



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
APELLATE SIDE
HIGH COURT CRIMINAL APPEAL NO. 425 OF 1998

From Original Conviction(s) and Sentence(s) in Criminal Case No. 772 of 1997 of The Principal Magistrate’s Court at Kakamega)

SAMSON MUSILWA JAIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

These appeals are consolidated. The appellant in criminal appeal No. 1065 Boniface Boyi Murumbutsa is said to be dead and therefore that appeal is abated. This judgment therefore relates to the remaining six appellants.

The appellants were charged jointly and severally with ten counts in respect of offences of Robbery with violence c/s 296(2). Breaking into a building and committing a felony c/s 296 (2). Breaking into a building and committing a felony c/s 306(a) and handling stolen property c/s 322 (2) of The Penal code.

After a full trial, all these appellants were convicted on either all or different counts and each sentenced to suffer death as provided for by law. In addition, some of the appellants received imprisonment terms in relation to the alternative offences. Being aggrieved by the said convictions and sentences, they appealed.

Each of the appellants has filed written submissions which we have read. When the learned counsel for the Republic rose to reply, he conceded the appealed by the 4th appellant Evans Anitsa Handa in its entirety but supported the other convictions.

We have re-evaluated the entire record in respect of each and every appellant jointly and severally as require of us, being the first appellate court.

The learned trial magistrate rightly dismissed counts one and tow of the charge as the complainants therein did to testify. Having dismissed those offences against all the accused persons, the learned trial magistrate was wrong to have passed sentence against the fourth appellant herein and sentenced him to death. The sentence cannot stand without a conviction.

On count three, the learned trial magistrate convicted the fourth appellant but did not pass any sentence. Even if she had passed sentence the conviction itself was not founded on any evidence. There was to evidence whatsoever to connect him with that offence. It is the evidence of pw15 that was relied upon to convict the fourth appellant. The wall clock was recovered from the house of the fifth appellant Bernard Akwiserura handa not that of the fourth appellant. With respect therefore, we agree with the learned state counsel that, the appeal by Dvans Amaitsa Handa should succeed.

In count four, the first appellant and second appellant were convicted and sentenced to death. According to the complainant, the robbery took place at about 1.15 a.m. There was no mention whatsoever of any lights that may have facilitated proper and positive identification. It is true that the second appellant led pw15 to the house of first appellant wherein the complaints TV was recovered. However, that alone is not enough to connect the first appellant with the offence of Robbery. However, the two appellants were accomplices in handling the T.B. with respect therefore, we agree that the Robbery charge be substituted with that of Handling Stolen goods. Accordingly the convictions against the first appellant, Samson Musilwa Jairo and the second appellant Moyi Tangale are hereby set aside and substituted therewith with handling stolen property c/s 322(2) of the Penal Code.

On count five, the first appellant and second appellants aforesaid were convicted of breaking into a building and committing a felony c/s 306(a) of The Penal Code. According to pw10, the house of pw9 was broken into at 1.15am. The robbers were never identified. No chicken were ever recovered. We also agree with the learned Counsel for the state that the convictions were unsafe. The appeals by the first and second appellants in this count must therefore succeed. They are both acquitted on that count.

On count 6, The first appellant, Samson Musilwa Jairo, the third appellant Edwin Luchana Lunalo, the fifth appellant Bernard Akwiserura Handa and the sixth appellant Josephat Luseka Vitolo were convicted of Robbery with violence C/s 296(2). According to Pw4 the complainant a gang of robbers walked into his home at about 11.00 P.M. He was forced to lie down during the ordeal that took about two hours. He was able to identify fifth and the sixth appellants. The fifth appellant removed the pants he was wearing and in the process there was close contact. The identification parade confirmed the involvement of the fifth and six appellants in the robbery.

Pw7, Pw14 and Pw22 testified on the recovery of the goods stolen,. A jacket was subsequently identified at Kakamega Police station. There were no injuries suffered and the state rightly conceded substitution to section 296(1) of The Penal Code. The effect is that the conviction and sentence under section 296(2) is set aside and substituted with one under section 296(1). Is set aside and substituted with one under section 296(1).

Count 7 covered the first third fifth and sixth appellants. The robbery was proved but as the learned counsel for the state rightly submitted, there was no evidence of injury. Accordingly substitution is appropriate. The conviction and sentence under section 296(2) of the Penal Code is substituted with one under section 296(1) of the Penal Code.

On count 8, we agree with the learned trial magistrate that robbery was proved. However, once again, as there were no injuries substitution is appropriate. The learned counsel for the republic conceded. Accordingly, the convictions and sentence under section 296(2) of the Penal code is substituted with one under section 296(1) of The Penal Code.

On Count 9 the same appellants, that is first, third, fifth and sixth were convicted of Robbery with violence C/s. 296(2). The evidence proved robbery but there were no injuries. The learned counsel for the republic concedes substitution which with respect we accept. The convictions under section 296(2) and sentence are hereby set aside. The same are substituted with section 296(1) of the Penal Code.

Finally, on count ten, the robbery was proved but as there were no injuries, the substitution proposed by the learned counsel for the Republic is acceptable. The convictions and sentence are hereby set aside and substituted with one under section 296(2) of the Penal Code.

The offences that the appellants now stand convicted are serious. They subjected innocent citizens to untold terror. The results of these appeals shall be as follows:-

1 The appeal by the fourth appellant Evans Amaita Handa is allowed in its entirety. The convictions are quashed and sentences set aside. He shall be set free unless otherwise lawfully held.

2 On Count 4, appellants one and Two, that is Samson Musilwa Jairo and Moyi Tangale whose

convictions have been substituted with that of Handling stolen property c/s 322(2) of the Penal Code shall serve five(5) years imprisonment with hard labour. They shall be subject to police supervision for a period of five(5) years from the date of their release from prison.

3 On count five(5) appeals by the first and second appellants that is, Samson Musilwa Jairo and Moyi Tangale are allowed, convictions quashed and sentences set aside.

4 On Count 6(six) 7 (seven) , 8(eight), 9(nine) and 10(ten) the first third, fifth and sixth appellants, that is, Samson Musilwa Jairo, Edwin Luchaha Lunalo, Bernard Akhwiserura handa and Josephert Luseka Vitolo whose convictions have been substituted with those under sections 296(1) , each is sentenced to serve 7 (seven) years imprisonment with four (4) strokes of the cane. On each of the counts 6,7,8 and 10. prison terms shall run concurrently. Each appellant shall be subject to police supervision for a period of five(5) years from the date of release form prison. For the avoidance of any doubts, prison terms shall run from the date of conviction in the lower court.

Order accordingly.

Dated and delivered at Nairobi this 11th day of July, 2002

A.MBOGHOLI MSAGHA

G. MBITO

JUDGE

JUDGE