



Langat v Republic (Criminal Appeal 497 of 2003)
[2006] KEHC 2997 (KLR) (20 February 2006) (Judgment)
DANIEL KIPROTICH LANGAT V REPUBLIC [2006] eKLR

Neutral citation: [2006] KEHC 2997 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 497 OF 2003
M APONDI & DK MUSINGA, JJ
FEBRUARY 20, 2006

BETWEEN

DANIEL KIPROTICH LANGAT APPELLANT

AND

REPUBLIC RESPONDENT

An appellant cannot adduce further evidence at a first appellate court without making an application to so

The appellant and five others were jointly charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The appellant and his co-accused were tried but it was only the appellant who was convicted and sentenced to death, the others were acquitted. The court held that an application to adduce further evidence of that nature could only be granted in special circumstances and before granting the same, the appellate court required to know the reason why the particular evidence was not given at the trial.

Reported by Kakai Toili

Evidence Law -- *evidence – adducing of evidence at a first appellate court - where an appellant sought to introduce evidence not presented at the trial court – where appellant did not make an application to adduce evidence – whether an appellant could adduce further evidence at a first appellate court without making an application to so.*

Brief facts

The appellant and five others were jointly charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The appellant and his co-accused were tried but it was only the appellant who was convicted and sentenced to death, the others were acquitted. The appellant, being dissatisfied with his conviction and sentence lodged the instant appeal.

The appellant’s grounds of appeal related to identification evidence where he argued that the evidence was not sufficient to warrant his conviction, that the trial court did not consider that he was a minor, aged 17 years when the offence was committed and therefore he could not by law be sentenced to death, and faulted the trial magistrate for rejecting his defence.



Issues

Whether an appellant could adduce further evidence at a first appellate court without making an application to do so.

Held

1. When the issue of the appellant's age was raised before the court, an order was issued that his age be assessed at the Nakuru Provincial General Hospital. That was done and the results were that he was over 18 years old. The charge sheet indicated that the appellant and all his co-accused were adults. There was nothing to indicate that the appellant was not an adult. At the time of issuance of the birth certificate the appellant was in jail and it was therefore unclear how the same was obtained. The birth certificate was procured purposely for the instant appeal. That ground of appeal was dismissed as the court was not convinced that the appellant was a minor at the time he committed the said robberies.
2. Counsel did not make any application to adduce further evidence at the hearing of the instant appeal. An application of that nature could only be granted in special circumstances and before granting the same, the appellate court required to know the reason why the particular evidence was not given at the trial. The reasons should be stated in an affidavit sworn either by the appellant or his advocate or some other person qualified to state those reasons. The appellant's counsel could not just produce a strange document without leave of the court and purport to rely on the same when it had not been produced before the trial court.
3. Regarding identification of the appellant, the offences were committed in broad day light. PW1, PW2 and PW3 saw a group of people robbing the complainants and then they informed the police who rushed to the scene and on seeing them, the robbers took off. The said witnesses intercepted the appellant. They handed him over to PW4, a police officer who was also in hot pursuit of the appellant. The complainants immediately identified the appellant as one of the people who had robbed and injured them. PW4 had even seen the appellant dropping some of the items which he had stolen from the complainants.
4. In the circumstances, the evidence of the appellant's identification was free from possibility of error and formed a secure basis for the appellant's conviction. There was absolutely no need for an identification parade because the complainants identified their assailants a few minutes after the robbery. The robbery took about 20 minutes and the complainants were therefore able to see the appellant clearly as it was day time.

Appeal dismissed; right of appeal within 14 days from the date thereof.

Citations

Statutes

1. Children Act

Advocates

None mentioned

JUDGMENT

1. The appellant and five others were jointly charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code.
2. In count one, the particulars were that on 17/6/03 along Eldoret-Total road at Kamara forest, Nakuru district, jointly with others not before court, while armed with dangerous weapons namely, a home made gun, pangas, rungas and axes they robbed David Derrick Doyoshiresh cash Kshs.13,600/-, one mobile phone make Segem, two radios make Sanyo, one long trouser, one shirt and a pair of open



- shoes, all valued at Kshs.17,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said person.
3. The second count was that on the same date and place they robbed Sylvester Okalo Okando cash Kshs.2,300/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said person.
 4. The appellant and his co-accused were tried but it is only the appellant who was convicted and sentenced to death, the others were acquitted. The appellant, being dissatisfied with his conviction and sentence lodged this appeal.
 5. The appellant raised six grounds of appeal. The first three grounds related to identification evidence where he argued that the evidence was not sufficient to warrant his conviction. In ground five, he stated that the trial court did not consider that he was a minor, aged 17 years when the offence was committed and therefore he could not by law be sentenced to death. He also faulted the trial magistrate for rejecting his defence.
 6. This being the first appellate court, we are under an obligation to reconsider the evidence that was tendered before the trial court, re-evaluate it and draw our own conclusion, see OKENO VS REPUBLIC [1972] E.A. 32.
 7. The prosecution case briefly stated was as follows:- On 17/6/03 at around 4.15 p.m. David Derrick Doyoshireshi (PW6) was driving a lorry registration number KAP 2565 ZB 8684 from Nairobi to Kampala. He was with a turn boy known as Okalo Okado (PW7). At Kamara forest along Nakuru-Eldoret road near a place known as Total, the lorry was overtaken by a bus and the driver slowed down. Before it picked up speed, about 8 people emerged from the bush with a gun, clubs and pangas. They ordered PW6 and PW7 to come out and they searched them, taking from them the various items as stated in the charge sheet. After a short while, police arrived at the scene and started chasing the assailants as they shot at them. The police had been informed of the incident by Stephen Ekunyuk Epondo (PW1) and Philip Meli (PW3).
 8. PW1 was in his farm which was near the scene of the robbery. He said that he heard the sound of a lorry being banged and some people ordering the occupants in the lorry to surrender their possessions then he ran and notified police officers who were manning a nearby road block. When the police started chasing the robbers who were running towards a nearby bush, PW1 identified the appellant. PW1 and PW3 intercepted and arrested the appellant and handed him over to the police officers. PW1 said that he saw the appellant clearly and the appellant even identified himself by stating his name after he had been apprehended by the said witnesses.
 9. Police Constable Francis Kimaiyo (PW4) corroborated the evidence of PW1 and PW3. He added that he saw the appellant drop some of the items which they had stolen from the complainants.
 10. PW7 added that he identified the appellant very well as the one who had cut him with a panga and added that the attack took place in broad daylight and the incident took between 20 to 30 minutes.
 11. When the appellant was put on his defence, he gave an unsworn defence and stated that on 17/6/03 he left home in the morning and returned at about 3.00 p.m. having been sent by his sister to see his uncle at Total. On his way back he did not follow the road but used a foot path and on the way he was chased by some people whom he did not know. He later found himself in Molo Police Station with an injured leg.
 12. On the basis of the foregoing evidence, the trial magistrate found that there was overwhelming evidence against the appellant and proceeded to convict him.



13. Mr. Momanyi for the appellant chose to first argue ground five of the appeal, i.e., regarding the age of the accused at the time of his trial and then combined the other grounds and argued them together. He argued that the appellant was a minor at the time when he was alleged to have committed the offences and so in accordance with the provisions of Section 186(b) of the *Children Act* he should have been provided with a defence counsel by the Government. He further submitted that Section 186(f) of the said Act required that if a minor is found guilty, the decision be reviewed by a higher court.
14. Counsel further cited Section 25(2) of the Penal Code which provides that a person below 18 years should not be sentenced to death.
15. The appellant's counsel produced in court the appellant's birth certificate number D.940275 which was issued on 28th June, 2005 by the Assistant Registrar of Births, Kericho District. Mr. Koech, State Counsel, submitted that the said birth certificate was specifically procured for purposes of this appeal, adding that the appellant's age was not brought up before the trial court. He further submitted that the right procedure for adducing additional evidence had not been followed.
16. When the issue of the appellant's age was raised before us, we ordered that his age be assessed at the Nakuru Provincial General Hospital. That was done and the results were that he was over 18 years old. The charge sheet indicated that the appellant and all his co-accused were adults. There was nothing to indicate that the appellant was not an adult. At the time of issuance of the birth certificate the appellant was in jail and it is therefore unclear how the same was obtained. We agree with Mr. Koech that it was procured purposely for this appeal and so we dismiss that ground of appeal as we are not convinced that the appellant was a minor at the time he committed the said robberies. Moreover, counsel did not make any application to adduce further evidence at the hearing of this appeal. As was held in *KIPKERING ARAP KOSKE VS R* [1949] EACA 135 an application of that nature can only be granted in special circumstances and before granting the same, the appellate court requires to know the reason why the particular evidence was not given at the trial. The reasons should be stated in an affidavit sworn either by the appellant or his advocate or some other person qualified to state those reasons. The appellant's counsel could not just produce a strange document without leave of the court and purport to rely on the same when it had not been produced before the trial court.
17. Regarding identification of the appellant, the offences were committed in broad day light. PW1, PW2 and PW3 saw a group of people robbing the complainants and then they informed the police who rushed to the scene and on seeing them, the robbers took off.
18. The said witnesses intercepted the appellant. They handed him over to PW4, a police officer who was also in hot pursuit of the appellant. The complainants immediately identified the appellant as one of the people who had robbed and injured them. PW4 had even seen the appellant dropping some of the items which he had stolen from the complainants.
19. In the said circumstances, we hold that the evidence of the appellant's identification was free from possibility of error and formed a secure basis for the appellant's conviction. There was absolutely no need for an identification parade as submitted by Mr. Momanyi because the complainants identified their assailants a few minutes after the robbery. The robbery took about 20 minutes and the complainants were therefore able to see the appellant clearly as it was day time.
20. We find no merit in this appeal and hereby dismiss the same and confirm the conviction and sentence that was passed by the trial court. Right of appeal within 14 days from the date hereof.

DATED AT NAKURU THIS 20TH DAY OF FEBRUARY, 2006.

MUGA APONDI



JUDGE
D. MUSINGA
JUDGE

