



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal Case 10 of 1994

MWINZILA KASYOKI NGEI ,..... APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

JUDGMENT

There were two accused persons before the Principal Magistrate's Court at Malindi. They were both charged with storebreaking and committing a felony contrary to Section 306(a) of the Penal Code. The 1st accused admitted the offence, was convicted and sentenced to serve 3 and a half years imprisonment with two strokes of the cane. He was subsequently called as a prosecution witness in the trial of the 2nd accused, now the Appellant.

The Appellant was convicted and sentenced to serve 4 and a half years with 6 strokes of the cane.

It had been alleged in the particulars of the charge that the two on 21.7.93 at Solar Salt Fundisha Location in Kilifi, broke and entered into the store of Solar Salt Co. Limited with intent to steal and did in fact steal therefrom a Generator valued at Shs.500,000/=, the property of the company.

The original 1st accused was the watchman guarding the secured store where the generator had been kept. He admitted to have broken and entered therein and stole the generator together with other people on the date stated in the charge sheet.

The prosecution called 5 witnesses. Two of them Ngumbao (p.W.2) and Kalume (p.W.3) are the watchmen who were on duty guarding the factory premises on the night of the alleged offence. So was the original 1st accused (p.W.4) Mwaruwa. P.W.1 was the factory Manager who confirmed the breaking of the store and the loss of the generator, its value and ownership by the company; while P.W.5 A.P. Sgt. Mugambi was the arresting officer from the Chief's Office who handed over the Appellant to C.I.D. Malindi after arrest. There was no evidence from the C.I.D. Malindi as to what investigations they carried out thereafter.

It was the finding of the learned trial Magistrate on the

evidence before him that

"Most of the prosecution witnesses were incapable of establishing the accused's participation in the offence. The workshop Manager (p.W.1) was not present at the time the offence took place. The watchmen (p.W.2) and (p.W.3) apart from seeing a motor vehicle enter the premises of the Solar Salt Co. Ltd. on the night of the material date did not witness the breaking of the store and theft from therein. The material and

sole implicating evidence against the accused is that of a third watchman Samuel Rabindo Mwaruwa (p.W.4). He was jointly charged with the accused and is currently serving imprisonment after pleading guilty to the present offence".

After considering that sole evidence the learned Principal Magistrate concluded:

"It is essential evidence of an accomplice which in the opinion of this court is worth belief. Evidence of an accomplice is admissible out of necessity. It however requires independent corroboration. This independent corroboration is not available in the evidence adduced by the rest of the prosecution witnesses. It is dangerous to convict in the absence of such corroboration".

Having correctly thus assessed the evidence and stated the law, the

Magistrate went ahead and said he believed the sole accomplice

witness because he had proved the case beyond reasonable doubt. He

accepted the accomplice's credibility on the basis that he had

confessed without fear of incarceration that he was at the centre

of the crime.

That finding was the main focus of the assault laid in the Petition of Appeal and the submissions of Mr. Gikandi for the Appellant. The main ground was that the learned trial Magistrate erred in fact and in law in convicting the Appellant on the basis of accomplice evidence which was not corroborated. Citing The King-Vs- Baskerville [1916] 2 K.B.658, Mr. Gikandi conceded that the trial court has the power to convict on the sole evidence of an accomplice after warning itself on the danger of so convicting.

But he submitted that the occasions are extremely rare when a court would convict on the uncorroborated evidence of an accomplice; and this case does not pass the test. That is because there is other evidence on record which discredits the evidence of the accomplice, which evidence was not considered by the learned Magistrate. He referred to the alibi evidence of the Appellant which was not even referred to in the Magistrate's judgment in any detail. He also referred to the evidence of P.W.2 and P.W.3 who stated that the Appellant was known to them as he was a working colleague before he resigned from the company. They witnessed the white car alleged to have been let through the gate by P.W.4 and noticed the occupants therein. They said however that they did not see the Appellant. It was abnormal for the watchman to let in a vehicle into the premises at that time but none of them reported the matter to their employer until it was claimed that the generator had been stolen. In all these circumstances Mr. Gikandi submitted that there was no corroboration of the accomplice evidence of P.W.4. The kind of corroboration required should have been independent and on material particulars.

Mrs. Mwangi for the state on her part was of the view that this was one of the rare cases where a trial court could convict on the sole uncorroborated evidence of an accomplice. It was also her view that there was circumstantial evidence to corroborate the accomplice evidence. She referred to the evidence of P.W.2 & P.W.3 who said they saw P.W.4 open the gate for a motor vehicle with some strangers inside and it headed towards the store where the generator was kept. The following morning the store was found broken and the generator missing. That is the evidence supporting the accomplice and the conviction was therefore appropriate.

For my part I agree with the summary of the evidence as related by the learned Principal Magistrate. He was also alive to the requirement in law that he had to warn himself that it was dangerous to convict on the uncorroborated evidence of an accomplice. I further agree that the trial Magistrate was at liberty after warning himself to convict on such sole evidence. In this case he convicted because he found the accomplice credible. In my view this was a casual view taken in a grave matter where the liberty of an individual was at stake.

Faced with such situation which has been held to be rare, the learned Magistrate in my view should have gone further and examined in detail the evidence on record to fortify his assessment of the credibility of the accomplice. For by his finding that there was no corroboration, he meant in law that there was no independent testimony which affects the Appellant by tending to connect him with the crime, that is, evidence, direct or circumstantial, which implicated the appellant, which confirmed in some material particular not only the evidence given by the accomplice that the crime was committed, but also the evidence that the appellant committed it.

It has also been stated in many authorities for e.g that:

"A confession by an accused involving his co-accused when unsupported by other testimony, is evidence of the weakest kind against such co-accused. It is accomplice evidence needing corroboration. Anyuma s/o Omolo & Another -Vs- Republic (1953) 20 EACA 218 and

"It would be difficult to conceive a case in which it would be proper to convict on the unsupported evidence afforded by the confession of a co-accused". Republic -Vs- Wadingombe bin Mkwanda & Others (1941) 8 EACA 33

This court on Appeal has the power, indeed the duty, to review and

re-examine the evidence recorded before the trial court. As Lord

Reading C.J. put it in the Baskerville case

"In a considering whether or not the conviction should stand this court will review all the facts of the case, and will bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this court, in the exercise of its powers will quash a conviction even when the Judge has given to the jury the warning or advice above mentioned, if this court, after considering all the circumstances of the case thinks the verdict unreasonable or that it cannot be supported having regard to the evidence".

It is my view and I agree with the submission made by Mr. Gikandi

that when the evidence of P.W.2 & P.W.3 and that of the Appellant

are tested against that of P.W.4, the evidence of P.W.4 becomes

suspect and cannot be solely relied upon to sustain a conviction.

It is clearly the case for the prosecution that the Appellant was

not a stranger to P.W.2 & P.W.3. He had worked with them until he

resigned after finding another job. These witnesses were at the

scene of the crime and saw the persons said to have committed the

crime. They did not see the Appellant. It leaves in one's mind a

nagging question as to why they did not and lingering doubts about

their credibility as witnesses of the truth. They never even reported this abnormal incident to their superiors until they heard

much later from P.W.4 that it was the Appellant among others, who

stole.

The other crucial evidence that was not analyzed by the trial Magistrate was the Appellants evidence. It introduced two aspects to the case. That of alibi and that of a grudge being held by P.W.4 towards the Appellant. The Appellant testified on oath and was cross-examined. The police did not indicate that there was no indication from the Appellant raising the defence of alibi when he was arrested or was being interrogated. Indeed it would appear that there was no investigation carried out by the C.I.D. Malindi after the Appellant was arrested by an Administration Policeman from the Chief's Office and handed over to them. They simply charged him. But he had a defence of alibi and this was never rebutted by the prosecution. For it is the law as stated in

Sekitoleko -Vs- Uganda (1967) E.A. 531 that:

"the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (Republic -

Vs- Johnson (1961) 3 ALLER 969..... the burden of

proving an alibi does not lie on the prisoner".

The Appellant testified that on the day and night of the alleged offence' he was at his home in Watamu throughout and that he was

now here near the scene of the crime. The trial Magistrate did not say why he disbelieved such evidence. He only made a fleeting mention of the evidence without commenting on it.

The Appellant also introduced evidence of a standing grudge with P.W.4. They were workmates and occupied neighbouring company houses. At one time the Appellant complained about P.W.4's and his families untidiness to the Manager whereupon the accommodation was taken away from P.W.4 and was told to look for accommodation elsewhere. They had not spoken to each other since that incident. That evidence does not appear to have been considered and dismissed or accepted. It is not clear in the circumstances whether the trial Magistrate would have placed the same weight on P.W.4's credibility if he had considered such evidence.

I am satisfied on the totality of the evidence on record that no proper basis was laid before total reliance was placed by the learned Principal Magistrate on the credibility of the sole accomplice witness. It was not safe to convict on this evidence and I allow the Appeal, quash the conviction and set aside the sentence. If the Appellant is held in custody he shall be set at liberty unless otherwise lawfully held.

Dated at Mombasa this 4th day of July, 1997.

P.N. Waki

JUDGE

4/7/97