REPUBLIC OF KRNYA

Agesaa v Republic

Court of Appeal, at Mombasa July 16, 1985

Kneller, Hancox & Nyarangi JJA

Criminal Appeal No 164 of 1984

(Appeal from the High Court at Mombasa, Aragon, J)

July 16, 1985, Kneller, Hancox & Nyarangi JJAdelivered the following Judgment.

The appellant and another were jointly charged with stealing from a locked vehicle contrary to section 279(g) of the Penal Code (cap 63). The co-accused pleaded guilty, was convicted and sentenced to imprisonment. The appellant pleaded not guilty, was tried, convicted and on May 9, 1984, he was sentenced to 3 years' imprisonment plus 5 strokes corporal punishment. He appealed to the High Court (Bhandari, J) on the grounds that there was no evidence to corroborate the evidence that the appellant had committed the offence; that the magistrate had ignored that part of the prosecution evidence which established the innocence of the appellant; that the appellant had not been identified sufficiently; that the magistrate considered the prosecution and defence evidence in isolation, which was an error; and that the appellant should not have been put on his defence.

The trial judge summarily rejected the appeal under section 352(2) of the Criminal Procedure Code (cap 75), causing the appellant to file this second appeal because there were substantial points of law raised in the first petition of appeal.

Mr Metho, the principal state counsel, Coast, conceded the appeal for the reason that the evidence for the prosecution was insufficient, the identification unsatisfactory and the two main witnesses contradicted one another.

In this second appeal, the issue of law which arise, although it is not in the second petition of appeal, is whether or not the learned judge should summarily have rejected the first appeal under section 352(2) of the Criminal Procedure Code.

The appeal was not brought on the ground that the conviction is against the weight of the evidence or that the sentence is excessive. The jurisdiction to reject an appeal summarily can only be exercised when an appeal is brought on one or both of those two grounds. Moreover it must appear to the judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced.

The grounds of appeal to the High Court, looked at fairly and considered in their totality, do not answer to a submission that the appeal is against the weight of evidence. Osongo and Another v Republic, [1972] EA 170 and David Kingori Gitahi v Republic Criminal Appeal No 2 of 1985.

In our judgment the learned judge erred in summarily rejecting the appeal.

Normally, after holding that a summary rejection was made in error, we would remit the appeal of the High Court for disposal according to law. In the circumstances we invoke section 3(2) of the Appellate Jurisdiction Act, cap 9, and proceed to determine the appeal on its merits. As we have already stated, learned principal state counsel conceded the appeal for the reasons which we have set out. In the analysis of the evidence the learned magistrate found, correctly, that the unsworn and uncorroborated evidence of Maurice PW 2 and that of Odanga PW 4 did not enhance the prosecution case. James Odhiambo PW 3

whom the learned magistrate described as a :

> ***"truthful and reliable witness"***

said he saw two men, one of whom was carrying something which was covered by paper, walk past her. The witness claimed in his evidence in-chief that he knew the two men well and that the appellant was one of them. Under cross-examination, Odhiambo said he did not see the faces of the men, that he saw them from behind and that he did not know them by name. That was the only evidence of identification which in our view was unsatisfactory and inadequate. The witness did not at all recognize the two men. The other key prosecution witness was Mjomba PW 5 whose evidence so riled the learned magistrate that

> ***"it was apparent that they may have been interfered with and schooled to cheat in court".***

The prosecution evidence was of poor quality and the principal state counsel was right to concede the appeal. Accordingly, we allow the appeal, quash the conviction, set aside the sentence and order the appellant shall be set at liberty unless otherwise lawfully detained.