



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 45 of 2007

JAMES MUGAMBI KANGARUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Nakuru C.M.CR.C.NO.2725/00

by Hon. N. M. Kiriba, Senior Resident Magistrate)

Coram:

Hon. M. Koome, Judge

Hon. M. G. Mugo, Judge

Mr. Njogu for State

Court clerks – Carol/Anthony

Appellant present

Mr. Ogolla for Appellant

JUDGMENT

The appellant, James Mugambi Kangaru was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. He was tried and convicted by the Hon. Senior Resident Magistrate N.M. Kiriba in Nakuru C.M.CR.C.NO.2725 of 2000. He was sentenced to suffer death. Being aggrieved by both the conviction and sentence, he filed this appeal on the ground inter alia, that the prosecution's evidence against him was neither sufficient nor weighty enough to support the finding of guilty and to sustain the conviction. He also contends that his defence was not considered at all by the trial magistrate and that the judgment of the trial court violated the provisions of Section 169 of the Criminal Procedure Code in that it did not set out the points for determination and no reasons were given for the decision arrived at.

The particulars of the charge facing the appellant were that; on the 4th day of December, 2000 at free Area Estate within Nakuru District of the Rift Valley Province, the appellant, jointly with others not

before court and while armed with stones and metal bars, robbed Peter Irungu Wambugu of two pairs of sandals and assorted utensils valued at Kshs.4,500/= and used actual violence on the said Peter Irungu Wambugu in the course of the robbery.

The appellant represented himself at the appeal and relied entirely on written submissions which we have duly considered. The State was represented by the learned State Counsel Mr. Njogu and has conceded the appeal, firstly on the grounds that the evidence of P.W.1, the complainant, is at variance with the particulars of the charge, as set out in the charge sheet in that, whereas the charge sheet specifies the value of the goods stolen as Kshs.4,500/=, the complainant testified that the said goods were worth Kshs.9,500/=. Secondly Mr. Njogu accepts the appellant's contention that the judgment offends the provisions of Section 169(1) of the Criminal Procedure Code.

We have, as is required of us, carefully considered the entire proceedings of the lower court and its judgment, analysed and evaluated the evidence adduced at the trial and have made our own independent conclusions in regard thereto.

The complainant, Peter Irungu Wambugu (P.W.1), testified that on 4/12/2006 he was alerted that someone had been arrested while stealing slippers from his shop and that the said person had been beaten by members of the public. Later that day a gang of people, who included the appellant, accosted the complainant at his shop and pelted him with stones. It was P.W.1's testimony that the appellant hit him with a stone while:

"The guy he was with looted (my) shop goods worth Kshs.9,500/=."

P.W.2, John Njenga, a hawker, testified that on the material date he heard a rumour that someone had been arrested with stolen shop goods. According to P.W.2 that person happened to be the appellant who returned to the scene with a gang of people and proceeded to attack P.W.2 and P.W.1.

Ann Nyambura, P.W.3 testified that the appellant stole two slippers from her shop and she screamed, attracting the attention of members of the public, who then beat up the appellant. Later on the appellant returned to the scene with a group of people who stoned P.W.1.

P.C. Samson Otieno then of Nakuru Police Station testified that on 18th December, 2001 the complainant herein took the appellant to the police station and made a report to the effect that the appellant had assaulted him. P.W.4 placed the appellant in the cells and afterwards the appellant was charged (with the offence of robbery with violence). The appellant's defence was that he was arrested at the bus station without cause and then charged with the offence.

That the evidence of P.W.1 is clearly at variance with the particulars of the charge herein is in no doubt. Not only is there a contradiction as regards the value of the goods allegedly stolen from the complainant but P.W.1 makes no mention of metal bars stated (in the charge sheet) to have been used in course of the robbery. Further, P.W.1's testimony is contradictory in itself as to when he was actually robbed by the appellant and his alleged accomplices, if at all. We find that, whereas P.W.1 claims to have been robbed of goods worth Kshs.9,500/= only a pair of slippers was exhibited at the trial. P.W.1 did not state what his other goods were and did not talk of any utensils having been stolen from him as stated in the charge sheet. Furthermore, as is clear from the evidence of P.W.4, that the complainant only reported having been assaulted by the appellant, not robbed by him. The entire prosecution evidence points only as an assault (with stones) and since it appears, from P.W.3's testimony (if the same is to be believed) that it is her slippers that were stolen, in circumstances not suggestive of a robbery in any event, the charge is, in our view unsupported by the evidence adduced at, the trial

We accept the appellants submission that the charge against him was not proved to the required legal standard and that the conviction was not supported by the evidence adduced, which, as we have noted hereinabove, was contradictory in material respects. Clearly the learned trial magistrate was wrong in finding that there was "*overwhelming evidence against the (appellant)*" and in convicting him.

The appellant's defence that he was "*just arrested and charged.*" is supported by the fact that the police witness did not tell the court how the investigations into P.W.1's complainant for assault led to a charge of robbery with violence being preferred against the appellant. The fact that the complainant did not report the alleged robbery incident on the day it happened but two weeks thereafter creates a doubt in our minds as to whether he was robbed at all.

We accept also, the appellant's submission that the judgment as recorded by the learned trial magistrate violates the provisions of Section 169(1) of the Criminal Procedure Code in the manner stated. We find that the State is in order to concede the appeal which is hereby allowed.

Consequently the conviction is hereby quashed and the death sentence set aside. The appellant is to be set free and released from jail forthwith unless he is for any other reasons legally held.

DATED, SIGNED and DELIVERED at Nakuru this 21st day of May, 2009.

M. KOOME

M. G. MUGO

JUDGE

JUDGE