REPUBLIC OF KENYA

Court of Appeal, at Nairobi

Kneller JA, Chesoni & Platt Ag JJA

Criminal Appeals 134, 135, 136 & 137 of 1982

Stephen M'Riungi, Geoffrey M'Baabu, Wilson M'Kiambi,

Robert M'Mugambi.....APPLICANT

v

Republic.....RESPONDENT

Judgment of the Court. October 27, 1983

The four appellants Stephen M'Riungi (1st appellant), Geoffrey Mbaabu (2nd appellant), Wilson Kiambi (3rd appellant) and Robert Mugambi (4th appellant) were jointly convicted of robbery with violence contrary to Section 296(2) of the Penal Code and were each sentenced to death. Their first appeals against conviction and sentence were dismissed by the High Court. They have now appealed to this court.

The first two courts found that in the morning of May 3, 1981, robbers broke into and stole from Ester Nyoroka's shop at Mbuinjeri Market in Meru District. The list of the goods stolen from the shop that morning includes among others Omo soap in packets, Imperial soap and the head of a Singer Sewing Machine. We specifically mention these items because they were spoken of in the evidence before the trial court. A torch was also spoken of but it does not appear to have been included in the charge.

A relative of Ester (PW 1) called Joseph Gitonga (PW 2) used to sleep in the shop and he was there that morning. Ester had left him in the shop at about 7 pm (Gitonga said he went to the shop at 9 pm) on May 2, 1981. At about 4 am on May 3, Gitonga was awakened by the sounds of people talking outside within the shop compound. He dressed up, armed himself with a sword and a torch and stood at the door. Then the door was smashed open with a stone which hit Gitonga on the right hip with the help of the light that originated from the torch flashed the door and cut him on the shoulder with a sharp instrument, after which he pulled Gitonga to see three of the robbers in the shop namely Stephen, Geoffrey and Wilson. Wilson gave Stephen sodas, biscuits and cigarettes. Gitonga was lying on his back with his face up. After the robbers had taken what they could they locked Gitonga in the shop from the outside and went away. Gitonga yelled for help but no one came until dawn when Daniel Kaviti (PW 10) came and opened the door from the outside. Gitonga went to the police station accompanied by Ester, Geoffrey Kijea (PW 9), Restus Muriithi (PW 6) and Githinji Imanyara (PW 8) and it was in evidence that at the police station Gitonga named the first three appellants as the robbers who had attacked him that morning.

Erastus Kiirigia (PW 3) who was a junior to the sub-chief of the area told the trial magistrate that he found the shop goods in the house of the 4th accused (Mugambi) and he named the goods recovered as the head of a sewing machine, Kimbo tins and Omo packets. He also said that the goods were in five bags which were exhibited in court. Mugambi's wife was present in the house, but Mugambi was not there.

Ester Nyoroka, Festus Edward Githinji, Geoffrey Kijea and Mbaya were with Erastus then and so were may other people according to Erastus' evidence. Ester Nyoroka's evidence was supported by what Erastus said for she had said that when the party of searchers led by the headman went to Mbaabu's (2nd appellant) house they found there a torch which she and Gitonga used at night. They also found some Omo packets which bore the handwriting she recognised as her own. She said that from Mbaabu's house the party moved to the house of Kiambi (3rd appellant) and again, there they found an Omo packet, tablets of Imperial leather and Lux soap, all of which she identified by her handwriting on each. She also identified tins of shoe polish found at Kiambi's house as they too had her handwriting. She identified her Khaki thread found in the same house by its colour. She added that they found her things in the house of Mugambi, the fourth appellant. She recognised the sewing machine by its serial number, 31K32. She gave details of what each of the five bags contained. The evidence of Festus Muriithi (PW 6) and Githinji Imanyara (PW 8) was in support of Erastus, Geoffrey Kijea (PW 9) and Ester Nyoroka about the stolen property that was found in Mugambi's house. Erastus said that when he asked Mrs Mugambi to whom the goods belonged she replied that they were taken to her house by Muriungi, Mbaabu, Kiambi and Mugambi. Geoffrey Kijea said the four persons named by Mrs Mugambi were Kiambi, Mbaabu, Muriungi the 1st accused, and Muriungi M'Muthamia and that when asked about Mugambi she kept quiet. This discrepancy was of no consequence for Mugambi's participation in the crime was based on possession of recently stolen goods, his confession and the confession of Stephen and not on being named by these witnesses. Mrs Mugambi in her own evidence named Muriungi, Mbaabu and Kiambi and said that her husband opened the door to them when they brought in the goods, which were later found in the fourth appellant's house.

The grounds put forward by Stephen, first appellant, in his second appeal are that he was not properly identified; Ester and Gitonga were not credible witnesses; it was an error of law to hold the evidence of Rael Korote Mugambi (PW 5) against the appellant; this appellant's confession (Ex 17) should not have been taken into consideration against him and that the lower court should not have taken the confession (Ex 15) of Robert Mugambi, the 4th appellant, against this appellant.

This was not a case of identification but recognition because Gitonga, who was in the shop when it was broken into, knew the first three appellants who, he said, all entered the shop and he saw them with the aid of the light from the hurricane lamp that was lit by Geoffrey and their torches. Gitonga had ample opportunity to recognise Stephen because, as we have already said according to Gitonga's testimony Stephen cut him with a sharp instrument, dragged him to the shop and sat on his chest and stomach.

The robbery took place at night, but the circumstances for positive recognition were favourable especially as the victim knew his attackers before. There was support for this recognition of Stephen in the evidence of Real Kirote wife of Mugambi in that she saw Stephen with others bring into Mugambi's house property in bags which when later recovered was identified as some of the goods stolen from the shop of Ester which Gitonga guarded. Then there was Stephen's charge and caution statement (Ex 17) in which he admitted committing the offence at the said shop and keeping the goods at Mugambi's house. So there was ample evidence on which the two lower courts correctly made concurrent finding of fact that Stephen was properly recognised. This was not a question of whether or Stephen could be convicted on the evidence of a single identifying witness in circumstances of difficulty, which would be a question of mixed fact and law (Kamau v Republic [1975] EA 139 at p 140). The question the appellant raises here is whether or not he was recognised by Gitonga, which, in this case is a mere question of fact, and there is a concurrent finding by the two lower courts with which we shall not interfere. Although the credibility of Ester Nyoroka and Gitonga was attacked in the two lower courts, those courts were satisfied that there were credible witnesses. The trial magistrate who saw and heard them and the first appellate court upheld that finding and we have no reason for interfering with that holding. Whether or not the evidence of Mrs Mugambi was to be believed was a matter satisfactorily dealt with at the trial and in the first appeal. The trial magistrate was impressed by the evidence of Mrs Mugambi. She was not found to be an accomplice. In any event even if her evidence were disregarded there was still other ample evidence implicating Stephen in the robbery as we have already shown.

Stephen says that it was an error of law to take into consideration his repudiated confession, but he did not raise any error of law in his argument at the hearing of this second appeal. The confession though

repudiated was amply corroborated by Gitonga's evidence of his recognition of Stephen at the scene of the robbery and further reference to his complicity in the offence by Mugambi in his confession, which, by virtue of Section 32(1) of the Evidence Act (Cap 80), permissible to take into account against a co-accused.

Geoffrey, second appellant, like Stephen, was known to Gitonga and Gitonga's evidence that he recognised this appellant, which was a question of fact, was accepted by the two lower courts. Again, whether correctly identified by Ester as part of her stolen goods is a question of fact. There was no evidence to support the allegation in the third ground of appeal that Mrs Mugambi implicated this appellant in order to save Mr Mugambi. As to this appellant's fifth ground of appeal the confessions of Stephen and Mugambi in which he was mentioned were admitted after a trial within a trial and proved. The confessions each implicated the co-accused who made it and Geoffrey. So, as in the case of Stephen, those confessions were in the circumstances properly taken into consideration as against Geoffrey as well as against the makers (Section 32(1) of Evidence Act). In the result the sixth ground fails.

Mr Odero who appeared for Wilson, the third appellant argued that the evidence of Gitonga should not have been confirmed as reliable by the High Court, but we were unable to see any merit in such a submission. As for Mrs Mugambi she was not an accomplice and it is not for us now to discredit her testimony. There was evidence accepted by the two lower courts that Gitonga recognised Wilson as the man who brought biscuits, sodas and cigarettes to Stephen, who was sitting on the abdomen and chest of Gitonga. The scene was adequately lit. The toilet soaps, omo, shoe polish and the thread for a sewing machine found in this appellant's house and positively identified by Ester as forming part of her stolen goods was independent confirmatory evidence of Gitonga's testimony and it was right to take into account the reference to this appellant in the charge and caution statements of Stephen and Mugambi. We have not found any merit in the four grounds of appeal Mr Odero advanced.

As to the fourth appellant, Gitonga did not say he saw Mugambi at the scene of the robbery. This appellant was found in possession, at his house of a substantial proportion of the goods proved to have been stolen from Ester's shop within a day of the robbery. He was implicated by the evidence of his wife Rael Kirote, whom he called as defence witness. He admitted his full participation in the robbery in a confession which he repudiated but which was corroborated by the evidence of his wife and of his being in possession of recently stolen goods. He was named as a member of the gang in the confession of the first appellant Stephen M'Riungi.

Grounds 1, 2 and 5 of Mugambi's appeal all relate to the issue as to what was his part in the robbery. Was he an accessory before the fact or after the fact, was he a joint offender, was he a principal offender? The High Court found that he was a principal offender and agreed with the subordinate court that he was guilty of the offence charged. These issues having been satisfactorily dealt with require no further consideration by us. The third ground of appeal attacks the admission in evidence of Mugambi's confession which criticism has no justification as the statement was properly admitted.

The fourth ground attacks the holding by the High Court that Mugambi's repudiated confession was corroborated by the testimony of his wife Kirote and the finding of stolen goods in his house. This evidence was accepted by both courts below and in our judgment was undoubtedly independent evidence confirming the commission of the offence and of Mugambi's part in its commission. As it was stated in R v Baskervill [1916] 2 KB C 58, corroboration 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, and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him - that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it: See also R v Beck [1982] 1 All ER 807 at p 815 where R v Baskervill was applied. The fourth ground of appeal, therefore, has no merit.

Mugambi's last ground of appeal is that the senior resident magistrate's court had no jurisdiction either to try him or to impose a sentence of death upon him. The point about the legality of the death penalty for armed robbery was stated by the High Court to have been abandoned. If that is not so, we need only say

that we agree with the learned judges on first appeal that the point is fully met by Section 74(2) of the Constitution, which provides that a law is not unconstitutional if it authorises the inflicting of a description of punishment which was lawful in Kenya on December 11, 1963. It should be noted that Section 74 does not concern itself with what offences may attract what penalties, or with what courts may award what penalties, but only with the nature of the punishment itself.

Mr Kamau's submission on the question of jurisdiction is that under the Constitution the jurisdiction to try a person on a capital offence is peculiar and exclusive to the High Court with its judge, assessors and defence advocate. He contended that Section 6 of the Criminal Law (Amendment) Act (No 3 of 1969) which purported to amend Section 7 of the Criminal Procedure Code so as to empower a subordinate court of the first class held by a senior resident magistrate or a resident magistrate to pass any sentence authorised by law for offences under Section 296 and certain other provisions of the Penal Code was ultra vires the Constitution.

"65.(1) Parliament may establish courts subordinate to the High Court and courtsmartial, and a court so established shall, subject to this Constitution have such jurisdiction and powers as may be conferred on it by any law.

(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by such courts."

Those provisions do not conflict with Section 60(1) which provides as follows:

"65.(1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

Thus, it is important that while a subordinate court of the first class remains always under the supervision of the High Court, it has such jurisdiction and powers as is conferred on it by Act of Parliament. There is no limitation in the Constitution whereby a subordinate court may not try the offence of armed robbery or pass a sentence of death upon a conviction for an offence carrying that penalty.

It is true that the appointment of a High Court judge is made by the President on the advice of the Judicial Service Commission and of a magistrate by only the Commission. The former enjoy a greater degree of security of tenure that the latter.

They are protected by provisions in the Constitution against Parliament passing ordinary laws abolishing their office, reducing their salaries while in office or providing that their tenure of this office shall end before they attain the retiring age.

They can only be removed from office on the advice of a tribunal consisting of a chairman, two other members chosen by the President from among persons who hold or have held office at a judge or a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from such a court. They are not subject to disciplinary control while in office.

The magistrates are appointed, disciplined and removed by the Commission.

Parliament by ordinary laws could abolish their office or reduce their salaries while they were in office or provided that the appointments would be only for a short fixed term of years.

Parliament did not, however, create any new court or alter or abolish the High Court or alter or reduce its jurisdiction and powers. These facts, we think, distinguish this appeal from Minds and Others v The Queen [1976] 1 All ER (PC) in which the facts were that the Parliament of Jamaica passed a Gun Court

Act in 1974 which set up a new court which was to have sole jurisdiction to hear and determine offences of a particular category, namely, those committed by any person who had also committed an offence under Section 20 of the Firearms Act of 1967 of Jamaica in which, in the opinion of the majority of the Judicial Committee, conflicted with Chapter VII of the Jamaica Constitution and was accordingly void by virtue of its Section 2.

There is no question here in this appeal of any transfer of judicial power to the executive. What happened was that by an ordinary law (which is permissible by Section 65(1) of the Constitution) Parliament increased the jurisdiction and powers of a certain class of magistrate for a certain type of offence and in this instance not even one previously triable only by the High Court. The amendments in the Act did not affect the requirement in the Constitution that no person shall be tried on a criminal charge or deprived of his liberty save by due process of law or derogate from the principle of equality before the law (as various sections of the Irish Vagrancy Act 1924 (5 gee 4, C 83) did for every 'suspected person' or 'reputed thief.' King v A G and BPP [1981] 1 R 233 (HC) 246 (SC)).

It is true the accused may not have a trial before a judge assisted by assessors (whose opinion he will weigh but may ignore) and the help of an advocate provided by the state if he cannot afford one, but he is afforded the right of appeal to the High Court and then to the Court of Appeal. So the proceedings and judgment in the trial court are scrutinized altogether by five judges (in the two courts) instead of three and he is furnished by the state at its expense with an advocate in this court.

We can see no valid ground for assuming that the said amendment was contrary to the Constitution of Kenya.

We observe that the powers to try and punish serious offences like robbery with violence has been exercised by magistrates in East Africa since as early as 1955: See Alajadu Kizito v Reginam [1955] 19 EACA Reginam 458. We, as was said in that case, do not think it is for this court to press for alterations in the law as that is a matter for the legislators.

In conclusion we would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) - the Times of March 30, 1983 - that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation.

For the reasons stated we dismiss all the four appeals.