REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 10 of 1994

(From Original Conviction and Sentence in Criminal Case No. 905 of1995 of the Principal Magistrate's Court at Malindi - J.R. KaranjaEsq., Principal Magistrate)

MWINZILA KASYOKI NGEI ..... APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

JUDGMENT

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

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

It had been alleged in the particulars of the charge that thetwo on 21.7.93 at Solar Salt Fundisha Location in Kilifi, broke andentered into the store of Solar Salt Co. Limited with intent tosteal and did infact 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 havebroken and entered therein and stole the generator together withother 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 dutyguarding the factory premises on the night of the alleged offence.So was the original 1st accused (p.W.4) Mwaruwa. P.W.I was thefactory Manager who confirmed the breaking of the store and theloss of the generator, its value and ownership by the company;while P.W.5 A.P. Sgt. Mugambi was the arresting officer from theChief's Office who handed over the Appellant to C.I.D. Malindiafter arrest. There was no evidence from the C.I.D. Malindi as towhat 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 ofestablishing the accused's participation in the offence.The workshop Manager (p.W.l) was not present at the timethe offence took place. The watchmen

(p.W.2) and (p.W.3)apart from seeing a motor vehicle enter the premises ofthe Solar Salt Co. Ltd. on the night of the material datedid not witness the breaking of the store and theft fromtherein. The material and sole implicating evidenceagainst the accused is that of a third watchman SamuelRabindo Mwaruwa (p.W.4). He was jointly charged with theaccused and is currently serving imprisonment afterpleading guilty to the present offence".

After considering that sole evidence the learned Principal Magistrate concluded:

"It is essential evidence of an accomplice which in theopinion of this court is worth belief. Evidence of anaccomplice is admissible out of necessity. It howeverrequires independent corroboration. This independentcorroboration is not available in the evidence adduced bythe rest of the prosecution witnesses. It is dangerousto 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 thePetition of Appeal and the submissions of Mr. Gikandi for theAppellant. The main ground was that the learned trial Magistrateerred in fact and in law in convicting the Appellant on the basisof accomplice evidence which was not corroborated. Citing The King-Vs- Baskerville [1916] 2 K.B.658, Mr. Gikandi conceded that thetrial court has the power to convict on the sole evidence of anaccomplice after warning itself on the danger of so convicting.

But he submitted that the occasions are extremely rare when acourt would convict on the uncorroborated evidence of anaccomplice; and this case does not pass the test. That is becausethere is other evidence on record which discredits the evidence ofthe accomplice, which evidence was not considered by the learned

Magistrate. He referred to the alibi evidence of the Appellantwhich was not even referred to in the Magistrate's judgment in anydetail. He also referred to the evidence of P.W.2 and P.W.3 whostated that the Appellant was known to them as he was a workingcolleague before he resigned from the company. They witnessed thewhite car alleged to have been let through the gate by P.W.4 andnoticed the occupants therein. They said however that they did notsee the Appellant. It was abnormal for the watchman to let in avehicle into the premises at that time but none of them reportedthe matter to their employer until it was claimed that thegenerator had been stolen. In all these circumstances Mr. Gikandisubmitted that there was no corroboration of the accompliceevidence of P.W.4. The kind of corroboration required should havebeen independent and on material particulars.

Mrs. Mwangi for the state on her part was of the view thatthis was one of the rare cases where a trial court could convict onthe sole uncorroborated evidence of an accomplice. It was also herview that there was circumstantial evidence to corroborate theaccomplice evidence. She referred to the evidence of P.W.2 & P.W.3who said they saw P.W.4 open the gate for a motor vehicle with somestrangers inside and it headed towards the store where thegenerator was kept. The following morning the store was foundbroken and the generator missing. That is the evidence supportingthe 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 tothe requirement in law that he had to warn himself that it wasdangerous to convict on the uncorroborated evidence of anaccomplice. I further agree that the trial Magistrate was atliberty after warning himself to convict on such sole evidence. Inthis case he convicted because he found the accomplice credible.In my view this was a casual view taken in a grave matter where theliberty of an individual was at stake.

Faced with such situation which has been held to be rare, thelearned Magistrate in my view should have gone further and examinedin detail the evidence on record to fortify his assessment of thecredibility of the accomplice. For by his finding that there wasno corroboration, he meant in law that there was no

independenttestimony which affects the Appellant by tending to connect himwith the crime, that is, evidence, direct or circumstantial, whichimplicated the appellant, which confirmed in some materialparticular not only the evidence given by the accomplice that thecrime was committed, but also the evidence that the appellantcommitted it.

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

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

"It would be difficult to conceive a case in which it would be proper to convict on the unsupported evidenceafforded by the confession of a co-accused".Republic -Vs- Wadingombe bin Mkwanda & Others (1941) 8EACA 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 shouldstand this court will review all the facts of the case,and will bear in mind that the jury had the opportunityof hearing and seeing the witnesses when giving theirtestimony. But this court, in the exercise of its powerswill quash a conviction even when the Judge has given tothe jury the warning or advice above mentioned, if thiscourt, after considering all the circumstances of thecase thinks the verdict unreasonable or that it cannot besupported 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 ones 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 aprisoner beyond reasonable doubt never shifts whether thedefence 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 grudgewith P.W.4. They were workmates and occupied neighbouring companyhouses. At one time the Appellant complained about P.W.4's and hisfamilies untidiness to the Manager whereupon the accommodation wastaken away from P.W.4 and

was told to look for accommodationelsewhere. They had not spoken to each other since that incident.That evidence does not appear to have been considered anddismissed or accepted. It is not clear in the circumstanceswhether the trial Magistrate would have placed the same weight onP.W.4's credibility if he had considered such evidence.

I am satisfied on the totality of the evidence on record thatno proper basis was laid before total reliance was placed by thelearned Principal Magistrate on the credibility of the soleaccomplice witness. It was not safe to convict on this evidenceand I allow the Appeal, quash the conviction and set aside thesentence. If the Appellant is held in custody he shall be set atliberty unless otherwise lawfully held.

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

P.N. Waki

JUDGE

4/7/97