REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 306 OF 2002

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 297 OF 2001 OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KIKUYU

GABRIEL KIHIU HINGA…….....……APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

JUDGMENT

The appellant, **GABRIEL KIHIU HINGA**, was convicted for STEALING contrary to Section 275 of the Penal Code. He was then sentenced to imprisonment for 24 months.

Following his conviction and sentence, the appellant lodged this appeal on 26th march 2002. That was some 13 days after sentenced had been handled down to the appellant. Thereafter, on 22nd April 2002, the applicant applied for bail pending appeal. That application was heard and determined by the Hon. Mbogholi J. on 9th May 2002, and ultimately the appellant was granted bail pending the hearing and determination of his appeal.

When this appeal came up before me for hearing, on 31st may 2004, the appellant was not in court. I therefore cancelled his bond, and ordered that warrants for his arrest should issue. I set down the case for mention on 14th June, 2004, to enable the court ascertain if the warrants of arrest had been executed, and also to have the surety show cause why his security should not be forfeited.

When the matter came up before me on 14th June 2004, Mrs Ikinu advocate explained that the appellant had be unaware of the previous hearing date. She explained that the appellant had been unaware of the previous hearing date. She explained that the hearing notice had been served upon the appellant's advocates, some three days before the Hearing date. Consequently, it had not been possible for the advocates to relay a message to their client, the appellant, in time. That explained the appellant's absence from court on 31st may 2004.

Being satisfied with the explanation put forward by counsel, I lifted the warrants of arrest and also reinstated the appellant's bond.

The appeal was then set down for hearing on 4th October 2004. but as the High court Registry only served notice on the two parties, some 3 days prior to the hearing, the appeal was adjourned, at the

instance of both parties.

The next hearing date was 27th October 2004. On that date the appellant was ready to prosecute the appeal, but the respondent sought an adjournment. I did however make an order that that would be the last adjournment, at the behest of the respondent. In the light of that order, when the respondent was not ready to proceed with the appeal on 6th December 2004, I nonetheless directed that the appeal would proceed. That would explain the reason for the lack of any submissions by the respondent.

Mrs Njagi, Advocate for the appellant submitted that the prosecution had failed to prove the offence beyond any reasonable doubt. She also faulted the court for placing reliance on the evidence of PW2, without cautioning itself that PW2 was, earlier, the prime suspect, even in the eyes of PW1.

Another issue which the appellant took up is that the learned trial magistrate shifted the burden of proof to the defence. It was contended that the trial court erred by implying that the appellant had a duty to prove his defence. In his considered view, the trial court failed to consider the appellant's defence, and by so doing wrongly convicted him.

The appellant also faulted the trial court for dispensing with the Probation Officer's Report. It was submitted that by doing so, the trial court deprived the appellant of the possibility of a non custodial sentence.

Even though the respondent did not make any submissions at the hearing of this appeal, I am nonetheless enjoined by law to re-evaluate the evidence on record, so as to be able to arrive to an appropriate judgment.

PW1, Alex Kinyanjui, said that he was a welding businessman based at Mbaraniki, Dagoretti Centre, Kiambu. On 9th February, 2001, PW1 left at PW2 at the workshop. He went to Alliance, but when he came back later, he did not find his grinder. PW1 reported the loss to the Administration Police, but when they arrived at the workshop, PW2 ran away, and stayed away for 9 days.

PW1 said that although he did not know who stole the grinder, when PW2 returned, PW1 reported to the police, and PW2 was arrested. As far as PW1 was concerned he suspected PW2 and not the appellant. PW2, Patrick Mwaniki Gachuna, said that he was a resident of Mbaraniki. He was being trained by PW1, on how to weld. PW2 testified that the grinder was taken by the appellant, and that the appellant threatened to kill him if he should tell anyone. However, the witness did not tell anyone about the threats of the appellant, until after he (PW2) was arrested by police.

PW3, PC Wamwea, testified that PW1 had reported to him about the theft of his grinder. PW1 had reported that he left the grinder at his workshop, wherein there was one of his trainees. However, when PW1 returned, the grinder was missing.

According to PW3, he arrested the appellant because one of the witnesses had said that they saw the appellant steal the grinder. PW3 did not disclose who the witness is that implicated the appellant. The date of the appellant's arrest is stated as being 2nd march 2001. That information is to be found on the face of the charge sheet. Therefore, I would have expected that if there was a witness who saw the appellant stealing the grinder, the witness would have reported it to PW1 and /or the police, promptly. The question is why did the undisclosed witness not make a report to the police.

Another interesting feature in this case is that PW3 did not even deem it necessary to visit the scene of crime. He also failed to ascertain if the witness he was relying on, for information that led him to arrest the appellant had run away. That piece of evidence, which came across through cross examination seemed to confirm the evidence of PW2, that it was he who implicated the appellant.

Of course, Pw2 said that he had been threatened by the appellant that he would be killed. But for some reason, once the police arrested PW2, the fear which he had of the appellant seemed to have evaporated.

In his defence, the appellant had denied stealing the grinder. He also denied ever issuing death threats toPW2. he said that on the material day, he had carried on with his duties, as a driver. He denied going into the complainant's workshop on that day. In other words, the appellant had an alibi defence.

I have got to remind myself that the burden of proof, in Criminal Cases, always vests in the prosecution to prove the case against the accused persons, beyond any reasonable doubt.

On his part, an accused person does not have to say anything in his defence. He could, if he wished, choose to remain completely silent, and that cannot be held against him. And even when an accused chooses to give his defence he would be under no obligation to prove the defence.

In this case, the appellant gave a sworn defence. He also called DW2, Solomon Njoroge, as his witness. DW2 talked of a letter which PW2's mother (Jane Wambui) showed him. By that letter, it is said that PW2 had promised to pay for the grinder.

The question I must now ask myself is whether the prosecution managed to adduce such evidence as would puncture holes into the appellant's alibi. If so, then the defence would be rejected. But if the evidence of the prosecution did not puncture holes into the alibi, and provided that the said alibi appeared reasonable (as opposed to outlandish), the court would have to conclude that it had raised doubts in the prosecution case.

In this case, the timings of various events were not specified. For instance, it is not clear what time PW1 left the workshop, to go to Alliance. We also do not know what time PW1 came back to his workshop. If those timings were known, the hour of the alleged theft would be capable of being ascertained, at least by estimation. Since, we do not know what time PW1 came back to his workshop. If those timings were known, the hour of the alleged theft would be capable of being ascertained, at least by estimation. Since, we do not know, the hour of the alleged theft would be capable of being ascertained, at least by estimation. Since, we do not know the timings, I find it hard to pin down the appellant, by asking him to explain his whereabouts at a particular hour, or hours. In the circumstances, I find it hard to cast any doubts on the appellant's alibi.

The learned trial magistrate dismissed the evidence of DW2, on the grounds that he did not produce in evidence, the letter which DW2 said he was shown by the mother to PW2. the trial court held that the said evidence of PW2. The trial court held that the said evidence of DW2 was hearsay. If that be case, one must apply the rule to all aspects of the evidence placed before it. By so doing, the evidence of PW2, in which he implicated the appellant, should also have been dismissed as hearsay.

The learned trial magistrate expressed himself thus:

"Upon observing the demeanour of the accused person in court especially during cross-examination, he was still imposing a threat to the witness (PW2) who he asked why he has not made good his threat to kill him. The witness (PW2) appeared intimidated and naïve and I believe that he would not have stopped the accused person from taking the grinder."

Having perused the record of the proceedings, I failed to find any reference to any threats which the learned trial magistrate record as having emanated from the appellant, directed at PW2.

Secondly, had such a threat been issued in court, as suggested by the learned trial magistrate, I would have expected the court to have taken some action against the appellant e.g. by way of a stern reprimand. But, again, I find no record of any such steps being taken against the appellant.

Thirdly, I find that the learned trial Magistrate fell into grave error by bringing into his analysis issues which had not come before the court through the parties. I say so because, from the evidence on record, there is nothing at all to suggest that PW2 did or did not try to stop the appellant from taking the grinder. Therefore, I find no basis for the conclusion that

PW2 was naïve and would not have stopped the accused from taking the grinder.

Furthermore, if the witness was so naïve, it becomes difficult to ascertain what portions of his evidence should be believed, and which other portions are to be disregarded, on the basis of naiveties.

When it is borne in mind that as far as the complainant was concerned, PW2 was the primary suspect, it was incumbent upon the learned trial Magistrate to treat his evidence with a lot of caution.

When commenting on the evidence of a c0-accused, Todd J. held as follows, in **Matheka V Republic [1983]KLR 351** at 352.

"**Evidence given by a co-accused persons against another should only be really be considered if it is believed and if it is corroborated in a material particular by independent evidence pointing to the guilt of the accused and if it is so implicates the person giving the evidence of the crime, which was not so in this case. In this regard amongst other cases I refer to the case of R V Hamisi bin Saidi & Another (1942) 10EACA 50.**

"**When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proceed, the court may take into consideration such confessions as well as against such other persons as well as against the person who makes such confession. Such a statement by an accused can only be used as evidence against his co-accused it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person against whom it is tendered."**

I know that whilst that case dealt with the issue of co-accused persons, in this case PW2 was not an accused. He was no more than a suspect. Neigh, he was the prime suspect. I believe that the mischief which was being addressed in the **Matheka case**, as well as the **Hamisi bin Saidi** case, was the same as that in this case. It is this; the court should not be too ready to accept evidence of one person against another, if both of them are likely to be faced with criminal liability, because each such person may only be interested in saving his own skin, if necessary by implicating the other person. But if by the confession, the person would be also incriminating himself to the same measure, and if his evidence was corroborated by independent evidence, the court

may accept the evidence. In those circumstances, it would be unlikely that the person was telling a lie, in which he was incriminating himself as well.

Applying that rationale to this case, I find that by implicating the appellant, PW2 was actually exonerating himself from all liability. Indeed, he even went further to accuse the appellant of threats to kill him.

Secondly, PW2's evidence was not corroborated at all by other independent evidence, as the grinder in issue was not recovered. Also nobody else either witnessed the appellant either stealing the grinder or otherwise ferrying it away or handling it in any manner whatsoever, after the alleged theft.

In the circumstances, I hold that it would be unsafe to uphold conviction. I therefore quash conviction, set aside the sentence and direct that the appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 24th day of January 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of

For the State

For the Appellant

Mr. Odero – Court Clerk