REPUBLIC OF KENYA

Siamoni v Republic

High Court, at Nairobi April 24, 1985

Torgbor J

Criminal Appeal No 274 of 1985

(Appeal from the 2nd Class District Magistrate's Court at Kibera, K Njuguna Esq)

Advocates

M Kokonya for appellant

Miss M G Mbarire for respondent

April 24, 1985, Torgbor J delivered the following Judgment.

This is an appeal by Alfred Kundu Siamoni against his conviction and sentence by the District Magistrate at Narok.

The appellant was charged with burglary under section 304(a) of the Penal Code as well as theft under section 279(b) of that code. The particulars are that on the October 24, 1984 at Narok town the appellant broke and entered the house of Eunice Boke Marwa with intent to steal and did steal therein various goods amounting in value to some Kshs 2,685.30 belonging to Eunice Boke Marwa.

Under section 304(a) of the Penal Code the offence of burglary is committed by a person who breaks and enters another person's house with the requisite intent to steal. In this case the complainant PW 1 gave the appellant access to the complainant's house by giving her house key to the appellant . There is no evidence on the record as to a break-in and the complainant herself stated that her house was not broken into. There is therefore no evidence to support the charge of burglary and the appellant's conviction on that charge is therefore unsustainable.

Regarding the theft charge there was no dispute that the appellant entered the complainant's house. The evidence of PW 1 and PW 4 also suggest that the appellant admitted the theft in the presence of a police officer and signed an undertaking to make good the complainant's loss by installment payments. Had the officer in question testified to that effect or produced the written undertaking proof of the appellant's guilt may have reached the required standard. In this case however the police officer's evidence fell far short of the required standard and the damning document was not produced. Further PW 3 the officer before whom both the complainant and the appellant appeared in connection with the incident stated (page 9) that he did not investigate the case. As the evidence against the appellant was entirely circumstantial the need for a full and proper investigation of the offence was that greater. PW 1 and PW 4 referred to each other respectively as husband and wife. Arguing with considerable force against attaching any weight to the evidence of these witnesses by reason of their relationship Mr. Kokonya for the appellant submitted that there was no direct evidence of the appellant's involvement with the theft, and that whereas PW 1 claims to have reported the theft on or about the October 14, 1984 the evidence of PW 4 shows that he attended the police station in connection with this incident some 2 or 3 days before the offence was committed and that such confusion with dates did not put the appellant's guilt beyond doubt.

In all I am not satisfied that the case against the appellant achieved the requisite standard of proof. In the case of Simon Musoke v R 1958 EA 715, the Court of Appeal that :

> "***in a case depending exclusively upon circumstantial evidence, the court must,***

before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than of guilt".

Their Lordships in the said case followed the decision in TEPER v R 1952 2 All ER 447 in which appears the following statement at page 489.

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

In the case under appeal I incline to the view that the prosecution's failure to produce he appellant's written acknowledgement of the offence and the absence of appropriated evidence from the police due no doubt to their not investigating this case at all have left serious gaps in the evidence against the appellant rendering such evidence unsafe and unsatisfactory for grounding a conviction.

Further I observe that he judgment of the trial magistrate seemed in parts to suggest the existence of a duty on the appellant to prove his innocence by refuting the allegations made against him. There is no such duty on an accused person, who may, if he so wished remain silent throughout the proceedings.

I have made this observation although learned counsel for the appellant did not specifically advert to it because, though basic, it is nevertheless an important safeguard for an accused person which the courts, especially an appellate court must protect.

For all these reasons the appellant's conviction will be quashed and the sentence thereto se aside. I understand the appellant has been in prison since January 29, 1985. In the circumstances I order his immediate release from prison.