Koech & another v Republic (Criminal Appeal 11 & 13 of 2001 (Consolidated)) [2004] KEHC 2604 (KLR) (4 August 2004) (Judgment)

David Kipngetich Koech & another v Republic [2004] eKLR

Neutral citation: [2004] KEHC 2604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL 11 & 13 OF 2001 (CONSOLIDATED)

M APONDI, J

AUGUST 4, 2004

BETWEEN

DAVID KIPNGETICH KOECH ..... 1ST APPELLANT

JOSEPH KIPLANGAT CHEPKWONY ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Original Conviction and sentence in Criminal Case No. 1692 of 199 the Senior Principal Magistrate's Court at Kericho - S.G. O'nganyi - P.M)

Following the enactment of the Children Act No 8 of 2001, convicted persons who committed offences when they were under the age of 18 years could have their sentences reconsidered in terms of section 190 of the Act.

The court found that the appellants were charged, convicted and sentenced for offences they committed when they were aged 16 and 17 years in the year 1999. Subsequently, the Children Act No 8 of 2001 was enacted and came into force on March 1, 2002. According to section 2 of that Act, the appellants were children and were thus entitled to have their sentences reconsidered in terms of section 190 of the Act.

Reported by Moses Rotich

Children *- sentencing of children - sentencing upon a conviction for robbery with violence contrary to section 296(2) of the Penal Code (Cap. 63) - two persons aged 16 and 17 years at the time of the offence convicted and ordered to be detained at the President's pleasure - enactment of the Children Act (Act No. 8 of2001) - whether following the enactment of the Children Act (Act No 8 of 2001), convicted persons who committed offences when they were under the age of 18 years could have their sentences reconsidered in terms of section 190 of the Act - whether the sentence should be set aside and the subjects discharged - Children Act section 190.*

Sentencing *- children/minors - sentences which may be imposed on a child/minor - two persons convicted of robbery with violence committed while they were children - trial court ordering that the persons be detained at the*

President's pleasure - statute enacted prohibiting the imposition of sentences of death, imprisonment or detention of children/minors - convicted persons appealing against their conviction and sentence - convicted persons having been in prison for five years from the date of their arrest and arraignment - whether the persons should be discharged - Children Act (Act No. 8 of 2001) section 190.

Criminal Practice and Procedure *- appeal - first appeal - duty of the High Court on a first appeal - matters which the court should consider in reaching its decision.*

Brief facts

The appellants were convicted by a subordinate court on two counts of robbery with violence contrary to section 296(2) of the Penal Code (Cap. 63). As they were under the age of eighteen years when the offences were said to have been committed, the trial court ordered that the appellants be detained at the President's pleasure. In 2002, the Children Act (Act No. 8 of 2001) came into force. Section 190 of the Act provided, among other things, that a child shall not be ordered to be imprisoned, placed in a detention camp or sentenced to death. The appellants filed an appeal against their conviction and sentence.

Issues

Whether following the enactment of the Children Act No 8 of 2001, convicted persons who committed offences when they were under the age of 18 years could have their sentences reconsidered in terms of section 190 of the Act

Held

1. As this was a first appeal, the High Court was mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-asses it and reach its own independent decision on whether or not to uphold the conviction of the appellants. The court had to bear in mind the fact that it did not see the witnesses as they testified and therefore it could not be expected to make any findings as to the demeanour of the witnesses. The Courts is further mandated to consider the grounds of appeal put forward by the appellant.

2. The evidence established that the appellants had been armed with dangerous or offensive weapons and that in the course of robbing the complainants, they had inflicted injuries on them. Therefore, the appellants' appeal against conviction lacked merit.

3. At the time when the offences were committed in 1999, the appellants were children as defined in section 2 of the Children Act (Act No. 8 of 2001) as they were aged 16 and 17 years.

4. In view of the change in the law, the sentence imposed by the trial court would be set aside. The appellants had been in prison for over five years.

Appeal partly allowed.

Orders

i. *Appellants discharged and set at liberty.*

Citations

Cases

Kenya

Njoroge v Republic [1987] KLR 19; [1982-88] 1 KAR 1134

Statutes

Kenya

1. Penal Code (cap 63) section 296(2) -(Interpreted)

2. Children Act (cap 141) sections 2, 190, 191 -(Interpreted)

Advocates

Mr Moturi for the 1st appellant

Mr Koech State Counsel, for the respondent

JUDGMENT

1. The appellants, David Kipngetich Koech and Joseph Kiplangat Chepkwony were charged with two counts of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the first count is that on the July 4, 1999 at Sondu Township in Kericho District the appellants jointly with others not before court while armed with dangerous weapons namely pangas, rungus and knives robbed Isaac Onyango Awino of assorted household goods and at or immediately after the time of such robbery used actual violence on the said Isaac Onyango Awino. The particulars of the second count is that on the same day at the same place while similarly armed, the appellants jointly with others not before the court robbed Omar Haji Buko of assorted household goods and at or immediately after the time of such robbery used actual violence on the said Omar Haji Buko. The appellants initially pleaded guilty to the offences but later changed their plea to not guilty. After a full trial the appellants were found guilty of both counts. They were sentenced to be detained at the President's Pleasure, as they were under the age of eighteen years when the said offences were committed. The appellants were aggrieved by their conviction and sentence. They have appealed to this court against the said conviction and sentence.

2. The appeals filed separately by the appellants were consolidated and heard as one at the hearing of the appeals. The appellants in their petitions of appeal presented more or less similar grounds of appeal. The appellants stated that being minors they did not understand the nature of the charges facing them nor did they understand the consequences of pleading to such charges facing them. The appellants further stated that they were misled into pleading guilty by their older co-accused who was able to escape criminal liability and was acquitted. The appellant further stated that they were innocent souls who did not know the consequences of pleading guilty to the said charges.

3. At the hearing of the appeal, Mr Moturi learned counsel for the 1st appellant, David Kipngetich Koech urged the court to allow the appeal. The 2nd appellant, Joseph Kiplangat Chepkwony, presented his written submissions to the court (with leave of the court) urging the court to allow his appeal. Mr Koech, learned state counsel was however of the contrary view. He submitted that the appeals filed by the appellants be dismissed and the conviction and sentences imposed by the trial magistrate which were proper, be upheld.

4. The facts of this case briefly stated were that on the night of the 4th of July 1999 PW 1 Isaac Onyango Awino was walking to his home from Sondu market. He heard some voices emanating from a nearby kiosk. He flashed his spotlight in the direction of the noise. He saw a group of people. He ran to his house and locked himself in. After a short while, he was followed by the group of people. They broke into his house. PW 1 was beaten with rungus and kicked all over his body. They then ransacked his house and stole Kshs 2,000/= and various household items. The robbery took place for about thirty minutes. On the 5th of July 1999 PW 1 was called to Sondu Police Station where he was able to identify some of his household goods which had been recovered. He as also able to identify the appellants in an identification parade mounted by the Police.

5. PW 2 Omar Haji Buko testified that on the night of the 4th of July 1999 he was in his house with his wife. He heard commotion outside his door. He was ordered to open the door of his house. He complied. Three men entered his house. One of the men cut him on the head with a panga and ordered him and his wife to sit down. PW 2's wife was then hit with a plastic whip. The robbers then took away PW 2's household goods. The robbery took place for about one hour. On the 5thy of July 1999, PW 2 was called to Sondu Police Station where he was able to identify some of the household goods which

he was robbed of the previous night. He also was able to identify the appellants as being among the number of people who robbed him.

6. PW 2s evidence was corroborated by the evidence of his wife PW 3 Zabibu Omar. She was also able to identify the appellants in the identification parade which was mounted by the police at Sondu Police Station. PW 4 Corporal Mohamed Tache testified that on the night of the 4th of July 1999 he received a report of the robbery at the houses of PW 1 and PW 2. He mobilized his fellow Police Officers and commenced investigations. On the 5th of July 199 he was able to trace the foot prints from the scene of the robbery to Sigowet Forest. It had rained the night before. At Sigowet Forest, they found the appellants. The appellants were arrested. They were interrogated. They showed PW 4 where the household goods stolen from PW 1 and PW 2 had been hidden. The said household goods were recovered and produced in court as evidence.

7. PW 5 Julius Koech, a Clinical Officer attached to Sigowet Health Centre treated PW 1 and PW 2 when they went to the Health Centre having sustained injuries in the course of the robbery. He produced the duly filled PW 3 forms signifying the injuries that the complainants had sustained. PW 6 Inspector Thomas Mucheru recorded a charge and cautionary statement from the 2nd appellant Joseph Kiplangat Chepkwony. The 2nd appellant admitted the offence. Though he retracted the statement during the trial, the same was admitted in evidence after a trial within a trial. When the appellants were put on their defence the 2nd appellant, Joseph Kiplangat Chepkwony offered no evidence in his defence. The 1st appellant, David Kipngetich Koech, admitted the offence in his defence though he stated that he was coerced into committing the said offence by the 2nd appellant and is other co-accused who were not arrested or charged. This being a first appeal, this court is mandated to look at the evidence adduced before the trial magistrate's court afresh, re-evaluate and re-assess the same and reach its own independent decision on whether or not to uphold the conviction of the appellants. In reaching its decision, the appellate court has to put into mind the fact that they did not see the witnesses as they testified and therefore cannot be expected to make any findings as to the demenour of the witnesses. The appellate court is further mandated to consider the grounds of appeal put forward by the appellant in reaching its decision. (See *Njoroge v Republic* [1978] KLR 19).

8. In the instant appeal, the issue for determination by this court is whether the prosecution proved its case beyond any reasonable doubt. The other issue for determination is what sentence should be meted out to the appellants in view of the fact that when they committed the offence they were children within the meaning of section 2 of the *Children Act* (Act No 8 of 2001).

9. In the instant case, PW 1 and PW 2 were robbed in the night of the 4th of July 1999. They were robbed by a gang of robbers who injured them in the course of the robbery. PW 1 was hit with a rungu and kicked all over his body. PW 2 was cut with a panga on his head. PW 3, the wife of PW 2 was whipped with a plastic whip. Both PW 1 and PW 2 were robbed of their household goods. The said goods were recovered a day after the robbery by PW 4 Corporal Mohamed Tache who was shown where the goods were hidden by the appellants. PW 1, PW2 and PW 3 identified the appellants in an identification parade as being amongst the gang of robbers who robbed and assaulted them on the night of the 14th of July 1999. The 2nd appellant, Joseph Kiplangat Chepkwony made a statement under a charge and caution admitting the offence. Even though the 2nd appellant had sought to retract the statement during the hearing of the case, the said statement was admitted into evidence after a trial within a trial. When put on their defence the 1st appellant admitted the offences but stated that he was misled by some of the older gang members to commit the robbery. The 2nd appellant chose not to give any evidence in his defence.

10. We have re-evaluated the evidence adduced by the prosecution and are of the view that the prosecution established their case on the charge of robbery with violence beyond any reasonable doubt. The appellants were identified at the scene of the robbery by PW 1,2 and 3. The household goods which were robbed from the premises of PW 1 and PW 2 were found in the possession of the appellants hardly a few hours after the said robbery was committed. Applying the doctrine of recent possession, there is no doubt that the appellants committed the robbery in question. PW 5 Julius Koech testified that he treated PW 1 and PW 2 from the injuries which they had sustained in the course of the robbery. It is our finding that all the ingredients to prove the charge of robbery with violence were satisfied by the prosecution. The appellants were armed with offensive weapons, namely rungus and pangas, they robbed the complainants PW 1 and PW 2 of their household goods, and in the course of the robbery they injured the complainants. We therefore find that the appellants appeal against conviction lacks merit and we order that the said appeals be dismissed. On sentence, the appellants were children as defined by the section 2 of the *Children Act* (Act No 8 of 2001) at the time the offences were committed. By the time the appellants were sentenced in 1999, they were aged sixteen and seventeen years respectively.

11. The *Children Act* came into force on the 1st of March 2002. The sentence imposed by the trial magistrate's court will thus be considered in light of the *Children Act* that had come into force at the hearing of this appeal. Section 190 of the *Children Act* provides that:

    (1) No child shall be ordered to imprisonment or to be placed in a detention camp.

    (2) No child shall be sentenced to death.

    (3) No child under the age of ten years shall be ordered by a Children's Court to be sent to a rehabilitation school."

12. Section 191 of the *Children Act* provides for the sentences that may be imposed by the court upon a finding of guilty being entered. In the instant case, the appellants were ordered detained at the pleasure of the President as they could not be sentenced to the mandatory death sentence by the trial magistrate's court. In view of the change in law, we set aside the sentence imposed by the trial magistrate. The appellants have been in lawful custody since the 15th of July 1999 when they were arrested and arraigned before the trial magistrate's court. The offences that the appellants were charged with were not bailable offences. The appellants have therefore been in prison for slightly over five years. In view of the provisions of the *Children Act* (Act No 8 of 2001) we do hereby order that the appellants be discharged. They are set at liberty unless otherwise lawfully held.

    It is so ordered.

DATED AT NAKURU THIS 4TH DAY OF AUGUST 2004.

MUGA APONDI

JUDGE

L. KIMARU

AG. JUDGE