



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M. KARIUKI, J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO 48 OF 2015

BETWEEN

JUMA ANTHONY KAKAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Kamau & Nyamweya JJ.) dated 6th December, 2013) in H.C.CR.APP.No. 637 of 2007

JUDGMENT OF THE COURT

1. Juma Anthony Kakai, (appellant) was on the 13th day of February, 2006 employed as a watchman by Timothy Muthaura Mugambi (PW1) to guard his residence and family who were at the material time residing in a house within Loresho Ridge estate in Nairobi. Something strange had happened on the said date because Victor Baraza Wamalwa (PW4) was also an employee of PW1 as a gardener. As he was leaving work, at about 4 p.m., he saw a note that was written to him by the appellant warning him to carry all his belongings when leaving the place of work on that day as something bad would happen on that day. PW4 made several efforts to contact his employer (PW1) and pass to him this information to no avail as he unsuccessfully flushed him on phone six times. Unfortunately, PW1 his phone was on silent mode as he was busy carrying out research at Chiromo campus and it was not until 8pm when he checked his phone and on finding so many missed calls he called Victor who narrated to him what was written in the note. PW1 tried to call the police but he did not get assistance, he called his wife and was told that the appellant was on duty. That is when he decided to go home.

2. The appellant was on duty on the material night. At about 10 p.m. on the same day, Jane Wanja Muthaura (PW2), the wife of PW1 was watching TV in the sitting room, she was in the house with her son and house help. Suddenly a gang of six robbers who were armed with dangerous weapons namely Somali sword, pangas and iron bars entered the house. It was obvious according to the witnesses that the thugs gained entry into the complainant's house effortlessly, thereby suggesting it was the appellant who let them in. While inside the house, they harangued and threatened the complainant's family; they demanded to be given money and car keys. They tied PW2 and other occupants and forced her to lie down as they ransacked the house and stole money from the bedroom, a motor vehicle registration number KAQ 260 V Nissan Sunny, one TV Sonny 21 inch, and other assorted goods as per the charge sheet.

3. While the family was undergoing this ordeal, PW1 arrived home, and was let in by the appellant who did not warn him of any danger. Another thing that stunned him was the fact that the dogs were not let out of their kennels which was usually done by the appellant.

Nonetheless, to his utter indignation, when he knocked the door of his house, it was a marauding panga and rungu yielding gang of thugs who opened for him and led him to the house. They menacingly demanded to be given money and mobile phones, ATM cards, including the pass word which he did and also gave them the car keys. Inside the sitting room, his wife and three children were tied with ropes. PW1 was ordered to sit down, he was also tied down, they removed his watch and took his Barclays Bank ATM card and demanded to be given the PIN which he did, two of the thugs drove the car, and went to withdraw money, they managed to withdraw Ksh 46,000/=. Thereafter the thugs ransacked the house, turning it completely upside down as they carted away household goods and money as was stated in the charge sheet. Before leaving, they demanded to be given the copy of the identity card of the appellant. When PW1 first hired the appellant, he requested him for a copy of his ID card.

4. As the thugs left, they locked the house and left with the keys while the victims of the robbery were left tied with ropes. PW1 struggled and untied himself, he broke the bedroom door where his wife was locked, after freeing themselves, they realized that the appellant who was supposed to be guarding them, also left with the thugs. The matter was reported to Spring Valley police station, and was investigated by Cpl Aloise Obunga (PW6). He visited the scene of crime on the 14th February, 2006. He went round the homestead and did not see any sign of break-in, the fence was intact and it not have any signs of people jumping over. He was given the note allegedly written by the appellant warning PW5 as aforesaid. By that time the appellant who was working as the watchman had disappeared, the thugs had demanded the copy of his ID, following some tips, he learnt the appellant was training at Everready. PW6 and PC Josiah Nyabera arrested him, it was the appellant who led the police to the arrest of his other two co- accused persons.

5. The three suspects were charged with the offence of robbery with violence, and handling stolen property before the Chief Magistrate's court at Kibera. All the accused persons denied the charge and upon trial, the learned trial magistrate found the charge against the 1st and 2nd co- accused was not proved, they were acquitted of the charge. As regards the appellant, his defence was that he had left the employment of the complainant on 31st October, 2005 due to poor pay and the fact that the complainant used to pay him his salary in piecemeal. He found a better job with Everready where he was working when he was arrested. He claimed that on the material day, he was not at work and that he was the one who introduced PW4 to the complainant, but after he left employment, his relationship with PW4 went sour due to the fact that PW4 started an affair with the maid while knowing that the appellant was having a love affair with her. The appellant denied having authored a letter that was produced by PW4 warning him of an impending danger on the material night.

6. The learned trial magistrate considered the evidence and was satisfied that there was ample evidence against the appellant against which he was convicted and sentenced to suffer death. This is what the trial magistrate stated in a pertinent portion her judgement regarding the appellant;-

“With regard to the 3rd accused the court finds as follows, there was evidence of opportunity that places him at the scene. He worked as a watchman for the complainant. He reported on duty on the material day and opened the gate and let the complainant in. The evidence places the accused person at the scene. His conduct cannot be consistent with innocence. He does not on that day set the dogs on the loose as he usually does. He disappears from his place of work immediately after the robbery. This is conduct that is not consistent with innocence. He also leaves a note to the shamba boy for whom he had secured a job for in the complainant's premises warning him to leave the complainant's place. Though the note was submitted to the document examiner to ascertain whose handwriting it was, the evidence as given by the shamba boy Victor Baraza is credible and consistent. The robbers also demanded for the 3rd accused person's ID card clearly showing that they knew him and were keen to protect him...”

7. Based on inter alia the above conclusions the appellant was convicted with the main count of robbery

with violence, and sentenced to death.

The appellant's appeal before the High Court was also dismissed hence this 2nd appeal which only turns on matters of law and we think it is opportune for us to state on the outset that this being a second appeal, we are restricted to address only matters of law. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Chemangong - vs- R [1984] KLR 611**. In **Karingo -vs- R (1982) KLR 213 at p. 219** this Court said:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari S/O Karanja -vs- R (1956) 17 EACA 146)”

8. That said, the appellant's appeal is predicated on some six grounds of appeal as stated in the supplementary memorandum of appeal that was filed on 27th January, 2016. The two courts below were faulted for basing their decision on a letter that was allegedly written by the appellant to PW4; affirming the decision of the trial court notwithstanding that the alibi defence put forward by the appellant was cogent; an essential witness was not called by the prosecution; the decision was based on suspicion and conjectures and wrong conclusions that did not lead to a conclusion that the appellant was part of the robbery and finally for failing to consider the appellant's defence.

9. During the hearing of the appeal, Mr Oyalo learned counsel for the appellant elaborated on the above grounds stating that the letter that was allegedly written by the appellant to PW4 was wrongly admitted in evidence; in the said letter, the appellant is alleged to have warned PW4 of the looming danger that night and advised him to carry away his personal effects; however the said letter was not signed, its authenticity was not proved; there was no proof that it was authored by the appellant and that notwithstanding, the trial court heavily relied on it in arriving at the conclusion that the appellant was aware of, or was part of the robbery. There was also a maid in the house when PW4 came across the said letter; he did not disclose the contents to the maid and even when he met the appellant on his way from work on that day, he did not discuss the contents of the letter; what is more astounding was the fact that when the complainant arrived home and the appellant was the one who opened for him the gate, he did not raise an issue about the said letter.

10. Counsel for the appellant also submitted that the appellant's alibi defence was not considered, the appellant testified that he left employment on 31st October, 2005; the complaint's evidence was also inconsistent as he could not recall critical dates such as when the appellant left employment; there was no documentary evidence to show that the appellant was their employee; thus there was doubt when he left employment; the maid who was in the house was not called to give evidence and according to counsel, the only reason why this crucial witness was not called by the prosecution was because her evidence would have dented the prosecution's case. Counsel urged us to allow the appeal also on the grounds that the defence by the appellant was not given any weight as the trial magistrate only mentioned it in passing and failed to evaluate the same.

11. On the part of the state, this appeal was opposed by Ms Maina learned Senior Prosecuting Counsel who supported the concurrent decisions by the two courts below. The two courts fastidiously went over the evidence and came to the conclusion that the appellant was the one who was guarding the residence of the complainants on the material night. He was responsible for releasing the dogs from their kennels, a duty he did not perform on the material night; he opened the gate for PW1 without warning him that there were robbers in the house; he never raised any alarm; the robbers asked for the appellant's ID; the investigating officers confirmed that there was no forceful breakage into the appellant's compound. Counsel submitted that the appellant's conviction was not only based on the letter warning PW4, but other cogent and credible evidence that completely displaced the alibi defence by the appellant. Counsel urged us to disallow the appeal.

12. We find two key issues of law raised in this appeal, the first one being the overall evaluation of the entire evidence that is whether there was cogent evidence to prove that the appellant was on duty on the material night, that he let in the robbers, willingly aided them by failing to let out the dogs, or warn the complainant when he arrived home that there were robbers in the house and for disappearing after the robbery, an indication that he aided the robbers in committing the crime. Secondly whether failure by the prosecution to call a crucial witness was indicative that the evidence by the said witness was adverse to the prosecution's case. In analysing the evidential burden that fell on the trial court, we appreciate the learned judges of the High Court who heard the first appeal took note of some of the leading authorities such as the case of;- **Njoroge vs Republic, (1987) KLR 19 at P.22** where it was stated that:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of facts as on questions of law, to demand a decision of the court of the court of the first appeal. and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in that respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570.”

In linking the appellant to the commission of the robbery although he did not participate in the robbery the two courts found that by his omissions, he aided the robbers, in particular the two courts went on to demonstrate that although the appellant did not enter the house with the robbers to commit the actual robbery, he was a principal offender in the context of the provisions of **Section 20 (1) (b) of the Penal Code** which provides that;

“Where an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

a. ...

b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence”

13. In responding to the grounds of appeal that the evidence did not prove to the required standard that it was the appellant who aided the robbery, we find the two lower courts carefully considered all the issues that were raised such as whether the appellant was on duty on the material day; to us both courts found the evidence of PW1, PW2 and PW4 that the appellant was on duty was truthful. In particular it is the trial magistrate who had the opportunity to assess the demeanour of the witnesses and in this regard, she was satisfied that the appellant was on duty and being the watchman, he not only let in the robbers as the investigating officer found there was no forceful entry into the compound, but he failed to let the dogs, out to warn the appellant or raise alarm and also he took off with the robbers. On our part, there was no justifiable reason(s) to depart from the findings of the two courts below especially the trial court that saw the witnesses as they testified. In **Nelson Julius Irungu -vs- Republic-** Criminal Appeal No. 24 of 2008, this Court held;-

“As this Court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses.”

Similarly, like the two courts below we are persuaded by the evidence recorded, and the judgments of the two courts that the *alibi* defence by the appellant was totally misplaced by the evidence of the three witnesses and the guiding principles enunciated in the case of;-

Wang'ombe v Republic, [1976-80] 1KLR 1683 were satisfied in this trial. These are:-

“When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution”.

14. The other ground raised by counsel for the appellant was in regard to failure by the prosecution to call the maid who in their opinion was a crucial witness in that she too had a shared responsibility of opening for the dogs or opening the gate; besides the appellant stated in his defence that he had an affair with her and when he left employment, PW4 seems to have taken over and therefore the possibility that the appellant gave evidence against him to implicate him could not be ruled out. This is how the trial magistrate dealt with the issue in her judgment;

“Is there a possibility that PW4 Victor Baraza framed the accused as a result of the grudge that they had? The court is of the opinion that the introduction of the girlfriend sharing is an afterthought aiming at creating a motive for PW4’s testimony.”

On our part we do not think any gap in linking the appellant with the offence would have been left even if the evidence of PW4 were to be discounted, the appellant was identified by PW1 and PW2. The appellant disappeared from his place of work immediately after the robbery and as if that was not enough, the robbers demanded from PW1 to be given a copy of his ID. Moreover it was PW1 who led the police to arrest the appellant. In any event by dint of the provisions of **Section 143** of the Evidence Act, Chapter 80, which provides;-

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

15. In this regard this ground of appeal also fails and so is the entire appeal which we find devoid in merit. However, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellant. In its recent decision in *Francis Karioko Muruatetu and another vs Republic, (2017) eKLR* the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts’ discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interrogate whether the death sentence herein should be maintained. We observe that the appellant was a first offender although when he was offered an opportunity to mitigate he offered none. This is understandable in our view because death sentence was the only one provided by the law, the court had no discretion to pass another sentence even if the interest of justice would not be met due to the circumstances of the appellant or under which the offence was committed. Say for instance a first offender or even a youthful offender who had just passed the threshold of the age of minority, or where the offenders in the cause of committing the offence did not cause any injury or serious threat to the life or limb of the complainant and they stole items of insignificant value, in all these circumstances the court had no discretion for persons charged with the offence of robbery with violence to pass any other sentence. Luckily the Supreme Court decision has cured that imbalance in criminal law by restoring judicial function of sentencing in capital offences.

16. We have mulled over the prospect of whether to remit this file to the High Court for the appellant to undergo a fresh mitigation; in this regard, we also considered the delay that is attendant to such a process and the increase in backlog of cases, in the end we were satisfied that as the appellant was a first offender, was sufficient to inform us that although the offence he was charged with was serious, the ends of justice would not be served by him serving a death sentence. In the circumstances we find the ends of justice would be served if the death sentence herein is reduced to a period of 20 years. Accordingly although the appeal on conviction fails, we are inclined to interfere with the judgment in regard to the death sentence which we hereby set aside and substitute thereto with a term of twenty years effective from conviction.

17. This judgment is written pursuant to the provisions of Rule 32 of the Court of Appeal Rules as G.B.M. Kariuki JA a member of this Bench left the judiciary before its delivery. We also apologize to the appellant for the delay in delivering this judgment which was occasioned by circumstances beyond our control.

Dated and Delivered at Nairobi, this 18th day of May, 2018.

M. K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR