REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 62 of 2011

PATRICK KIMATHI MITHIKA…..…….. 1STAPPELLANT

JOSPHAT KABERIA…..……..2ND APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

(Criminal Appeal against both conviction and sentence by Hon J.N. Nyaga SPM at MAUA SPM Criminal Case No. 1004 of 2008 delivered on19.3.2010)

J U D G M E N T

The Appellants **PATRICK KIMATHI MITHIKA** and **JOSPHAT KABERIA** are charged with two count of robbery with violence contrary to section 296(2) of the Penal Code. They were convicted in one count in count 1 and sentenced to death. Being aggrieved by the conviction and sentence they filed his appeal. The appeals have been consolidated having arisen from the said trial.

The 1st Appellants raised 6 grounds of appeal.

Which are summarized as follows.

That the prosecution did not avail all the crucial witnesses in support of their case. The evidence of recovery of the exhibits was not properly proved. That there was inconsistency in the evidence of the witnesses.

And that the sentence of death imposed upon him was harsh excessive arbitral inhuman and unconstitutional.

The 2nd appellant has raised six grounds of Appeal. These are interdem with those raised by the 1st Appellant and we therefore need not repeat.

The facts of the prosecution case are that the two complainants were each sleeping in their houses when thugs struck at about 2 am. PW1 the complainant in count 1said that some people broke into his house and entered. He was then beaten up and robbed off 3 trousers and one cap. The thugs then left. He said that he was not able to identify any of them and it was at night, that the incident took place inside his house and there was no form of lighting.

PW2 was the complainant in count 2. He was robbed hi mobile phone inside his house. He was not able to identify anyone.

The prosecution case is that the two complainants and others followed footprints from PW1's house for a distant of 15 kilometres where they found the 2 appellants sleeping in the bush. They said that they recovered the 3 trousers, the cap and the mobile phone stolen from the complainant. They tied the two Appellants and took them Njuri-Nceeke elders and also left the exhibits with the elders. In court PW1 identified the trousers as his and also produced receipts for them. He also identified the cap by the markings New York. PW2 on the other hand identified the mobile phone as his.

The 1st Appellant in his sworn defence denied this offence and challenged the prosecution for failing to call witnesses from the village where he was arrested. The 2nd Appellant also gave a sworn defence he denied the offence and said that he was dropped by a PSV at Ngudune Stage on the material day after coming from Isiolo. He said that he was arrested at the stage by Police Officers and taken the Police Station where he was eventually charged with this offence. The two Appellants gave written submissions in support of their appeal. We have considered their submissions.

The state was represented by Mr. Moses Mungai learned State Counsel. He opposed the appeal. Counsel urged that there was sufficient evidence against the Appellant on the basis of identification on items stolen from the complainant which were found in their possession soon after the offence was committed.

We are the 1st appellate court and as such we have subjected the evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We have also drawn our own conclusions as required of us. We are guided by the court of Appeal decision. In the case of **OKENO V. REPUBLIC [1972] EA 32**. The role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings 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 has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

The learned trial magistrate acquitted the two Appellants for the 2nd count of robbery with violence on account of insufficient evidence the complainant PW2.the learned trial magistrate found that the evidence of identification of the mobile phone recovered in this case was insufficient because when PW2 gave his statement to the police he said that his stolen mobile phone was a model C113. The phone before court Exh.4 was a Siemens model A35. We feel that the learned magistrate was correct to acquit the appellant in count 2. Regarding count 1. The learned trial magistrate found that the evidence of identification by PW1 of 3 trousers and a cap was sufficient to sustain a conviction. The learned trial magistrate was impressed by the complainant's evidence of arrest and recovery of the stolen items and believed that they were telling the truth. He had this to say about identification

"Mwiti identified the 3 trousers as his. He produced receipts for 2 of the trousers. He said that he had fitted them at the tailors shop at Ngudune Market. He identified the cap that was labeled New York….all the same I have no doubt that at the time of the arrest in the bush the accused were found in possession of 3 pairs of trousers and a cap stolen from Stephen Mwiti (PW1) Mwiti identified the trousers and the cap to the satisfaction of the court".

The burden lies with the prosecution to prove the charge against the accused persons beyond any reasonable doubt. In this case the Appellants were convicted on the basis of the prosecution evidence of PW1 and 2 that they were found in possession of 3 trousers and one cap stolen from PW1. The prosecution needed to adduce evidence to establish that both Appellants were in possession of the said exhibits. Possession is defined under section 4 of the Penal Code in the following terms:-

(a) Be in possession of or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself of not) for the use or benefit of oneself or of any other person;

(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them

We have carefully analyzed the evidence of the prosecution before the court in relation to possession of the trousers and the cap for which the Appellants were convicted. Nowhere has either PW1 or PW2 explained where exactly where the trousers and cap were found in relation to the Appellants. PW1 merely stated as follows "**We found some people sleeping in the bush. They were two people. We found them with my stolen clothes".** He did not say exactly where they were. PW2 on his part was absolutely silent on his part of the trouser and cap. He did not say in his evidence that any trousers or caps were recovered from the Appellant. The prosecution did not show whether the Appellants had the trousers and the cap in their person or next to them or in some container belonging to them. It is our respective finding that the prosecution did not prove that the Appellants were in possession of the trousers and the cap recovered in this case.

Connected with the issue of possession is the issue of identification of the Exhibit. PW1 needed to identify the trousers and the cap as his property. Regarding identification this is what PW1 said:

"**We were given one elder and followed the footsteps. We found some people sleeping in the bush. They were two people. We found them with my stolen clothes. It was about 15 kilometers from my home. We found the people at 11 am….and these are the clothes 3 trousers, one cap".**

With respect we do not think that PW1 made any attempt to identify the trousers. Apart from saying that he fitted them in the market and producing receipts he did not establish what enabled him to specifically identify those trousers as his property.

Having carefully considered this Appeal we have come to the conclusion that the evidence adduced against the Appellant fell far too short of prove to the required standard in criminal cases. We find that the conviction against the appellant were unsafe and should not be allowed to stand.

Accordingly we quash the conviction against both Appellants and set aside the sentences. We order that the Appellants should be set at liberty forthwith. Unless they are otherwise lawfully held.

DATED AT MERU THIS 22ND DAY OF NOVEMBER, 2012.

LESIIT, J
JUDGE.

J.A. MAKAU
JUDGE.