REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 6 of 1998
ELIAS KADENGE NGUMBAO..... APPELLANTS

KADENGE KARISA KIKONDA

versus

REPUBLIC.....
RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 7 OF 1998

KADENGE KARISA KIKONDO ..... APPELLANT

versus

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal CaseNo.1229 of 1997 of the Snr. Principal Magistrate's Court atMalindi - Mrs. J.M. Matu, Ag. PM)

JUDGMENT

The two appellants ELIAS KADENGE NGUMBAO AND KADENGEKARISA KIKONDA were charged with robbery contrary to section296(1) on two counts, then on one count of burglary andstealing contrary to sections 304(2) and 279(b) of the PenalCode and on 2 counts of assault causing actual bodily harmcontrary to section 251 of the Penal Code. They were foundguilty of all except on count of robbery contrary to section 1296(1) of the Penal Code. She sentenced them as follows:

- for robbery contrary to section 296(1);

- 3 years imprisonment with 2 strokes and3 years police supervision- for Count 2 burglary and stealing contrary to section304(2) and S.279 - 2 years and 1 stroke of the cane;

- for count four - assault causing actual bodily harm contraryto Section 251 of the Penal Code - 12 months imprisonment and also - On Count 5 - assault causing actual bodily harm contrary to s.251 of the Penal Code - 12 months imprisonment all prison terms to run concurrently.

In their mitigation appellant No.l said he was the 5thborn and all his brothers and sisters before him died and thathe was the breadwinner for the family, he is married with 2young children. The second appellant

said he suffers fromEpilepsy and asked for leniency. The Learned Magistrate tookinto consideration these mitigating pleas in awardingsentences to the appellants.

The law is that the Court in appeal against sentence willnot usually interfere with the discretion of the trial Courtin awarding sentence except where the trial court misdirecteditself in principle and thereby awarded an erroneous orexcessive sentence in the circumstances. The principles upon which the Court of Appeal in England acts on appeal as statedby Archbold 1998 p.825 para 7-136 are in broad terms:-

(a) When the sentence if not justified bylaw, so that the Court will interfere notas a matter of discretion but as of law.

(b) Where sentence has been passed on thewrong factual basis.

(c) Where some matter has been improperlytaken into account, or

(d) There is some fresh matter to be takeninto account.

(e) Where the sentence is wrong in principle ormanifestly excessive.

These categories are not exhaustive and they overlap butwhere the sentence is usually excessive manifestly then theappeal court would regard that as a wrong on principle. Herethe sentence for robbery under S.96/1 of Penal Code is liableto imprisonment for 14 years with strokes of the cane notexceeding 28. The magistrate awarded only 3 years and 2strokes. Sentence for burglary contrary to S.304 of PenalCode is 10 years maximum together with Corporal punishment.Here learned magistrate gave 2 years and one stroke of thecane and offence under S.251 has 5 years as the maximumsentence. The learned magistrate gave 12 months for bothoffences. All these were to run concurrently.

It is clear that the learned magistrate's sentencing wasnot excessive nor was it illegal since the sentences werewithin the limits imposed in the(Act) Penal Code.

It may be said that by saying that the offences are then prevalent he took into account matters not relevant, but Imust say the learned magistrate should not import suchextenuating factors unless there is evidence for it. Herethere was no such evidence neither did prosecution state it.The Court should never say such. An accused person shouldonly be sentenced only for the offences he has committed andfound guilty of unless he has asked that they be taken intoaccount, but not in the general view that offences areprevalent. Where there is no such evidence however, I am ofthe view in this case that the matter could not haveinfluenced the learned magistrate as he awarded very lowsentences.

Regarding the fact that second appellant was sufferingfrom epilepsy, although the learned magistrate did not mentionit specifically, I am satisfied he had it in mind as he saidhe noted their mitigation.

I believe the sentences were proper and did not, apartfrom the few matters noted, derogate from the properprinciples of law as to sentencing and I hold that themagistrate exercised her discretion correctly.

The offences charged were serious offences, two feloniesand aggravated misdemeanors the maximum sentence of whichwould' have been 34 years imprisonment and 25 strokes of thecane in total, they got only 7 years and 4 strokes in theagregate. The sentences given were on the lower side andwould even be enhanced.

I shall dismiss the appeal as to sentence.

As regards appeal against conviction this was only byappellant No.2 Kadenge Karisa Kadenge he says in his appeal

His ground of appeal was a written submission as to hisinnocence but grounds can be deduced from the way he argued itthat first he was not identified as one of the robbers andthat he was never found with the

stolen articles. The radiohe was found with he admits did not. belong to him but he tookit as security towards payment of work rendered by him toappellant No.l who had not paid him all the debt ofKShs.3200/-. He had only paid 800/-. Besides he said eventhe cassettes belonging to the complainant were found in thepossession of the appellant No.l as for offences of assault,he denied assaulting PW.l. Mr. Bwonwonga Principal State Counsel conceded appeal on conviction on the robbery charge and I agree with him as the complainant never identified appellant No.2 and the evidence against him was from co-accused which needed corroboration.

Normally the trial court should:-

"regard the statement of such persons as taintedbecause from the position occupied by them theirstatements are not entitled to the same weight asthe evidence of an independent witness. Accompliceevidence is held untrustworthy for three reasons.

(a) because an accomplice is likely to swearfalsely in order to shift the guilt fromhimself.

(b) because an accomplice is a participatorin a crime, and

(c) because he gives evidence under a promise of a pardon.See R v. Hasham Juma [1949]16 BACA 90.

The conviction of Second Appellant on the offence ofburglary contrary to section 296/1 of the Penal Code is quashedand sentence of 3 years and 2 strokes set aside.

As regards Count 2 which was of burglary and stealingPW.2 Mwatela Wanje Mbogo left his homestead on 8-9-97 with hiswife at 2 p.m. On their return at 11 p.m. the children werenot there and he was missing one mattress, one radio cassette,19 cassettes and KShs.400/-. The radio was found in the houseof appellant on 25-11-97 2 1/2 months later. The other itemswere found in the house of appellant No.l. The evidence ofPW.2 was that he said nothing about the radio when he wasarrested with it by PW.5 Sgt. Henry Mugambi. In his unsworndefence statement appellant said that he took the radio fromAccused No.l as lien for unpaid payment for work done. TheLearned Ag. Principal Magistrate did not however make anyspecific rejection of the explanation given by the appellantperson but found him jointly guilty with the first appellant.

The conviction of appellant No.2 against the offence of burglary therefore can only stand if the facts fitted the principle of Recent Possession. Archbold 1998 para 21-125 on Recen,t Possession says:-

"The rule [for it is no more than application ofCommon Sense] is it is submitted that where it isproved that premises have been entered and propertystolen therefrom and that very soon after the entry the defendant was found in possession of theproperty it is open to the jury to convict himof burglary"

Each case depends on its own facts. "Factors such as the nature of property stolen, whether it be of a kind that passes from hand to hand, and the trader or occupation to which the accused person belongs can be taken into account" See R v. Hassan s/o Mohamed [1948] 15 EACA 121.

There are two factors here the court convicting on recentpossession would make a finding on. First the nature of theproperty found, in this case the radio. Was it of a naturethat passed hands easily, secondly, if he was the burglar, thetime of two months was that too long a time for a burglar toretain the radio, then lastly his explanation.

Again Archbold has discussed this on paragraph 21-126 where he says-

"There is no magic in any given length of time in many cases where the ONLY evidence is that ofrecent possession, it will be impossible to excludethe possibility that the defendant was a receiverof the stolen property in such cases a case ofburglary should not be left to the jury whererecent possession is literally the only evidence"

In many situations there are other pieces of evidence which show which way-

"They include time and place of the theft, the

type of property stolen, the likelihood of it beingsold on quickly, the circumstances of thedefendant, whether he has any connections with thevictim or with the place where the theft occurred,anything said by the defendant and how that fits inor does not fit in with the other availableevidence"

Here two months period from date of theft for item like aradio was not too long. Secondly, the fact that the onlyevidence was of recent possession may point more to receivingstolen property in which case his explanation would beconsidered. Could he have been a receiver in respect of theRadio?

I have looked at the explanation given and against theseprinciples it appears to me that it was a reasonableexplanation that he took the radio as a pledge for work done.In those circumstances he could not even have been a handlerof stolen property under S.322 of the Penal Code. The testhere would be whether the accused's story might be true,reasonably, irrespective of whether in fact the Court believedit or not.

LEONARD ARTHER BART V. R [1941]19 KLR 920 75.

I think on these considerations, offence of burglarycould not stand and I quash appellant's conviction also onthat charge of burglary contrary to section 304(2) and 279 ofPenal Code.

That leaves counts 4 and 5 which charged assault causingactual bodily harm contrary to section 251 of the Penal Code.

Count four was assault on NELSON CALAMI NGUMA on 21-11-97at Mambrui Village. At the trial PW.3 the driver of theMatatu was there when appellant one and two came in aspassengers. The two accused robbed a passenger of money andwanted to grab money from the conductor and they had knives which they cut PW.3 with. In my view it does not matter which of the two cut the PW.3 because the two appellants had joint intention and were acting in concert. S.21 of the Penal Code provides:-

"When two or more persons form a common intentionto prosecute an unlawful purpose in conjunctionwith one another and in the prosecution of suchpurpose an offence is committed of such nature thatits commission was a probable consequence of theprosecution of such purpose each of them is deemedto have committed the offence.

There may be more than one principal to theCommission of an offence where two persons haveknives and both stab the victim who dies of hiswounds they are both guilty of murder." Archbold1998 para 19-24. PW.3 says they stabbed him with a knife, so they are bothprincipals.

The second charge of assault contrary to section 152 wasin respect of assault on MANGI YAA KITU on 21-11-97 at MambruiVillage by the two appellants. again here PW.4 Mangi YaaKitu, the conductor of, the Matatu was cut with a knife while1st appellant attempted to rob him of the money. During thetrial appellant did not dispute PW.5's assertion that one ofthem stabbed him.

On identification PW.5 had been with the two for sometime when they boarded Matatu until they demanded to alight.He had them in view. Besides he even demanded money from themfor the fare. PW.5 was clear that he saw appellant No.2 forthe first time that day. He saw him in the light which was in the matatu PW.4 on the other hand said the two robbers werepeople he had been seeing from time to time.

The learned Ag. Principal Magistrate was right in findingthat the two appellants acted with Common intention and Isupport his conviction of accused No.2 on both counts ofassault and dismiss his appeal as against them. There willtherefore be allowed appellants appeal against conviction forrobbery and burglary whereas his appeal against conviction on two charges of assault are hereby dismissed. Appeal againstsentence by the first appellant is hereby dismissed.

Dated at Mombasa this 27th Day of October 1998.

A.I. HAYANGA

JUDGE