REPUBLIC OF KENYA
Kanyi v Republic

High Court, at Mombasa
March 1991

Amin J

Criminal Appeal No 394 of 1990

(From original conviction and sentence in Criminal Case No 3759 of 1989 of

the District Magistrate's Court at Kisumu, B Hanyare Esq DM III)

Criminal Practice and Procedure *– judgment – different magistrate writing judgment in a trial conducted by another magistrate - cases depending on the demeanour of witnesses – whether such procedure proper – section 200 Criminal Procedure Code - whether procedure proper.*

Evidence – *suspicion - whether suspicion alone can suffice as evidence.*

The appellant was convicted of the offence of assault and sentenced to serve 2 months in prison.

The decision on the case during the trial depended on whether to accept the evidence of prosecution witnesses and the complainant as ample proof required in criminal cases. The evidence was however conflicting with the prosecution alleging a different set of circumstances from those alleged by the appellant.

The appellate court noted that the trial was conducted by a different magistrate from the one who wrote the judgment. In delivering the judgment, the magistrate had invoked section 200 of the Criminal Procedure Code.

Held:

1. The magistrate was entitled to invoke section 200 of the Criminal proceure Code (cap 75) when delivering her judgment. However, this was an instance where the entire decision of the court hinged upon the demeanour of the witnesses, thier credibility and their veracity.

2. The trial magistrate only who has the conduct of the trial, who has the opportunity to see the witnesses, observe them, hear them is the one who is capable of arriving at a decision effecting the weight to be attached to the evidence adduced before the Court.

3. There was grave suspicion that the appellant might well have committed the offence for which he was charged but suspicion alone is not a substitute for the prerequisite evidence beyond reasonable doubt.

Appeal allowed.

Cases

Peters v Sunday Post Limited [1958] EA 424

Statutes

1. Penal Code (cap 63) section 251

2. Criminal Procedure Code (cap 75) section 200

Advocates

Mr Gathuku for the Appellant.

Mr Metho for the State.

March 1991**, Amin J** delivered the following Judgment.

The appellant in this case Stephen Nganga Kanyi, was convicted contrary to section 251 of the Penal Code on 19th October, 1989. He was charged for unlawfully assaulting Silver Ogalo occasioning him actual bodily harm and on conviction on 31st August, 1990, the appellant was fined Shs 1000/ - or in default to serve two months imprisonment at the detention camp. It is against this conviction and sentence that this Petition of Appeal is lodged. Mr Gathuku the learned counsel for the appellant submitted four grounds in this Petition of Appeal.

Mr Gathuku has challenged the finding of the learned trial magistrate and he, *inter-alia*, contends that the learned trial magistrate failed to consider in depth and analyse the defence evidence before coming to her decision. He has furthermore expended on his grounds of appeal when submitting his arguments in support thereof.

Mr Metho the learned principal state counsel relies on the evidence of PW2, PW 4 and contends that there is ample evidence to convict the appellant and the magistrate was correct in her decision in doing so.

I have carefully considered the grounds of appeal, the record of the Court and the submissions made by the learned counsel. This Court finds that the bone of contention in this case was a question of fact. This relates to whether to accept the evidence of the prosecution witnesses and the complainant as ample for the purpose of proof beyond a reasonable doubt or to find that the evidence of the appellant and his witness is credible. The evidence on the issue of the assault is diametrically in conflict. The prosecution alleging a different set of circumstances, events leading to this assault whereas the appellant and his witness submitting a totally different explanation as to how the injury was caused to the complainant. It is noteworthy though there were a number of other persons in the bus, no independent witness testified at the trial for one or the two of the parties to this contention. The Court notes that the hearing was commenced at the lower court by Mr Benson Hauyave, DM III and the hearing was concluded entirely by Mr Hauyave on 5th July, 1990. The judgment was delivered by the learned magistrate S Muketi on 31st August, 1990. The learned magistrate invoked section 200 of the Criminal Procedure Code when delivering judgment in this case. She was entitled to do so. However, this is one of those instances where the entire decision of the Court hinges upon the demeanour of the witnesses, their credibility and their veracity. The trial magistrate only who has the conduct of the trial, who has the opportunity to see the witnesses, observe them, here them, is the one who is, in my view, capable of arriving at a decision affecting the weight to be attached to the evidence adduced before the Court. (*Peters v Sunday Post* (1958) EA 424.

No doubt the learned magistrate who pronounced the judgment did so boldly. This Court finds on its own independent evaluation and assessment of the record of the Court that there still remains considerable doubt as to the events as testified by the witnesses. There is the grave suspicion that the appellant might well have committed the offence for which he is charged but suspicion alone is not a substitute for pre-requisite evidence beyond reasonable doubt. These deficiencies to be explained and / or accepted were in the domain of the learned trial magistrate, who unfortunately was no longer available to pass judgment.

For these reasons, the Court finds that the conviction is of a doubtful nature. It is quashed. It is orderd that the appellant if in custody to be released forthwith and or if the fine is paid should be refunded to him.

Orders accordingly.