



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 84A OF 2016

PATRICK MUCHIRI KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Karatina Criminal Case Number 516 of 2014 on 18.10.16 by F.W. Macharia SPM)

JUDGMENT

The Trial

The Appellant herein **Patrick Muchiri Kariuki** who was accused 1 in the trial court has filed this appeal against sentence and conviction on a charge of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya and an alternative of handling stolen goods contrary to section 322(2) of the Penal Code Cap 63 Laws of Kenya.

The prosecution called a total of eleven (11) witnesses in support of their case. PW1 told court that he was robbed of a Vitron TV, DVD- LG and phone on the night of 28.2.14 and that he identified appellant whom he referred to as Karish who was his neighbor and who hit him on the right leg with a metal bar among the 4 men that robbed him. That a later date, his TV and DVD were recovered by police.

PW3 Lucy Wangui Kimaru recalled that her bar was robbed by 2 people she did not identify who injured her and stole her items including a DVD player which was later recovered.

PW9 PC Chikiri received appellant and one Rebecca (the 3rd accused in the trial court) from members of public who accused them of engaging in criminal activities. That they led him and his colleagues to a house that PW8 Joyce Munene identified to belong to Rebecca where several items as shown on the inventory PEXH. 1, and which were suspected to be stolen were recovered. It was his evidence that the PW8 told him that appellant lived with Rebecca.

PW11 PC Mango, the investigating officer told court that upon receiving appellant and other suspects and the items recovered from them, he summoned the complainants and PW1 identified a Vitron TV and DVD- LG as his while PW3 identified a Premier woofer as hers.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. In his sworn defence, appellant denied the offence and also denied that he led police to the recovery of the stolen items. He also denied being a tenant in the house where the stolen goods were recovered.

Rebecca Wambui Wachira (3rd accused in the trial court) denied that the stolen items were recovered from her house and said that the house from where they were recovered belonged to appellant.

On 18.10.16, the learned trial magistrate delivered a judgment in which she convicted the appellant and of the 1st alternative count of handling stolen property and the 2nd count of robbery with violence and sentenced him to suffer death.

The Appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 3.5.17, the appellant set out 4 grounds of appeal to wit:-

- 1. The trial magistrate erred in law and fact by placing reliance on purported visual identification and recognition by PW1 and PW2 without considering that no first report was tendered on record with the appellant's description***
- 2. The trial magistrate erred in law and fact in relying on the exhibited items without evidence that appellant led police to their recovery***
- 3. The trial magistrate erred in law and fact in by not considering that the members of public that arrested the appellant were not called as witnesses***
- 4. The trial magistrate erred in law and fact in by rejecting the appellant's defence***

During the hearing of the appeal, the appellant relied wholly on his amended grounds of appeal and submission filed on 3.5.17. Mr. Nyamache, Counsel for the state, in response thereto submitted that the appellant was identified by PW1 at scene of crime and that the trial magistrate had warned herself of the dangers of convicting on the basis of evidence from one witness. sentenced to the minimum sentence for incest and urged this court not to interfere with it. He also submitted that appellant led police to recover the stolen goods and that appellant's defence was considered and rejected since it did not shake the prosecution case.

In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

1. Identification and recognition by PW1 and PW2

PW1 told court that appellant also known as Karish was one of the persons that robbed him on 28.2.14 at 11 pm. He said that there was lighting in the house.

I have considered the evidence on record and I find that there was no evidence as to the type of light or how bright or otherwise it was. In the case of **Maitanyi –vs- Republic (1986) KLR 198** the Court of Appeal stated:-

“That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves.”

In the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, the Court of Appeal held:-

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its

size, its position relative to the suspects etc.”

The evidence on record shows that PW1 did not tell his wife PW2 that he was robbed by Karish. One would therefore wonder how he could have forgotten to mention the appellant to PW2 the first person to whom he reported the incident to. This in itself ought to have sown the seed of doubt on the mind of the learned trial magistrate concerning the recognition of the appellant by PW1. Such doubt should have benefited the appellant herein.

In light of the above, it is clear to that the evidence of recognition by PW1 could not be safely relied on and the learned trial magistrate erred in convicting the appellant on such evidence.

2. Recovery of the stolen items

PW9 PC Chikiri told court that appellant and one Rebecca (the 3rd accused in the trial court) led him and his colleagues to a house that PW8 Joyce Munene identified to belong to Rebecca where several items as shown on the inventory PEXH. 1, and which were suspected to be stolen were recovered. It was his evidence that the PW8 told him that appellant lived with Rebecca.

Appellant denied that he led police to the recovery of the stolen items. He also denied that the house from which the items were recovered was his. PW8 Joyce Munene, the caretaker of the house from where the stolen items were recovered testified that the house had been let by Rebecca and not the appellant. And contrary to PW9's evidence that PW8 told him that appellant lived with the appellant, PW8 said he did not know the appellant and Rebecca denied that he lived with the appellant.

In my considered view, the only person that bore the responsibility of explaining how the stolen items found their way to the house where they were found was Rebecca and not the appellant since appellant had neither leased that house nor lived with Rebecca.

3. Appellant's defence

I have considered the appellant's defence and I find that had the trial court appropriately considered it, it would have had no reason to believe in Rebecca when there is overwhelming incriminating evidence against her and disbelieve the appellant even in view of strong evidence exonerating him.

Decision

From the foregoing, it is clear to this court that the evidence of recognition by PW1 and recovery of the stolen goods could not be safely relied upon. I find that the prosecution failed to discharge its burden of proof and thus, the learned trial magistrate erred in convicting and sentencing the appellant. Accordingly, I set aside the judgment and quash the appellant's conviction and sentence and unless otherwise lawfully held, order that the he shall be released and set free forthwith.

DATED THIS.....13th.....DAY OF.....July.....2017

T. W. CHERERE

JUDGE

DELIVERED ON THIS 19TH DAY OF JULY 2017

BY: - T. W.CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk

Appellant

For the State