REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 521 of 2001

STEPHEN MURIGI………...……………………APPELLANT

VERSUS

REPUBLIC…………………...…...…………RESPONDENT

JUDGMENT OF THE COURT

The appellant together with another person who was acquitted faced three counts of robbery with violence contrary to Section 296(2) of the Penal Code. They also faced three alternative counts of handling stolen goods. All the counts indicated that the appellant was armed with offensive weapons namely bows and arrows at the time when he committed the offence.

He was tried and convicted and sentenced to death as by law provided. He was aggrieved by the said conviction and sentence and preferred this appeal.

This being a first appeal, we are under an obligation to reconsider the evidence that was tendered before the trial court, re-evaluate it afresh and reach our own independent conclusion.

The prosecution case briefly stated was as follows:-

PW1, Papino Centra testified that on 8/10/2000 he was driving a motor vehicle registration number KSU 463 from Naivasha heading to Mirera and had two passengers in the vehicle, his wife **Annah Wanjiku (PW3)** and one **Serah Wanjiru (PW2).** At about 7.30 P.M., the vehicle was hit with stones on the windscreen and it was damaged. Suddenly a man ordered PW1 to stop the vehicle and come out. PW1 complied. He put off the engine and the lights of the car. He was ordered to give money by the people who had forcefully stopped him. He gave them Kshs.850/- which he had in his possession. The robbers also robbed them of shoes and a bag which contained cups and bowls which had food. They were then ordered to proceed on with their journey. He said that the robbers were more than five. He was unable to identify them because it was dark. He made a report to the police and he was later called by the police to their station and was shown a bag, cups and bowls which he identified as being the property of PW2 which had been stolen. He was informed that the items had been recovered from a certain lady.

PW2 corroborated the evidence of PW1 and added that the robbers took from her Kshs.800/-. She also identified her bag which was stolen and which contained utensils. Sometimes later as she travelled in a matatu together with PW4 they saw a lady carrying the said bag. They asked the lady where she got the bag from and she said that she had bought it but later she changed her story and said that she had been given the same by her cousin. PW2 made a report to the police and the lady was arrested. She was later charged together with the appellant but was acquitted. Thereafter, PW2 was called by the police and she identified the bag and the utensils as the ones that had been stolen.

PW3 corroborated the evidence of PW1 and PW2 and added that her handbag which was in the car was also stolen. The handbag was later recovered from that lady who had been charged together with the appellant.

PW5, Police Constable Nicholas Omondi told the court that on 9/10/2000 the second accused was taken to Naivasha Police Station by PW3 after she had been found in possession of the handbag that had been stolen. The witness said that he also recovered three plates, three cups, one glass and a teaspoon from the house of the second accused. PW2 identified the utensils as hers. The teaspoon had a mark of Kenya Airways.

The appellant gave an unsworn statement of defence. He stated that he used to operate a shop at Kabazi and was also doing photography. He said that on 8/10/2000 he was at Kabazi doing photography and on 23/10/2000 he was arrested in relation to other charges which were unrelated to the offences he had been charged with. He was later taken to court and charged. He denied having committed the said offences.

Although the second accused before the trial court was acquitted and therefore she is not an appellant, it is important that we consider what she stated in her defence as she was the only person who implicated the appellant. On 6/12/2000 she gave an unsworn statement of defence and said that the bag in question was sold to her and that she did not know where it came from. She said that the utensils were inside the bag. Only the bag had been sold to her and she was told to keep the utensils but later the complainant alleged that she had stolen the bag. She said that the police forcefully entered into her house to carry out a search and she denied having committed any robbery. The trial magistrate then set the date for judgment to be 8/12/2000. However, on that day, the appellants co-accused told the court that she wanted to retract what she had said earlier in her defence. The court allowed her and she gave another unsworn statement of defence. She said that on an undisclosed date, the appellant went to her house and gave her the bag and he asked her to keep the contents but later on another day he went and asked for the items but he told her to continue keeping them. She further stated that on 29/10/2000 she was at Karagita when a lady and a man confronted her and asked her where she had got the bag from. She answered that the bag had been given to her by her cousin and gave them his name. She said that the following morning they went with police to her place and recovered the items in question.

In his judgment, the trial magistrate, after warning himself of the fact that the complaints did not identify any of the attackers on the material night and that the only evidence that linked the appellant was that of an accomplice, he held that it was the appellant who gave the bag and its contents to the second accused. He further stated that the bag and the utensils had sufficiently been identified by the complainants and in the absence of any reasonable explanation as to how he got the items, the doctrine of recent possession was applicable. He proceeded to convict the appellant and sentenced him to death on the three counts of robbery with violence.

In his appeal, the appellant argued that there was no sufficient evidence to link him to the charges which he faced. On the other hand, Mr. Koech, Senior State Counsel supported the conviction and sentence saying that despite the fact that the appellant was not identified by the complainants, the accomplice evidence was sufficient to warrant the appellant's conviction.

It is not in doubt that the only evidence that was tendered as against the appellant was that of the appellant's co-accused. It was also very shaky evidence. It was uncorroborated accomplice evidence. Such evidence required to be corroborated and it would be a miscarriage of justice to convict the appellant on such evidence as was held in ***OKUMU VS REPUBLIC [1985] K.L.R. 803.***

The charges that were preferred against the appellant indicated that he was armed with dangerous weapons namely a bow and arrows but there was no evidence to that effect. The material prosecution witnesses said that their vehicle was stoned and none of them alleged that their attackers were armed with bows and arrows.

We are satisfied that the conviction of the appellant by the trial court was unsafe and consequently we allow the appeal, quash the conviction and set aside the sentence that had been imposed. The appellant

should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 14th day of February, 2006.

D. MUSINGA

JUDGE

14/2/2006

L. KIMARU

JUDGE

14/2/2006

Judgment delivered in open court in the presence of the appellant and N/A for the Attorney General.

D. MUSINGA

JUDGE

14/2/2006

L. KIMARU

JUDGE

14/2/2006