



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.18 OF 2012

(An appeal against conviction and sentence of Sotik PM Criminal Case No.254 of 2010

– Hon. S. R. Rotich – Senior Principal Magistrate delivered on 2nd March 2012)

THOMAS KIPNGENO CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Thomas Kipngeno Chepkwony, the Appellant herein, was with Wilfred Koech tried on a charge of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge are that:

On the night of 31st December 2008 and 1st January 2009 at Kericho township in Kericho District within the Rift Valley Province, jointly with others not before court while armed with offensive weapons namely Pangas, knives, Rungus and Ropes robbed Suleiman Kipkoech Salim of a motor vehicle registration number KAW 243U Toyota Station Wagon valued at Ksh.650,000/=, one mobile phone make Nokia 6070 valued at Ksh.8000/= and at or immediately before or immediately after the time of such robbery killed the said Suleiman Kipkoech Salim.

At the end of the trial Wilfred Koech was acquitted and the Appellant was convicted and sentenced to suffer death.

The Appellant being dissatisfied, preferred this appeal. The Appellant through the firm of S. G. O'nganyi Advocates put forward the following grounds

1. THAT the learned trial Magistrate failed to consider that he had no jurisdiction to hear the case.
2. THAT the identification of the Appellant was both at the Scene and Parade fatally defective.
3. THAT the Honourable Trial Magistrate's Judgment lacked analysis and he dealt with the evidence in a perfunctory and generalized manner.

When the Appeal came up for hearing Mr. Mutai learned Senior Principal Prosecution Counsel conceded the appeal on the basis of the aforesaid grounds of appeal.

Before delving deeper into the substance of the Appeal, we wish to set out in brief, the case that was before the trial court. A total of 12 witnesses testified in support of the Prosecution's case. Evans Kiprono Langat (PW1) told the trial court that on 31st December 2008, his driver by the name Wariah drove motor vehicle registration number KAW 243U as a taxi within Kericho township. Alfred Kigen (PW3), another employee of PW1 driving motor vehicle registration number KBC 061Q as a taxi, informed the trial court that on 31st December 2008 at around 10.00 p.m. three people approached him seeking to be transported but he declined to accept their offers. PW3 claimed the appellant herein was the one who spoke to him to negotiate for the taxi fare and that his colleague, the driver to KAW 243U told him to pick other passengers instead. At 1.00 a.m., PW3 said, he was called by PW1 and told motor vehicle KAW 243U had been seen abandoned at a tea plantation and that Wariah was missing. APC Stephen Etuku (PW2) stated that he was on patrol on 1st January 2009 when he stopped motor vehicle registration number KAW 243U with passengers inside. PW2 stated that the driver told him that the people inside were known to him but was surprised to learn the next day that the motor vehicle was found abandoned with a dead body therein. PW1 stated that on 1.00 a.m. on 31st December 2008 he received a phone call from a friend called Peter who informed him that his motor vehicle registration number KAW 243U had been found abandoned and broken down at Chepseon. IP. John Ogoti (PW6) stated that on 1st January 2009, at about 1.30 a.m. he with other police officers who were manning a road block found motor vehicle registration number KAW 243U with no occupant but with blood stains in the boot. They guarded the aforesaid motor vehicle until 6.00 a.m. when PW1, the owner arrived. PC. Solomon Gambo (PW4) told the trial court that on 14th January 2009, a woman whose name he did remember informed him at Nyagacho Police station that the Appellant had sought for refuge in her house and that members of the public were baying for his blood. PW4 said he visited that house where he dispersed the crowd which had gathered by shooting in the air before arresting the Appellant. IP. Reuben Onchoka (PW9) conducted an identification parade in which PW3 identified the Appellant as one of the people who approached him on the fateful night.

The Appellant gave sworn testimony when placed on his defence. He denied committing the offence. He stated that he was arrested for an offence he did not commit. The trial magistrate considered the evidence from both sides and came to the conclusion that he was convinced that PW2 knew the Appellant hence there was no doubt as to his identity. The trial magistrate also stated that he was convinced that the Appellant participated in the robbery and killing of the deceased.

Having set out in brief the case that was before the trial court, we now turn our attention to the merits or otherwise of the appeal. The final common ground argued on appeal is to the effect that the trial magistrate who initially heard the case had no jurisdiction to transfer the case from one subordinate court to another after she recused herself from hearing the case. The record shows that the case was initially heard by Hon. Kwena, learned Senior Resident Magistrate but on 21st December 2009 she recused herself from further hearing the case midstream. She made an order to have the case placed before the court presided over by the head of station. On 27th July 2010, the case without any reference to the recusal order of Hon. Kwena was placed before Hon. S. R. Rotich, learned Principal Magistrate for hearing. It would appear the case started denovo without any specific order being made. Mr. Mutai learned Senior Prosecution Counsel pointed out that there was need to take plea a fresh if the case was to begin a fresh. Mr. Ong'anyi. Learned advocate for the Appellant also complained that the learned Senior Resident Magistrate had no jurisdiction to have the case transferred from Kericho Chief Magistrate's Court to Sotik Principal Magistrate's Court. Mr. Mutai concurred with Mr. Ong'anyi. We have on our part considered the concurring arguments. With respect, we agree with learned counsels that it is only the High Court which has the power to transfer a case of this nature from one subordinate court to another for hearing and determination under Section 81 of the Criminal Procedure Code. The learned Senior Resident Magistrate therefore had no jurisdiction to transfer the case to any other court or magistrate to hear and determine the same after she recused herself. Even if the case had been competently transferred to Sotik Principal Magistrate's Court, the same was not properly conducted as required under the provisions of the Criminal Procedure Code. No plea was taken before a retrial was commenced. That was a fatal error which cannot be cured under Section 382 of the Criminal Procedure Code. We find that there was no competent trial undertaken against the Appellant.

On the basis of the above grounds, we allow the appeal. The order on conviction is quashed and sentence is set aside. The Appellant is hereby ordered set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 17th day of July, 2014

J. K. SERGON

H. OMONDI

JUDGE

JUDGE

In the presence of:

- Mutai for Director of Public Prosecution
- Ong'anyi for Appellant