REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.536 OF 2000

(From Original Conviction and Sentence In Criminal Case No.108 of 1997 of the Principal Magistrate's court at kiambu)

JOSEPH WAIGANJO MUKAMI……. APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

JUDGMENT

These appeals are consolidated. The two appellants were originally charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code, one count of attempted robbery contrary to section 297(2) of the Penal Code and one count of arson contrary to section 332(a) of the Penal Code.

After a full trial, the appellants were convicted of the offence of attempted robbery and each sentenced to death. They were also convicted of the offence of arson and each sentenced to 18 (eighteen) years imprisonment. These appeals arise from the said convictions.

Both these offences were committed at night. The conviction of the appellants were founded upon the alleged identification by P.W.2, P.W.3 and P.W.5. These three witnesses said they saw the appellants outside the residence of the complainant when the car parked outside was set ablaze.

On the night in question, a gang of about 15 to 20 people raided the house of the complainant ; one man who had gained entry into the house was hit by the complainant on the head using a sewing machine head. This man subsequently died.. His colleagues seeing this set the car outside and the house ablaze. The complainant and other occupants managed to escape but a young child aged about 2 ½ years old was burnt to death.

At the hearing of these appeals, the learned counsel for the Republic conceded that the charge of attempted robbery was not proved. On our independent evaluation of the evidence, we, with respect, agree. There is no evidence from any of the prosecution witness that any attempt was made leave alone demand. The ingredients of that offence were not proved.

On the offence of arson the issue of identification was crucial. The appellants were said to be known to the witnesses P.W.2 and P.W.3. They were neighbours and the original first accused was said to be related to the wife of the complainant. The incident must have been shocking. The occupants of the house were struggling to find an outlet to leave the house which had been set on fire. It is under such circumstances that the witnesses said they saw the appellants among 15 to 20 people.

We note that the appellants denied the offence ad each gave and alibi which however the lower court

did not believe. Several questions arise. The light from the burning car was said to be bright how brightly, how far were the witnesses from the burning car? To be able to see the suspects? How close were the suspects standing from the burning vehicle? For how long did the witnesses observe the suspects? With respect, all these questions were begging for answers at the close of the prosecution case.

Reports were made to the police and witnesses recorded statements. If it is true that P.W.2 and P.W.5 saw these appellants on that night surely they would not have failed to reveal the names to the police when their memories were still very fresh.

The complainant was informed by one man called John that the appellants were the people who raided and burnt his house and vehicle. Two significant facts are that, his own wife who was in the house and purported to identify the appellants and the housegirl who also said she saw the appellants never told him that the appellants were involved. Further the man only known as John in these proceedings was never called as a witness. This is a man who was known. The omission to call him draws an inference that his evidence would have been adverse to the prosecution case.

The evidence of P.W.5 who said he identified the appellants at an identification parade stands alone. In any case the questions we have posed above have not been answered. Both P.W.2 and P.W.5 were with the complainant in his bar before they retired home. The complainant in his own words admitted he had taken beer and was drunk. However, P.W.2 and P.W.5 denied all this. This in our view cast doubt in their credibility and whatever else they said must be viewed from that perspective.

Finally there was no evidence that the appellants, who were complainant’s neighbours, left the village, yet took three weeks for them to be arrested.

IN our assessment of evidence there were so many doubts in the prosecution case that made the convictions most unsafe. We are therefore inclined to allow these appeals which we hereby do.

Accordingly, these appeals are allowed, convictions quashed and sentences set aside. The two appellants shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Delivered, dated and signed this 30th day of July 2003.

A. MBOGHOLI MSAGHA

JUDGE

R.M. MUTITU

JUDGE