REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO. 08 OF 2010
Appeal arising from BGM CM. CR. NO.699 of 2009

BENSON KIMANI MAINA alias BENTO.....APPELLANT
~VRS~
REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Benson Kimani Maina alias Bento was convicted by Bungoma Senior resident Magistrate of the offence of handling stolen goods contrary to section 322 (2) of the Penal Code and sentenced to serve seven (7) years imprisonment. The Appellant was acquitted of the main charge of robbery with violence contrary to section 296 (2) of Penal Code. Being aggrieved by the conviction and sentence, he lodged this appeal.

In his grounds of appeal, the Appellant faults the trial court for convicting him when all the ingredients of the offence including the identity of the exhibits were not proved. In his supplementary grounds, the Appellant stated that he was not accorded an interpreter and that the language used by the court was not recorded. Also that section 200 of CPC was not complied with when the second magistrate took over.

The State opposed the appeal. The State Counsel Mrs. Leting argued that the court proceedings were interpreted in Kiswahili at plea time and that witnesses testified in the same language. On non-compliance of section 200 CPC, the State counsel said that the case was heard by one magistrate. The names of Mrs. Onditi and M. Wambani refer to one and the same person. The stolen items were recovered in the house of the Appellant which led to his conviction on the alternative charge. According to the State, the sentence was reasonable.

The facts of the case are that in the night of 27/03/2009 at 1.00 a.m, the complainant PW1 was asleep in his house at Bungoma town. He is a businessman selling second hand clothes. He had kept his stock in the house. A gang of eight men forced the door of his open and attacked him. They robbed him of 59 shirts, one thermos flask and cash Ksh.1500/=. PW1 sustained injuries in the course of the robbery. He later reported the matter to the police. Police arrested four (4) people including the Appellant and charged them with robbery with violence. The others were acquitted of all the offences.

Two weeks after the incident, the complainant was called to the police station where he was shown two shirts and six seat covers. He identified the items as part of his stolen property. PW1 said he had identified the Appellant during the robbery. However, the trial court found that the circumstances of identification were not conducive to positive identification and gave the Appellant the benefit of the doubt.

PW2 a police officer testified that he was investigating another robbery case where the Appellant's co-accused in this case had been arrested. Accused no.3 namely Godfrey Simiyu Nyongesa led the officer PW2 to the house of the Appellant. He found that the Appellant had moved to another house. He was shown the new house where the Appellant was a tenant. The house was open but there was no one inside. PW1 searched the house and recovered the two shirts and six seat covers produced as exhibits in this case. Several other exhibits related to other cases were recovered. The national identity card of the Appellant, a pair of sports shoes belonging to the Appellant were also taken by PW1 as exhibits.

PW3 Inspector Aaron Kipsang testified that he went to the houses of several suspects at Webuye where they recovered several items related to various robberies. In his evidence in chief, PW3 said he arrested accused 1 Hassan Murunga. The Appellant was accused 1 in the lower court and his name is Benson Kimani Maina *alias* Bento. Hassan Murunga was the second accused. This contradiction was not addressed in the judgment of the trial magistrate. It was an important issue since the Appellant was convicted of handling stolen property. The details of the recovery ought to have been properly scrutinized. On cross-examination by the Appellant, PW3 brought in new evidence. He said he had gone to the house of Benson alias Bento (meaning the Appellant) and recovered several items which he did not name or identity in court. Later, PW3 said that the shirts and table clothes recovered from the Appellant's house were removed from his suitcase. PW3 did not know the Appellant before the incident. PW2 said he knew the Appellant and accused 3 before the incident. Having known the Appellant, PW2 said he identified the sports shoes of the Appellant and took them as exhibits from the house in absence of the Appellant. PW2 did not explain how he knew the Appellant and how he could identify his shoes.

PW4 the investigating officer did not visit the scene of crime or places of recovery of the stolen items. He said that the Appellant was arrested by members of public and handed over to the police. The persons who arrested the Appellant were not called as witnesses. Neither did the police officer who received the Appellant at the police station testify.

The whole evidence of recovery of the stolen items leaves a lot to be desired. The house of the Appellant was searched in his absence. The police did not prepare an inventory to show what they recovered from the house of the Appellant as opposed to the houses of his accomplices. The national identity card of the Appellant was never produced in evidence. This casts doubt on the evidence of PW2 who said that he recovered it. The identification of the items was not satisfactory. There was no mark shown by PW1 when he said the two shirts and the table clothes belonged to him. PW2 and PW3 gave uncoordinated evidence on the recovery of the items, yet they were together at the house of the Appellant.

The plea in this case was taken on 16/04/2009. The language used is recorded as English/Kiswahili. The court did not record which of the two languages were used to read the charge to the accused persons. It is a requirement that the court indicates the language used. This is meant to ensure that the accused understands the charge. The language used by the witnesses in their testimonies is not indicated. This fortifies the claim by the Appellant that he did not follow the proceedings. Section 72 of the constitution and section 198 of the Criminal Procedure Code imposed a duty on the court to ensure that the accused understands the charge. The language used by the court must be indicated.

The court must record that the accused understands that language. The trial court did not comply with the law in this case as relates to language.

This case was heard by one magistrate called Margaret Wambani – Onditi. The names of Margaret Wambani and Mrs. Onditi refer to one and the same person. The issue of non-compliance with section 200 of the Criminal Procedure Code does not arise.

In her judgment, the court did not examine the evidence of recovery of the exhibits thoroughly. The same was riddled with contradictions and had several gaps which raise doubt as to whether the Appellant was found in possession of the stolen items. The conviction was therefore not based on cogent evidence and the Appellant ought to have been given the benefit of the doubt.

The appeal must therefore succeed. I hereby quash the conviction and set aside the sentence imposed. The Appellant is set at liberty unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 25th day of November, 2010 in the presence of the Appellant and the State Counsel Mrs. Leting.

F. N. MUCHEMI
JUDGE