



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1603 OF 1984

BERNARD KIMANI MUCHOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Senior Resident Magistrate's Court at Kiambu, G E O Tunya, Esq)

JUDGMENT

Bernard Kimani Muchoki was charged with theft contrary to section 275 of the Penal Code. He pleaded not guilty, was tried, convicted and sentenced to two years' imprisonment. He appeals against that conviction and sentence on eight grounds.

Mr Akhaabi for the appellant argued ground five first by criticising the trial magistrate for proceeding with the trial at the start of the defence case in the absence of defence counsel. Defence counsel was present from the commencement of the trial up to the close of the prosecution case but was absent on May 22, 1985 when the defence case opened. On that date at 12.15 pm, the magistrate recorded the time and the following statement :

“the defence lawyer has not attended despite notice to him. The case has been adjourned severally due to his default. It is a very old case. I will proceed in his absence as the accused himself urges me to do”

In reliance on article 77(2) of the Constitution of Kenya, Mr Akhaabi argued that by so proceeding the magistrate had arbitrarily deprived the appellant of his constitutional right to be represented by counsel of his choice and we were referred to the case of *Galos Hired & another v Kind* [1944] AC 149 and *Mary Kingston v Rex* 32 Cr App Rep 183 at 188–190.

We have considered the argument and the principle referred to by counsel and we agree that an accused person has a right of representation by an advocate of his choice when proceedings began on June 27, 1983. The record shows that since that time there were about six adjournments or mentions until the trial actually got under way on October 19, 1983. After the close of the prosecution case, the trial magistrate was transferred from Kiambu to Nyeri and after further adjournments and mentions, a hearing date was set for June 18, 1984, nearly one whole year since the trial commenced. Prior to this date, however, it appears the case was mentioned on May 9, 1984 when an order was made setting a new trial date for May 22, 1984. This was followed by a further order made on May 10, 1984 “for witness summons for defence to attend Nyeri SRM on May 22, 1984”. Defence counsel did not appear on that date and the trial proceeded in his absence after the magistrate had recorded the observations quoted above.

Mr Akhaabi contends that despite the recorded observations of the trial magistrate, there was nothing on

the record to show either that a notice was sent to defence counsel or that the appellant urged the court to proceed with the trial in his counsel's absence. We are not in a position to say whether or not a notice was sent to defence counsel or that the magistrate was urged by the appellant to continue with the proceedings other than that the magistrate recorded the position as such. Upon considering the record and counsel's submissions, we ask ourselves whether any prejudice had resulted to the appellant by his counsel's absence at the stage of the proceedings when it occurred.

It is conceded by Mr Akhaabi that the appellant himself made no application for adjournment because of his counsel's absence though he could have done so if he was minded so to do. In this connection, we observe that the record shows the appellant as an educated and intelligent man and an ex-chief and further that his rights in terms of section 211 of the Criminal Procedure Code were explained to him before he chose to make a sworn statement. In that statement, we observe, he adopted an earlier and well-considered statement he had made to the police and in which he exculpated himself from the offence charged. Again and on his behalf, his counsel who was present throughout the presentation of the prosecution evidence, had cross-examined the prosecution witnesses as he saw it fit. The appellant could not have suffered any prejudice during the presentation of the prosecution case and in his own defence he said nothing in court to incriminate himself. He gave an innocent explanation of his conduct which the trial magistrate did not believe as he was entitled not to. The trial magistrate was satisfied and so are we on the evidence that the appellant's conduct was consistent with no other hypothesis than that he stole the articles in question. If the appellant was concerned about the safety of those goods as he claimed, what would have been safer than placing them in police custody when asked to do so? We are not therefore satisfied that any prejudice resulted to the appellant by his counsel's absence when the appellant presented his innocent explanation to the court. We therefore reject ground 5 of this appeal.

Regarding grounds 1,2,3 and 7 of the appeal, we did not accept either that the appellant's conviction was against the weight of the evidence (ground 1) or that the intention to permanently deprive the complainant company of the properties in question was not supported by evidence (ground 2) or again that the trial magistrate misdirected himself on the standard of proof (ground 3). We observe in this connection that at the commencement of this appeal, Mr Akhaabi conceded that two ingredients of the charge were not disputed, namely that the complainant company and not the appellant was the owner of the properties in question and that the appellant "took" those properties within the definition of the offence charged. The appeal was therefore, in the main, on the issue as to whether the appellant intended fraudulently and permanently to deprive the owner of the said properties (ground 2 and 7).

It is clear on the evidence that the appellant was not the owner of the furniture and had no claim of right to it. Yet in his statement under inquiry taken on June 3, 1983 he claimed the properties listed in MfI – 18 as his. He claimed that he had bought them at a place on Tom Mboya Street in Nairobi and that he paid for them from his own pocket. This statement was a lie and did not help the appellant's credibility generally. Again he stated that a meeting had been proposed for June 11, 1983 on which date he intended to return the properties in question. None of the company directors or employees who testified knew about such a meeting and the appellant's professed intention to return the said properties is quite inconsistent with his statement that he was owner of those properties.

Further, his contention that another director, Mr James Ndungu Muchungi, had sold a company cupboard and a fridge without being prosecuted does not accord with innocent explanation; and again further, the distribution of those properties into the homes of the appellant's friends or relatives is at the very least an indication that he had no or no safe place of his own to keep them and what would have been easier than entrusting the lot into police care and custody when asked to do so? That too was a further manifestation of inconsistent conduct on the part of the appellant. We therefore reject the complaint that the appellant's evidence was either not considered or given due weight. His evidence was inconsistent and or contradictory and unbelievable and was properly rejected by the trial magistrate.

The appellant's letter to the Officer Commanding Kiambu Station, Exh. A (page 38 of the record), is revealing. It showed the appellant as an intelligent person who was not unaware of company practice and procedure. It also showed that the appellant was aware after vacating the company house that resolution had been taken concerning the transfer of company furniture by him to the company and significantly he

stated in paragraph 5 of the letter that the Board of Directors met on May 28 and June 4, 1983 but nothing was said on those occasions about furniture. If so then he lied to the trial court when he stated at the meeting on June 1983. A further meeting was proposed for June 11, 1983 to discuss the transfer of furniture and on which date he intended to retain the company's furniture. For these reasons, we find grounds 1,2,3 and 7 of the appeal unsustainable and reject them.

Under ground 4 of the appeal, Mr Akhaabi at first complained that the trial magistrate was wrong in asking himself why the accused took a lot of trouble in distributing the furniture to various places in Nairobi, Kiambu and Muranga. We find nothing wrong with that question as it was based on the factual evidence before the court, that the appellant did precisely that. Mr Akhaabi then criticized the trial magistrate for finding the appellant's exculpatory explanation implausible for the reasons stated earlier. We also find the appellant's story unbelievable and therefore reject ground 4 of the appeal.

Under ground 6, the trial magistrate was criticized for first summing up the prosecution evidence and then doing likewise for the defence. We find no fault, prejudice or injustice to the appellant in the manner he summed up the evidence respectively for the prosecution and the defence and we are satisfied that his reason for the rejection of the defence case was apparent on the record and in the conviction of the appellant. It is also our view that the cases of *Okeli and Others v Republic* [1965] EA 555, *Kimani Muchoki v Republic* High Court Criminal Appeal No 683 of 1984 (unreported), *Owen Kimotho Kiare v Republic* No 93 of 1983 (unreported) and *Gerald Kamau Kihara v Republic* Case No 10 of 1983 (unreported) to which we were referred, do not assist the appellant at all in the particular facts and circumstances of this case. Ground 6 therefore fails.

Ground 8 of the appeal concerned sentence. We observe that the appellant was not a first offender and that at the time of his trial, he was serving a term of imprisonment and that the trial magistrate granted the appellant's request and passed a sentence of two years to run concurrently with the term he was then serving. We take into consideration the fact that there has been full restitution of the stolen property to the complainant company and will therefore substitute a term of 18 months' imprisonment to run from the date of the appellant's conviction for this offence.

Order accordingly.

Dated and delivered at Nairobi this 10th day of June , 1985.

A.M COCKAR

JUDGE

E.N.A TORGBOR

JUDGE