REPUBLIC OF KENYA

Nguku v Republic

Court of Appeal, at Kisumu June 25, 1985.

Hancox JA, Platt & Gachuhi Ag JJA

Criminal Appeal No 106 of 1983

(Appeal from the High Court at Nairobi, Sachdeva & Porter JJ)

Cases

R v NDAR KURUKI (1945) 12 EACA, 84.

R v RAOJIBHAI PATEL (1956) 23 EACA, 836

R v MAQSUD ALI (1965) 2 EAR, 464

OKETHI OKALE v REPUBLIC (1965) EA, 558

KIRENGA v UGANDA (1969) EA, 562

RATTEN v THE QUEEN (1971) 3 AER, 501

D P P v HESTER (1972) 3 EAR, 1065

KINGI v REPUBLIC (1972) 3 EA, 280

BUKENYA & OTHERS v REPUBLIC (1972) EA, 549

R v ROBSON & HARRIS (1972) 2 AER , 699

D P P v KILBOURNE (1973) 1 AER 440

NORBERT OBANDA v REPUBLIC (1983) 2 KCA, 155

Advocates

R D Menezes for Appellant.

J Bwonwonga for Republic.

June 25, 1985, Hancox JA, Platt & Gachuhi Ag JJA delivered the following Judgment.

This is a second appeal by the appellant from the decision of the High Court at Nairobi. (Sachdeva and

Porter JJ) dismissing his appeal against his conviction for corruption in office contrary to section 3(1) of the Prevention of corruption Act (cap 65), and a sentence of eighteen months' imprisonment.

In November 1981 Charles Odeya Odero, a plumber at Kisumu Airport, was suspected of being involved in the theft of water pipes from the store. The officer-in-charge of the Airport, Meshack Anyama Okello, who was referred to by the trial magistrate as the complainant, and we shall so refer to him, was to be called as a prosecution witness and bonded accordingly. After several adjournments, the case was fully adjourned to January 19, 1982 at Winam Court. Initially Odero only was charged with theft of the water pipes but after the appellant, a serving police officer at Kisumu police station, took over the investigation in the middle of January, 1982, the complainant was joined as a co-accused: (see Ex D2). The appellant was also investigating the complainant in connection with the theft of eight iron sheets, which were also said to have been stolen from the airport and had been recovered from the complainant's house. The appellant said in evidence that he showed these to Chief Inspector Lutubula at the police station. He did not, however, charge the complainant with the theft of the iron sheets at that stage. This was because, according to him, before he took the complainant to court on January 19, 1982 he (the appellant) received fresh information which implicated the complainant in the theft of the iron sheets. That caused him to consider whether the complainant should also be charged with that offence. He accordingly served the complainant with a P22 form on January 19, 1982, requiring him to report back at the police station on January 22, 1982.

However, on January 18, 1982, that is to say the day before the adjourned court date, and the date of the second charge-sheet naming him as a co-accused, the complainant was summoned to the police station and told by the appellant that he was to be so charged. He was bounded to attend at the police station on January 19 and did so attend. On that occasion he was asked by the appellant to give him a lift in his official vehicle to the Lake Nursing Home where the appellant's wife was confined. Either before or after that journey the complainant was given the further notice to attend the police station on January 22 to which we have referred. That evidence was strenuously but unsuccessfully objected to by the defence at the trial, and formed a ground in the petition of appeal to the High Court and to this court. It was held to be part of the res gestae, and the High Court upheld the republic's submission that it was admissible by virtue of section 6 of the Evidence Act (cap 80).

The complainant said that at the nursing home the appellant asked him for "something substantial", in view of his expenses there, before he attended the appellant on January 22 "so that the case could be cleared." The complainant, whether or not the magistrate's septicism about his good faith was justified, pretended to fall in with this request, but reported the matter to the CID on January 20. Accordingly a trap was prepared for false and genuine money to be handed over by the complainant to the appellant at the Wayside Bar in Kisumu at 5.00 pm on January 21. The transaction was to be witnessed in the bar by Corporal Charles Wafula of the Kakamega CID who was unlikely to be known to the appellant in Kisumu. The complainant was also provided with a tape-recorder, but that proved to be abortive because of the noise from the juke box in the bar. As regards the ground of appeal relating to the unfavourability of that evidence to the prosecution if produced, and the consequent adverse inference arising from section 119 of the Evidence Act (formerly section 114 of the Indian Evidence Act), if it contained evidence supportive of the prosecutions contention it was advisable that the police should have played the tape in court, if only to show that it was not intelligible.

On January 21, the complainant and the appellant duly met in the Wayside Bar, where, after buying him some drinks, the complainant then left the bar with the appellant. At about 6.30 pm outside the bar the complainant handed the appellant the genuine Kshs 200 and the fake notes in the envelope with which he had been provided by the CID, which the appellant put in his right trouser pocket. The prosecution's case was that as the police waiting outside advanced on the appellant he took out the envelope, threw it away and attempted to run off. The envelope with the money inside it was recovered from the ground, and the appellant was arrested and charged with the offence. The appellant's story was that after the complainant had purchased beers for him in the bar, and on the way out, the complainant "came from behind him hurriedly" and attempted to thrust the envelope into his right pocket, but he slapped it and it fell down. He said he did not touch the envelope and he shouted at the complainant. He was arrested almost immediately after that.

The learned senior resident magistrate held that he complainant was a statutory but a real accomplice, but that there was ample corroboration of his evidence by that of the police officers who witnessed the events inside and outside the Wayside bar, by the fact that the appellant did not buy the complainant even one drink, and from the antecedent events on January 19, 1982, and in particular from the unusual and unethical favour done by the complainant in giving the appellant a lift in an official vehicle to the nursing home. He totally rejected the appellant's defence that this was a frame-up, if we may be permitted that expression, by Chief Lutubula and his team, dictated by motives of jealousy, in that the appellant had been more successful in his investigations than themselves.

In a rather diffuse judgment the High Court rejected all the arguments contained in the memorandum of appeal to that court, and put forward by Mr Menezes, which in part follow these comprising the petition of appeal to this court. Eight grounds of the first appeal do not appear in the present petition.

Mr Menezes abandoned the first and fifth grounds of appeal and proceeded to argue in support of the second ground that the magistrate had deviated from the cardinal principle that all the prosecution and defence evidence must be weighed by the trial court in its totality. The magistrate had, Mr Menezes said, conceded that initially there was a case only against Odero, and had then made an assumption in favour of the appellant that he needed to pursue investigations against the complainant. Thereafter the magistrate had considered the evidence piecemeal, putting the least favourable construction to the appellant that he could on each piece of evidence as he considered it. Mr Menezes directed our attention to that which he described as a glaring misdirection in the judgment as follows:-

> "On careful consideration of the whole of the evidence I have no doubt that the truth in the matter lies with the witnesses for the prosecution rather than the accused."

Having said that Mr Menezes submitted that the magistrate then proceeded to analyze the evidence extensively and in detail, showing that he had not in fact considered the evidence in its totality as he had earlier said.

We agree that the passage quoted does give the impression that the evidence had been considered as a whole before it was analysed in detail, because the magistrate then dealt with various portions of the evidence, matching the prosecution evidence thereon with the appellants' version, and arrived at specific findings on the items of evidence he was considering. For instance immediately after stating that he accepted the evidence of PW 7 (the barman), PW 10 (Corporal Wafula from Kakamega CID) PW 11 Sergeant Njuguna (who participated in the police trap that was laid) and PW 12 (C/I Amos Litubula who directed operation at the Wayside Bar on January 21st) the learned magistrate went on to say,

> "I am satisfied on the evidence that the meeting at the bar between the accused and the complainant had been arranged earlier as the complainant says and I reject the accused's contention that (the) meeting was wholly accidental…"

Shortly after that the magistrate referred to the complainant contacting the accused (the appellant) on the evening of January 21 (this must be a reference to their telephone conversation before 10.00 am that day when the appellant suggested that they should meet at the Wayside Bar), and demonstrated by close reasoning, including the fact that the police trap was actually laid, that it was an inevitable conclusion that the meeting between them was not coincidental, but in pursuance of the arrangement at which they had previously arrived, and which had its inception during the journey to the nursing home on January 19.

Quite obviously when analyzing the facts and the opposing evidence in a trial the individual facts and the assessment of the relative credibility of the witness thereon come first. It is incumbent on the trial magistrate or judge to consider the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence after doing so. In this case Mr Menezes' contention regarding the second ground is borne out by the record of the judgment, which shows that the general conclusion was arrived at in advance of the individual analysis of the facts. We do not think that this point was fully appreciated by the learned judges of the High Court on the first appeal for after reciting ground two of the memorandum, which is similar to ground two in the one to this court, they said simply that on their own

reading of the file and the judgment they took the view that the allegation was unjust in relation to it. If the course taken in this case is followed the point is almost bound to be taken on an appeal that the directions of this court's predecessor in Okethi Okale v Republic [1965] EA 558 at page 559, which was cited to us by Menezes and which we now set out,

> He submitted that the passage suggests that the learned judge first accepted the case for the prosecution and then cast upon the appellants the burden of disproving it or raising doubts about it. We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in Ndege Maragwa v Republic (10), where the trial judge had used similar expressions this court said:-
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> "…. We find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution.
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> Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, or course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different)."

We think that the observations of this court in that case apply with equal force to the present appeal" have not been complied with.

It is true that in that case there had been an acceptance of the prosecution case followed by an indication that the burden was cast on the appellant to rebut it, which is not the complaint here, but we nevertheless think that the direction given in that case should always be observed.

We now pass to ground 3 of the memorandum of appeal to this court, which concerned the res gestae and the events at the nursing home which occurred on January 19. Mr Menezes' point was this: that if believed the complainant's evidence showed the commission of an offence which was completed in itself, namely the corrupt soliciting of a bribe within section 3(1) of the Prevention of Corruption Act, (cap 65). No other construction could be put on the words (if believed)

> "He asked me to see him with something substantial on or before January 22, so that the case could be cleared"

in the context in which the evidence was given. It followed that if that evidence was allowed to be given it would amount to evidence of the bad character of the appellant in the course of his trial for another offence, that is to say, receiving the bribe (which would ordinarily but not necessarily follow the soliciting thereof) on January 21, a separate and distinct offence. As to this ground the learned judges of the High Court said:

> "We are of the view that the attempt by Mr Menezes to bring this allegation within the provisions of section 57" (of the Evidence Act)" is very thin."

Section 57 of the Evidence Act of course renders evidence of another offence inadmissible except in certain circumstances which do not apply here.

The relevant provision of the Evidence Act which contains the res gestai rule is section 6, and it says:

> "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places."

In most cases the issue of whether something testified to can be admitted as part of the res gestae arises in relation to whether that which would otherwise be inadmissible as hearsay can be admitted as an exception to the hearsay rule, but the wording of the section is wide enough to cover the circumstances prevailing in this case provided the events of January 19 "are so connected with the facts in issue as to form part of the same transaction." In Ratten v The Queen [1971] 3 AER 801, in relation to the admissibility of words spoken over the telephone by a woman about to be murdered Lord Wilberforce said at page 806"-

> "When a situation of fact (e.g killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife without knowing in a broader sense, what was happening. Thus in O'Leary v Regem evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon, J said :
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> 'Without evidence of what, during that time, was done by those men who took any significant part in the matter and specially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.'

In the instant case we take the view that the events of January 21 could not be properly understood unless the antecedent events of the preceding two days were admitted into evidence. We agree with Mr Bwonwonga, who appeared for the republic, that the events of January 19 were sufficiently connected with the facts in issue, namely the events of the Wayside Bar on January 21, as to form in circumstances of this case to separate the soliciting stage from the receiving stage, so as to create two distinct offences, instead of th at which was in reality a chain of events leading up to and constituting the offence of which the appellant was charged. It follows that in our judgment ground 3 of the memorandum of appeal fails.

We therefore turn to ground 4 and 7 of the appeal, which were argued together, Mr Menezes' submission here was that the trial magistrate had ignored the first duty of a court dealing with accomplice evidence, which is that the court must first decide whether the accomplice, in this case the complainant, is a credible witness and then ascertain if there is any evidence corroborative of it before the accomplice's evidence can be accepted. This proposition receives support from the passage which Mr Menezes cited from Republic v Ndara Kuruki [1945] 12 EACA,84, which was a case mainly concerned with the extent to which an accused's statement can be used against his co-accused, and in which the court said, as regards accomplices, at page 86:

> "A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If, however, the court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affect the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case the court should record in its judgment whether or not it regards the accomplice as worthy of belief."

It is also supported by the following extract from Lord Hailsham's speech in Director of Public Prosecution v Kilbourne [1973] 1 AER, 440, a case concerning the corroboration by one group of young boys of the evidence of another group of young boys in relation to indecent assaults committed on them, in which he said at page 452

> "In addition to the valuable direction to the jury, this summing-up appears to contain a proposition which is central to the nature of corroboration, but which does not appear to date to have been emphasized in any reported English decision until the opinion delivered in Director of Public Prosecutions v Hester by Lord Morris of Borth-y- Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witnesses's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise."

In the case of Director of Public Prosecutions v Hester [1972] 3 AER 1056, at page 1065, a case of an indecent assault on a girl, Lord Morris gave a similar direction as follows:-

> "One of the elements supplied by corroborative evidence is that there are two witnesses rather than one. The weight of the evidence is for the jury. It is for the jury to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one credit worthy witness confirms what another credit worthy witness has said."

In the instant case it is said that there was no specific finding as to the creditworthiness of Meshak Anyama Okello, the complainant, and Mr Menezes drew our attention to a passage in the judgment of the High Court of the first appeal to this effect, where the first reference to the complainant being a statutory accomplice is made.

If the judgment of the senior resident magistrate is examined properly it will be seen that he did make specific findings, not on the whole of the complainants' evidence, it is true, but on its essential aspects, for he says:-

> "I accept the evidence of the complainant, supported as it is by the evidence of PW 7 , PW 10, PW 11 and PW 12 also by the other circumstances of the whole case."

That passage can only refer to the incident at the Wayside Bar because it was that occasion to which all those witnesses testified. The magistrate went on to say, again specifically, that he accepted the complainant's evidence as to what took place after the complainant and the appellant left bar, as to the handing of the envelope containing the money by the complainant to the appellant, and the appellant putting it in his trouser pocket. He also accepted the complainant's evidence that he and the appellant had prearranged the meeting at the bar. The magistrate did not say in so many words that he accepted the complainant's evidence regarding the conversation at the nursing home, and as to the telephone conversation on the morning of January 21, but it is obvious that he did so, for the says:-

> "Accused having demanded money from the complainant at the hospital's substantial amount to clear himself of the charges – the complainant was provided with Kshs 200 and some other face (false) money making in all Kshs 1800 in envelope."

Was there, then, corroboration of the complainants" evidence? So far as the events of the evening of January 21 are concerned, apart from the evidence of the barmaid Peres Mbole, who only saw what took place inside the bar, the witnesses Corporal Wafula, Sergeant Njuguna and C/I Amos Lutubula gave evidence which was not only corroboration of the statutory accomplice, but substantive evidence in itself, for Corporal Wafula said he saw the envelope pass from the complainant to the appellant who pocketed it. The other witnesses said that when the appellant became aware that a trap had been laid he took out the envelope and threw it away. The chief inspector, in the full view of all present, then retrieved the envelope and found in it the real and false money which had been given to the complainant. This in our view provides substantive and independent evidence, as well as being corroboration of the complainant's credible evidence. It may be that there was no separate corroboration of the events of January 19, or of the

prior telephone conversation between the complainant and the appellant on the 21st, but these occurrences are so clearly part of the chain of events which led to the trap which was successfully laid, and in which several officers took part, that we consider the complainant's evidence on those aspects was rightly accepted. For these reasons we consider that grounds 4 and 7 of the appeal fail.

This brings us to the tape recording, on which we have already commented. It is the prosecution's duty, Mr Menezes submitted, to produce all relevant evidence before the court and if they do not, then they risk an adverse inference being drawn against them for their failure to produce it under section 119 of the Evidence Act. Illustration (g) to the former section 114 of the Indian Evidence Act covers this aspect. After considering the case of Kingi v Republic, and Bukenya & Others v Uganda, both appearing in 1972 volume of the East African Law Reports at pages 280 and 549 respectively, we accept that the presumption that the evidence, if produced, would be unfavourable to the party concerned is not confined to oral testimony, but can also apply to evidence of a tape recording which is withheld. We consider that there was a misdirection by the learned judge of the High Court when they said that it was a different proposition to relate the presumption to an inanimate object "about which the evidence is that it was incapable of assisting the court." Inanimate object it may have been but it was nevertheless capable of reproducing a live conversation and, as the court said in Republic v Maqsud Ali [1965] 2 EA 464, another case cited to us by Mr Menezes, the courts are having to adapt constantly to modern techniques and new aids and it would be wrong to deny to the law of evidence the advantages to be gained thereby. From that authority it is clear that provided a proper foundation is laid, that is to say that the accuracy of the tape recording can be proved and the voices recorded properly identified, there is no reason why a tape recording should not be admitted, if relevant, as well as any other evidence. The other authorities citied by Mr Menezes, Kirenga v Uganda[1969] EA 562, at page 569 per Jones J and Republic v Robson and Harris [1983] Criminal Appeal No 62, is that any objection to a relevant tape recording must go to weight and not to admissibility. In the instant case C/I Lutubula said the tape would have been of little use because of the noise from the juke box in the Wayside Bar. Nevertheless it should, in our view, have been produced and played to the court or, at the very least, offered to the defence for them to do so, if only to show that it was unintelligible. This was all the more necessary because, as Mr Menezes said, there were apparent conflicts in the evidence of the barmaid and Corporal Wafula as to what transpired inside the bar. Moreover it would have given a clue to the appellant's attitude, in as much as it would show that, far from being in a state of anxiety and fear, the appellant was joking and playing around with the girls at the bar.

We therefore agree with Mr Menezes' submission on this ground, but we do not think they carry the appellant's case very much further because of the very clear and cogent evidence of the other police witnesses of the appellant receiving and pocketing the envelope containing the money, of which the serial numbers had been recorded, and of his attempting to get rid of it when he realized the game was up. For these reasons we do not consider that the failure to play the tape recording and the misdirection thereon in the High Court in any way affected the validity of the evidence against the appellant in the circumstances of this case.

We turn finally to ground 8 which, as Mr Menezes said, was to some extent connected with ground 3, which we have rejected. Mr Menezes conceded that if the conversation of January 19 was admissible then it did amount to a promise by the appellant to forbear from carrying out his duty in relation to the iron sheets, in return for a reward or consideration. We think this must represent the correct position and, accordingly, ground 8 fails also.

Reverting to ground 2, as we said we think there is substance in Mr Menezes' submission. However taking the judgment of the magistrate as a whole we are satisfied that he did in fact reach a decision on the totality of the evidence and that he bore well in mind through out the onus of proof in relation to each piece of evidence lay on the prosecution. We are also satisfied that the judges of the High Court did consider all the evidence in the case and were entitled to reach the same conclusion as the magistrate did.There was thus concurrent findings of fact by both the lower courts on all the essential aspect of the case. We therefore conclude that the second ground of the appeal fails.

We have no doubt that the findings of guilty recorded against the appellant were justified on the evidence

and all the grounds of this appeal material to our decision having failed, we dismiss his appeal against the conviction. No question arises for our determination as regards the sentence passed on the appellant, from which he was released on Presidential amnesty.

Appeal dismissed.