



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 179 of 2008

PATRICK MUSYOKI MULINGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant Patrick Musyoki Mulinge alias Ferdnand Mweke Munguti was charged before the learned Senior Resident Magistrate Taveta with three counts as follows:-

COUNT NO. ONE

ATTEMPTED ROBBERY WITH VIOLENCE CONTRARY TO SECTION 297(2) OF THE PENAL CODE

PATRICK MUSYOKI MULINGE ALIAS FERDNAND MWEKE MULINGE: On the night of 12th December, 2007 at Taveta Township in Taita District, within the Coast Province, being armed with a Dangerous weapon, namely a knife, attempted to rob JOSEPH MWAISANYA his bicycle make Raja and Kshs.3000/- all valued at Kshs.5000/- and at or immediately before or immediately after the time of such attempted Robbery, used actual violence to the said JOSEPH MAISANYA.

COUNT NO. TWO

ESCAPE FROM LAWFUL CUSTODY, CONTRARY TO SECTION 123 OF THE PENAL CODE

PATRICK MUSYOKI MULINGE ALIAS FERDNAND MWEKE MUNGUTI: On the 12th night of December, 2007 at Darajani Village in Taveta District within Coast Province, being a suspect in lawful custody of No. 58331 PC ZACHARIA SHITANDA and No. 38321 PC. CHARLES RONO for the offence of attempted Robbery with Violence contrary to S. 297(2) of the Penal Code, escaped.

COUNT NO. THREE

STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE

PATRICK MUSYOKI MULINGE ALIAS FERDNAND MWEKE MUNGUTI: On the 19th day of December, 2007 at Chalia Village in Taveta District within Coast Province, stole one Bicycle make Phoenix valued at Kshs.6000/- the property of

DANIEL MSHIGATI

The said Appellant was arraigned in court on 24th December 2007 and denied all three counts. His trial commenced on 24th January 2008 at which the prosecution called a total of eleven (11) witnesses. The brief facts of the case were that on 12th December 2007 at about 7.00 p.m. **PW1 JOSEPH MWAISYANYA** a Pastor was walking home when he came across the Appellant. **PW1** was at the time pushing his bicycle make **RAJA**. The Appellant introduced himself to **PW1** as Corp. Musyoki of Challa AP's Camp and purported to arrest **PW1** for involvement in a murder which he claimed to be investigating. The Appellant then offered to release **PW1** In exchange for Kshs.3000/-. **PW1** did not have money on him and offered to go and collect the money from his house. The Appellant suggested that they store **PW1's** bicycle at a nearby video shop. **PW1** then made away and began to make enquires with others about this Corp. Musyoki. It transpired that no such officer existed at Challa AP's Camp. Police were dispatched to the scene to interview the Appellant but he managed to evade them. Later he was arrested near Mwembeni and put in a police vehicle. On the way to the police station at Darajani the Appellant escaped from the police by jumping out of the moving vehicle and running into the nearby bushes. On 19th December 2007 **PW4 DANIEL BONANI MSHIGATI** left his bicycle outside his house at Challa. The Appellant came and took the bicycle and rode away on it. **PW4** gave chase and managed to apprehend the Appellant. They took him to Challa AP's Camp. The police conducted an identification parade at which five prosecution witnesses identified the Appellant. He was then charged in court.

At the close of the prosecution case the Appellant was ruled to have a case to answer. He gave an unsworn defence and denied all the charges. On 12th May 2008 the trial magistrate wrote his judgement in which he acquitted the Appellant of the first count of Attempted Robbery but convicted him on the second and third count. After hearing mitigation from the Appellant the trial magistrate sentenced the Appellant to serve two (2) years imprisonment on the second and third counts, and ordered that the sentences run consecutively. The Appellant being dissatisfied with both his conviction and sentences filed this present appeal against both.

The Appellant who appeared in person for this appeal opted to rely entirely on his written submissions which had been duly served on both the court and the State. Mr. Ondari learned State Counsel appeared for the Respondent State and gave oral submissions in support of both the convictions and sentences as imposed by the lower court.

This being a first appeal I am obliged to re-examine the evidence adduced before the lower court and consider whether the same met the required standard of proof. In the case of **OKENO –VS- REPUBLIC [1972] E.A.L.R. 33** the Court of Appeal held that –

“VI It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld”

[See also **AJODE –VS- REPUBLIC [2004] KLR 82**]

I have carefully perused the written submissions filed by the Appellant in which he raises the following grounds of appeal.

- (1) Embarrassing charge sheet
- (2) Non-compliance with S. 211 Criminal Procedure Code.

- (3) Breach of the Appellants Constitutional Rights under S. 72(3) Constitution of Kenya
- (4) Harsh and excessive sentence

I propose to deal with each of these four grounds individually.

In ground No. 3 the Appellant claims as follows in his written submissions –

“other irregularity which forms my argument is the fact that my constitutional rights were violated for I was kept in police custody for 5 days yet the law gives only 24 hours in charge which carries death sentence kindly see Section 72(3)(b) of the Constitution”.

The argument raised here by the Appellant is both flawed and misconceived. It is totally incorrect to assert that S. 72(3)(b) of the Constitution of Kenya provides that suspects arrested on suspicion of having committed offences which attract the death penalty, are required to be arraigned in court within a period of twenty four (24) hours after their arrest. For avoidance of doubt I will here quote the provisions of S. 72(3)(b) of the Constitution –

“72(3) Any person who is arrested or detained ...

(a).....

(b) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence, -

and who is not released, shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention where he is arrested or detained, or within fourteen days of his arrest or detention, where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death ...”

[my emphasis]

The clear meaning of this provision is that where a suspect has been arrested or detained upon suspicion of his having committed a capital offence (which is punishable by death) he is required to be brought before a court within **fourteen days** of such arrest, and **not** within twenty-four (24) hours as the Appellant alleges. The twenty-four hour period only relates to non-capital offences. The Appellant was arrested for and was charged with the offence of Attempted Robbery with Violence contrary to S. 297(2) Penal Code. This is a capital offence punishable by death upon conviction. The fact that the learned trial magistrate did eventually acquit the Appellant of this particular offence does not negate the fact that this was the offence for which he had been initially arrested. By his own admission having been arrested on 19th December 2007 and first brought to court on 24th December 2007, the Appellant was in custody for a total period of five (5) days. This is well within the fourteen day period provided by by the Constitution. As such I find that this ground of his appeal is not substantiated by fact or law, it has no merit and is dismissed.

The first ground of appeal which the Appellant relied on was that the charges against him were misleading and embarrassing rendering the charge sheet defective and therefore invalid. He goes on to quote S. 135(1) and S. 135(3) of the Criminal Procedure Code. S. 135(3) provides –

“(3) Where, before trial or at any stage of the trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information”

This provision gives to a court the absolute discretion to decide whether or not to separate the offences in one charge or information and the decision of whether or not a charge sheet can be said to be embarrassing lies within the sole discretion of the trial court. In this case the learned trial magistrate made no such finding. He proceeded with the hearing of the charges as they were framed by the prosecution. It would appear that the Appellant in framing this ground did not give due cognizance to S. 135(1) of the Criminal Procedure Code which provides –

“135(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information of the offences charged are founded on the same facts, or form or are part of a series of offences of the same or similar character”

In the case before the lower court the Appellant faced a charge of Robbery with Violence for which he was apprehended by police officers on 12th December 2007. The Appellant however escaped from the custody of the police officers and a manhunt was launched to trace him. This escape forms the basis of Count No. Two of the charge. On 19th December 2007 whilst still at large the Appellant is alleged to have stolen a bicycle. This is the basis of Count No. Three of the charge. It is very clear and indeed obvious that the charges which the Appellant faced emanated from one transaction or were inter-connected. As such it was quite in order to place the offences in the same charge sheet. In my view there is absolutely no ***“embarrassment”*** caused to the Appellant by so doing. The Appellant was not prejudiced in any way as he had an opportunity to respond to and defend himself on each charge which he did. I find that this ground of his appeal has no merit and I do hereby dismiss the same.

The third ground of the Appellant’s appeal is that S. 211 of the Criminal Procedure Code was not complied with. In his written submission the Appellant states that –

“its also my argument that there was a breach of law in the way I was entertained to my defence. The law requires one to be told of his rights of calling witness to his defence but I was denied this opportunity by the trial court”

The Appellant is quite right in his explanation of the provisions of S. 211. Again for avoidance of any doubt I will quote S. 211(1) Criminal Procedure Code which is the relevant provision and which provides –

“211(1) At the close of the evidence in support of the charge and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him

to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that if he does so, he will be liable to cross-examination or to make a statement not on oath from the dock, and shall ask him whether he has any witness to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)”

Without a doubt this is a very crucial provision and can be properly said to be the heart of a criminal trial. Any breach thereof would in my view certainly amount to a breach of a suspect’s right to a fair trial. In the case of **NJOKA –VS- REPUBLIC Criminal Appeal No. 115 of 2001** the Court of Appeal sitting in Nyeri held as follows –

“1. S.211 of the Criminal Procedure Code requires that the rights of an accused person to elect whether to remain silent, to make an unsworn statement, to give sworn evidence and to call witnesses be explained to him at the close of the prosecution’s case and when he is being put on his defence. These are fundamental rights of the accused and are meant to ensure a fair trial”

The question is whether or not the learned trial magistrate did comply with S. 211(1) in the hearing of the Appellant’s case. A look at the typed copy of the record indicates that there was no such compliance. The typed record at page 20 indicates that at the close of the prosecution case the trial magistrate delivered his ruling that the accused had a case to answer. He then placed the accused on his defence. On 16th April 2008 the accused proceeded to give an unsworn defence. Nowhere in this typed copy of the record is there an indication that S. 211 was complied with. However a careful perusal of the hand-written record reveals a totally different scenario. Page 65 of the hand-written copy reads as follows:-

“Court Ruling

From the evidence adduced the court finds a prima facie case has been made out against the accused to justify the court putting him on his defence.

SIGNED - R.M.

26/03/08

COURT: S. 211 CPC complied with [my emphasis]

Accused: I will give an unsworn statement. I will not call any witnesses.

Court: Defence hearing on 16/04/08

Mention on 09/04/08

SIGNED – R.M.

26/03/08”

It is evidently and abundantly clear that on 26th March 2008 the learned trial magistrate did comply with S. 211 and the various options for giving his defence were explained to the accused. The accused responded that he would give unsworn defence and would not call any witnesses. It is dishonest of the Appellant to come now before the appeal court and claim that this right was denied to him. However I am very concerned about this anomaly between the hand-written

proceedings and the typed record. This is not the only instance in this case where such an anomaly exists. At page 6 line 33 of the typed record introduces the evidence of PW3 thus –

“PW3 Adult sworn states in Kiswahili

The following page 7 at line 1 reads –

“and 2 young men ...”

Clearly a portion of the evidence of **PW3** was left out. Again I had to revert to the hand-written proceedings to recover the missing part. Why would a court typist leave out crucial parts of the evidence? Why would the proof-reader fail to notice this anomaly? Why were the proceedings certified with gaps in it? These are all questions to which I have no answer. I cannot rule out the possibility that this was done by design rather than by error. It would not be far fetched to so conclude. I would like to warn the court personnel to **carefully** ensure that court proceedings are typed accurately. Magistrates ought not to certify proceedings which are incomplete. This could result in great injustice or indeed give the Appellant undue advantage.

All said and done I find that contrary to the Appellant’s allegations, S. 211 was properly complied with. This ground of his appeal has no merit and the same is hereby dismissed.

The Appellant made no appeal against his sentence – suffice to say I find the same to have been lawful. The upshot is that I am satisfied that the Appellant’s conviction on Count Nos. two and three were based on the facts and were sound in law. I find no reason to interfere with the same. This appeal therefore fails and is hereby dismissed. The convictions of the Appellant are upheld and the sentences imposed are duly confirmed.

Dated and Delivered this 9th day of December 2009.

M. ODERO
JUDGE

Read in open court in the presence of:

Mr. Onserio for State

Appellant in person

M. ODERO
JUDGE
9/12/2009