REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 7 of 1995

JOSEPH BOIT KIMEI ……………………………………………………………………1ST APPELLANT

SAMWEL RUTO KIPTOO ………………………………………………………………….2ND APPELLANT

AND

REPUBLIC ………………………………………………………………………………RESPONDENT

(Appeal from a conviction of the High Court of Kenya at Eldoret (Mr. Justice D. K. S Aganyanya) dated 5th September, 1991

IN

H. C. CR. A. NOS 7 & 8 OF 1991)

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JUDGMENT OF THE COURT

Section 361 (3) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya is in the following terms:

"361. (3) if it appears to the Court of Appeal that a party to an appeal, though not properly convicted on some count, has been properly convicted on some other count, the court may, in respect of the count on which it considers that the appellant has been properly convicted, either affirm the sentence passed by the subordinate court or by the first appellate court or pass such other sentence (whether more or less severe) in substitution therefor as it thinks proper."

It would seem therefore that an offender must be sentenced only for these offences of which he has been convicted. This is illustrated by the case of Mfundo v. Republic, [1975] E. A. 63 where the appellant therein had been charged before the Resident Magistrate's court at Kilosa, Tanzania with forgery; uttering a false document; and stealing by a public servant. After examining the full evidence before him, the trial magistrate substituted for the forgery charge a conviction of fraudulent false accounting. He also accordingly convicted him on the other remaining two charges and sentenced him to imprisonment for three years, two years and four years respectively. These sentences were to run concurrently. The sentence on the count of stealing by a public servant was passed under the Tanzanian Minimum

Sentences Act, 1972. On first appeal to the High Court of Tanzania, the substituted conviction of fraudulent false accounting was reversed to that of the charge of forgery as originally laid in the charge sheet but the sentences of three years imprisonment was undisturbed. The conviction for the charge of uttering a false document was quashed and the sentence of two years imprisonment was set aside. The conviction and sentence of four years imprisonment in regard to the charge of stealing by a public servant were confirmed. Regarding the latter sentence, the first appellate judge observed that the magistrate had passed an illegal sentence under section 4 (a) of the Tanzanian Minimum Sentences Act, 1972 instead of the mandatory legal sentence under section 5 (d) of the said Act which was imprisonment for a term of not less than five years, yet the judge confirmed the illegal sentence. But before doing so, he noted that:

"as has recently been re-affirmed by the Court of Appeal for East Africa, this court cannot on appeal enhance a sentence without first having given the appellant an opportunity of showing cause why the sentence should not be enhanced ………………"

On second appeal to the Court of Appeal for East Africa, the precursor to our present Court of Appeal, that court made the following observation in regard to what the first appellate judge had observed before confirming the illegal sentence:

"The case referred to (by the first appellate judge) is probably Amratlal v. Uganda, [1970] E. A. 401, where this court followed its earlier decision in another Uganda case, R. V. Abdul Aziz, (1948) 15 E. A. C. A. 51. We do not think that those cases were relevant as they did not concern minimum sentences. In the case of the appeal before him there was no legal sentence capable of enhancement or confirmation, and the judge's exercise of confirming the illegal sentences was a nullity. His duty in the circumstances was to set aside the illegal sentence and to substitute a legal one. No question of enhancing arose. Accordingly we set aside the illegal sentence of four years and substitute a sentence of imprisonment for five years under s. 5 (d) of the Minimum Sentences Act, with effect from the date of the conviction."

On 23rd September, 1989 at about 7.30 p. m. Shaukatali Ebrahim Lightwala (P. W. 1) was in the sitting room of his house in Elgon View, Eldoret together with his family and brother-in-law, Dr. Bhaijiessaji Abdulal Zavery (P. W. 2). They were listening to Quran cassettes from a radio cassette, which P. W. 1 had borrowed from P. W. 2. As they did so, P. W. 1 heard the opening sound of the kitchen door. When he went into the kitchen to check what was happening, he was confronted by a person who was carrying a "simi". Lights in the kitchen were on and he was able to see the man carrying the "simi". Realising that people had come to rob him, he shouted and on doing so, the man with the "simi" struck him with it at the back of his neck just below the head. Shortly thereafter two other men came into the Kitchen and P. W. 1 was ordered to sit down. He was asked for money and the keys to his Datsun motor vehicle. One of the invaders went to the sitting room while the others asked P. W. 1 to take them to the bedrooms. He complied and as he did so he jumped onto the bed in one of the bedrooms and pressed the button to the security alarm system in his house which was connected to the offices of securicor (K) ltd. at Eldoret. That security alarm system was code numbered 241. When he pressed the button as aforesaid, the man with the "simi" attacked him with it and in self-defence he grabbed the "simi" consequent to which he was cut on his left hand. Thereafter, the other invaders descended on him and cut him all over his head with a panga in the process of which his wrist watch, make, Seiko 5, was struck and its strap broke off and the robbers took it away together with some Shs. 200/= to Shs. 300/=. They also took with them the radio cassette which P. W1 had borrowed from P. W. 2.

In the meantime, P. W. 2 who was also being assaulted by one of the robbers with a "rungu" in the sitting room had his wrist watch, make , Seiko 5, pulled of his hand by this robber as he gave him some money from his pocket. That watch had his identification mark - "z" - on its underside. Soon after the robbers left P. W. 1's house, P. W. 2 assisted in rushing P. W. 1 to Eldoret Nursing Home where he was admitted and discharge after 48hours observation. P. W. 2 was also treated at the same Nursing Home and discharged on the same evening.

According to Dr. Vinod Vasanji Lodhia (P. W. 6), when he attended to P. W. 1 on the evening of 23rd September, 1989, the latter was drenched in blood and had five cut wounds on the scalp and face which were bone deep and approximately 3",2", 4", 1", and 1/2 " long. He had also a cut wound on the right ear

measuring about 3" long and another cut wound on the left temporal region infront of the left ear measuring approximately 2" long. P. W. 1 had also soft tissue injuries around the thoracic and abdominal areas. His right thumb had a deep cut wound measuring about 1" long. P. W. 6 assessed these injuries as grievous harm.

P. W. 2 who was also attended to by P. W. 6 on the same evening had a swelling on the head resulting from a blunt injury the degree of which was classified as harm.

In response to the alarm referred to above, the securicor guards arrived at P. W. 1's house just as the robbers were coming out of it . According to two of these guards - Amos Sabuni (P. W. 3) and Maurice Mandila Wandebwa (P. W. 4) -these robbers were five in number. The two guards pursued them and while four of the robbers disappeared, one of them was arrested within the compound of P. W. 1's house carrying an axe, a "rungu" and a radio cassette which P. W. 1 had borrowed from P. W. 2 and from which he and his family together with P. W. 2 were listening to Quran cassettes. This radio cassette whose make was Gold Star, Model No. 585 028 was subsequently positively identified by P. W. 2. Who also tendered in evidence its permit. The person thus arrested was the first appellant herein. The police at Eldoret Police Station were then alerted and shortly thereafter they arrived at the scene of the robbery where the Securicor guards handed over the first appellant to them together with the items he had been arrested with.

Acting on information, No. 35621 P. C. James Biwott (P. W. 5) went to the house of the second appellant herein between 4.00 a. m. and 5. 00 a. m on 27th September, 1989 where he found him asleep. The second appellant was wearing on his hand a Seiko 5 watch which had been pulled off the hand of P. W. 2 during the robbery in the house of P. W. 1. At the trial of the appellants in the Principal Magistrate's Court Eldoret, this watch was positively identified by P. W. 2 through its identification mark- "Z" - referred to earlier in this judgment. Also recovered on the table in this house was another Seiko 5 watch with a broken strap which P. W. 1 identified at the trial of the appellants as the one robbed from him when he was being attacked by the robbers in his house at the material day.

The appellant's defence at their trial was principally a denial of their involvement in the robbery which took place in the house of P. W. 1 on the evening of 23rd September, 1989. In her judgment dated 6th December, 1990,the learned trial magistrate discounted this defence and found that the offence for which the appellants were charged and tried before her had been proved against them beyond reasonable doubt. That offence comprised of two counts of robbery with violence contrary to section 296 (2) of the Penal Code as laid in a substituted new charge sheet on 8th August, 1990 and endorsed by the trial magistrate on the same day which latter was the date of commencement of the appellant’s trial for the two counts of the offence contained therein. The learned trial magistrate then said:

"I find them guilty and convict them accordingly."

and proceeded to sentence each of them to 10years imprisonment together with ten strokes of corporal punishment and ordered that each of them shall be under police supervision for a period of five years upon being released from prison. In convicting and sentencing the appellants, the learned trial magistrate made no mention of the counts of the offence for which they were thus convicted and sentenced.

Dissatisfied with the decision of the learned trial magistrate, each of the appellants appealed to the High Court of Kenya at Eldoret against conviction and sentence for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. A conviction for an offence under the aforementioned section carries with it a mandatory death sentence. The first and second appellant's appeals to that court were numbered 7 and 8 respectively. While admitting those appeals on 17th March, 1991, the first appellate judge made the following notes in respect of each of them:

"charge proved beyond doubt. Hearing before I judge at Eldoret.

Appellant should not be produced in court at hearing of appeal at state expense."

Naturally therefore, when the appellant's consolidated appeals came up for hearing before the first appellate judge on 8th august, 1991, there was no appearance by or for them. It is noteworthy that at the close of his address to the first appellate court, counsel for the respondent indicated that the appellants had been charged with an offence under section 296 (2) of the penal Code.

In his judgment dated and delivered on 4th day of September, 1991,the first appellate judge proceeded erroneously as if the appellants had been charged with, tried, convicted and sentenced for the offence of simple robbery under section 296(1) of the Penal Code. After a careful analysis of the evidence before the trial magistrate, the learned judge made the following conclusion:

"I would find no merits in the grounds of appeal raised by the appellants, and that the sentence imposed was a bit on a higher side is neither here not there. The appellants deserve it considering the injuries they inflicted on the complaint in the course of the robbery. The appeals are dismissed in their entirely."

The net-effect of this conclusion was that the first appellate court upheld the appellants' conviction for the offence laid against them in the substitute charge sheet as is outlined above.

The appellants' second appeal to this court is basically on the issue of identification as they claim not to have been identified by P. W. 1 and P. W. 2 as some of the robbers who robbed them in the house of P. W. 1 on the evening of 23rd September, 1989. At the hearing of this appeal on 25th September, 1995, this was really their strongest point besides their claim that the evidence led against them at their trial was false. The response of counsel for the respondent in this regard was that the first appellant was arrested within the compound of P. W. 1's house with one of the stolen items from that house - a Cold Star radio cassette, Model No. 585 025. This was almost immediately after the robbery in this house. The second appellant was arrested four days later wearing P. W. 2's watch while P. W. 1's watch was on the table inside the house where he was sleeping as is narrated above. These two watches had been stolen during the robbery at the house of P. W. 1. In these circumstances, according to counsel for respondent, the appellants' identification by P. W. 1 and P. W. 2 was immaterial.

From the evidence available before the learned trial magistrate, we are in no doubt that the appellants were guilty of the offence of robbery with violence contrary to section 296(2) of the Penal Code as laid against them in the substituted charge sheet referred to in this judgment and for which they were tried. It was in respect of that offence with its two counts that the trial magistrate quite rightly convicted the appellants. The penalty flowing from such conviction was, as pointed out earlier in this judgment, a mandatory death sentence. The sentence of 10 years imprisonment with ten strokes of corporal punishment passed on each of the appellants together with the five years police supervision order in respect of each of them upon release from prison were certainly illegal. From the law we have attempted to set out at the beginning of this judgment, the illegal sentence and order cannot be allowed to stand. The same are set aside and in substitution therefor, each of the appellants is sentenced to suffer death in the manner authorized by law on each of the two counts of robbery with violence contrary to section 296 (2) of the Penal Code.

In the result, the appellant's second appeal to this court must fail and the same is dismissed in terms of this judgment .

It is so ordered.

Dated and delivered at Nakuru this 26th day of February, 1996.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL