REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

CRIMINAL APPEAL NO.132 OF 2000

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.1460 OF 1999 OF THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MACHAKOS)

JULIUS MUINDI MWASYA……. ……...……. APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

JUDGMENT OF THE COURT

The appellant Julius Muindi Mwasya having been dissatisfied by the judgement and sentence given by the Machakos Senior Resident Magistrate Machakos in Criminal Case No.1460/99 now appeals to the High Court praying that this appeal be allowed and that judgement and sentence be set aside.

The appellant was represented by Mr. Kasyoka who cited eight grounds of appeal.

We have set out below each of the eight grounds as follows for our ease of reference

1. The Learned Magistrate erred in law and in fact in convicting the appellant when there was no evidence adduced to prove the charges preferred.

2. The Learned Magistrate erred in law and in fact in relying on the evidence of P.W.1 and P.W. 2 against the appellant which evidence was highly contradictory in material particulars and which evidence was of no probative value.

3. The Learned Magistrate erred in law and in fact in relying on the evidence of P.W. 1 against the appellant which evidence was manifestly full of falsehoods and contradictory in material particulars on the two occasions P.W. 1 gave sworn evidence in Court.

4. The Learned Magistrate erred in law and in fact in relying on the evidence of P.W.1 and P.W.2 against the accused person as to alleged identification and/or recognition of the appellant when there was no evidence led to prove the vital circumstances that facilitated the alleged identification or recognition and when all the circumstances and facts adduced were not conducive to positive identification or recognition.

5. The Learned Magistrate erred in law and infact in relying on the evidence of P.W.1 and P.W.2 as

to identification and/or recognition of the appellant when it was manifestly clear that the said witnesses did not give a description of the appellant to the police or any other person in their initial statements recorded to the police before the arrest of the appellant and soon after the robbery.

6. The Learned Magistrate erred in law and infact in holding that the appellant had given contradictory statements in his defence when indeed there was no such contradiction.

7. The Learned Magistrate erred in law and infact in disregarding the evidence of D.W.3 as to having given the appellant the 9.000/= shillings and inferring that the Kshs.8,825/= found on the appellant was the balance of money alleged to have been stolen from the complainant when there was no evidence to prove the same and when indeed the complainant did not record the amounts of money as having been stolen in his initial statements.

8. The Learned Magistrate erred in law and in fact in rejecting the evidence of the appellant particularly with regard to the issue of the alibi.

Mr. Kasyoka argued the fourth and 5th grounds of appeal together. He also argued grounds two and three together and combined 6, 7 and 8 together.

On the question of identification we have considered Mr. Kasyoka's submission to the effect that the identification of the appellant based on the testimony of P.W.1 and P.W.2 is inadequate. He has argued that the prevailing circumstances did not favour positive recognition or identification of the appellant.

The identification of the appellant was complicated by the fact that the incident took place at night as the robbery occurred at 7.30 p.m. He has argued that there was need to enquire through Evidence as to the amount of light that was available during the robbery.

The case of Joseph Ngumbao Nzaro –vs- Republic (C.A) Criminal Appeal No.44/87 was cited to us. This case adopted the holding in the case of Republic –vs- Turnbull 1976 3 AII ER 549. The above case dealt with evidence of identification by recognition where it was held:-

(1) Before accepting visual identification as a basis for conviction the Court had a duty to warn itself of the inherent dangers of such evidence,

(2) A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.

(3) The guidelines laid down in Republic –vs- Turnbull (1976) AII ER 549 were appropriate to the circumstances and inhabitants of Kenya and had been correctly followed in the past by the High Court and the Court of Appeal. We have also noted the holding in the case of Charles O. Maitanyi –vs- Republic (C.A) Criminal Appeal 6/56 which was also cited to us. Looking through the Trial Magistrates record it is quite clear that the robbery took place at night and that identification was by torch light. The need for the Trial Magistrate to warn herself of the dangers of reaching a conviction given such lighting was quite real.

As regards the issue of the appellant contradictions noted on record Mr. Kasyoka was quick to point out several contradictions between the evidence of P.W.1 which was given on 25/5/1999 and the evidence of the same witnesses as given on 25th, May 1999 and on 17TH June 1999. Our perusal of both records clearly shows that these contradictions are material contradictions which expose the veracity of the evidence of the appellant. A doubt arises as to whether the complainant Identified the appellant through electric light or through torch light. We find that the benefit of this doubt should have been resolved in favour of the appellant.

As concerns the appellants alibi defence we have noted Mr. Kasyokas submissions. We agree that there was need for the Trial Magistrate to have given more emphasis to the appellant alibi defence. The duty

impossed by the law on the appellant is to give a reasonable explanation as to where he was during the robbery and how he became seized of the money complained of. The case of Peter Njuguna Mburu – vs- Republic (C.A) Criminal Appeal No.54/83 was cited in support of the proposition to the effect that the Trial Magistrate should always make a finding on any alibi defence presented. Our perusal of the proceedings in the Lower Court clearly indicates that the Trial Magistrate did not make any finding on the alibi defence presented by the appellant.

It was submitted that the Trial Magistrate misdirected herself when considered the fact of the appellant running away as evidence of guilt on the part of the appellant. Although the Trial Magistrate did not indicate whether she construed this evidence against the accused person we agree with the defence counsel that the issue of the running away of the appellant should not have been construed as evidence of his guilt. We have noted the holding in the case of Christopher Mwangi V. Republic (C.A) Criminal Appeal No.60/86 on this point where it was held:-

"The appellant decision to run away when challenged was not of itself evidence of guilt."

We have considered the fact that the Learned State Counsel does not support both the conviction as well as the sentence. We therefore allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. The appellant is therefore set at liberty forthwith unless lawfully held. Order accordingly.

Dated and delivered in Machakos this 11th day of December 2001.

NAMBUYE

JUDGE

ROBERT MUTITU

JUDGE