We do not think Parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated, there are specific reasons why *voir dire* examination is necessary before the evidence of a child of tender years can be accepted by the courts. We would therefore hesitate to agree with Mr. Mulama that in view of the definition of “a child of tender years” by the Children Act, any child over the age of ten years should now testify on oath without the trial court conducting a *voir dire* examination.

In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child’s development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is brought up. Some children are slow developers while others are fast learners it would therefore be prudent to test the intellectual capacity of a child witness before putting the child in the witness box.

Having reached the above conclusion, it follows that the acceptance of the evidence of the complainant by the trial magistrate without conducting a *voir dire* examination on the witness was fatal to the prosecution case. The child testified that he was 13 years old and in our view the said child was one of “tender years” and *voir dire* examination ought to have been administered on the witness.

The appellants’ counsel also faulted the trial court for sentencing the appellants to death despite their being minors. There appears to be nothing on record to indicate the ages of the appellants. At the top of the charge sheet, the apparent age of the appellants is indicated as “adult.” The trial magistrate cannot therefore be faulted for imposing the sentence of death on the appellants since there is no evidence that

they were minors.

As is required of us, we will proceed to analyze the evidence adduced at the trial, so as to arrive at our own independent conclusion. In doing so, we are guided by the fact that we neither saw nor heard the witnesses testify.

On the issue of the evidence adduced, the appellants submit that they were convicted on inconsistent and hearsay evidence. They also argue that the evidence was inadmissible and insufficient. They contend that the identification of the appellants was unsatisfactory and the trial court failed to warn itself about the dangers of convicting on such evidence. Counsel for the state contended that sufficient evidence had been adduced during the trial to connect the appellants with the crime committed and the trial magistrate was therefore right in convicting them.

What was the evidence adduced before the lower court? The complainant testified that:-

“On 28th September, 2007 at 5 p.m. I had gone to the market to get my phone I had taken there for charging. As I went home riding a bicycle I met 3 people, one held the bicycle. He is not in court. The three held me but I ran off. The one who had held my bicycle held me and the tall one who is 1st accused in the dock took my phone and the third one who is 2nd accused took the bicycle.....”

The complainant then continues to narrate how the appellants were arrested after some hide and seek. The complainant proceeds to state that:-

“I learnt my phone was recovered from a Somali lady to whom it had been sold. My phone was Nokia 1600. It belonged to my mother. This is Nokia 1600 MFI (1) robbed from me by accused but recovered. It had my mother’s name at the back but it is not there now.

The sim card had been given to me at the time of theft but it is now in the phone but I cannot operate it.....I did not know the people. The Somali Bantu arrested 1st accused had seen accused as they escaped and that is how they got to know he was wanted for robbery.”

The impression we get from the said evidence is that the appellants were arrested at the scene of crime but the mobile phone was recovered on a different occasion. From the answers given during cross-examination we form the opinion that the appellants were not arrested at the scene of crime. PW2 Noor Abukar Nurdly told the court that he arrested the 2nd Appellant with ¼ Kg of sugar. He later released him and then rearrested him.

PW3 Mohamed Bale stated that he saw the 2nd Appellant hiding and after a short while the complainant came shouting that he had been robbed of a mobile phone. They arrested the 2nd Appellant and released him. Two days later they saw him, arrested him and escorted him to the police station.

PW4 Fartun Aden Abdi and PW5 Mohamed Farah told the court that on 28th September, 2007 at around 7.00 p.m. they were walking to the market when they met the appellants with one Abdinasir. Abdinasir told them that he was selling a Nokia 1600 mobile phone which he had. PW4 bought the phone at an agreed price of Kshs.3,000/=. Kshs.2,500/= was paid on the spot and the balance of kshs.500/= was to be paid upon production of documents by Abdinasir. Two days later PW5 learned that the mobile phone had been stolen. PW4 took the mobile phone to the police station. During cross-examination by the 2nd Appellant PW4 told the court that the money he paid was shared by the appellants and Abdinasir and they even argued over it. He also stated that the appellants together with PW5 had been arrested by the time the mobile phone was taken to the police station. When cross-examined by the 1st Appellant, PW4 denied that she had been arrested by the police. PW5 told the court that he was not present when the

appellants were arrested.

PW6 Police Constable George Njoroge stated that on 30th September, 2007 he arrested the 2nd Appellant. The 2nd Appellant told him Warsame (PW 5) knew where the mobile phone had been stolen from. Warsame was arrested and he led him to the 1st Appellant who was also arrested. They then led him to the home of Abdinasir but he escaped before he could be arrested. The mobile phone was later taken to the police station by the person who had bought it. PW6 admitted that he had not known the appellants before he arrested them. He also did not know why PW5 was not charged.

PW7 Police Constable Alex Nderitu told the court that on 30th September, 2007 he rearrested the 2nd Appellant, who was taken to the station in connection with a robbery that had occurred on 28th September, 2007. The next day the 2nd Appellant led them to Warsame (PW5) and identified him as one of the robbers. PW5 was arrested. The 2nd Appellant also led them to the 1st Appellant who was also arrested.

We have closely examined the evidence adduced herein and doubts have been created in our minds. The complainant (PW1) was not present during the arrest of the appellants. He told the court that he had not known any of the people who robbed him prior to the date of the robbery. Why were identification parades not held? There is evidence that PW5 was named as one of the robbers. Under what circumstances was he released and why was he not charged together with the appellants? Had proper investigations been conducted, an identification parade should also have been held for PW5. The evidence on the recovery of the mobile phone leaves us in doubt as to whether any of the appellants had anything to do with the phone. In fact there was no clear identification of the recovered phone by the complainant.

At the end of the day we are left in doubt as to whether the appellants were indeed among the people who robbed the complainant. Coupled with the fact that no *voir dire* examination was conducted before the evidence of the complainant was received, we reach the conclusion that the conviction herein is not safe.

We therefore allow the appeal and set aside the conviction and sentence. The appellants are thus set free unless otherwise lawfully held.

We make orders accordingly.

Signed and dated this 22nd day November 2013

S. N. MUTUKU,

W. KORIR,

JUDGE

JUDGE

Dated and delivered this 2nd December 2013

S. N. MUTUKU,

JUDGE