REPUBLIC OF KENYA

Court of Appeal at Nairobi

Criminal Appeal 4 of 2009

ALEXANDER NGUGI NJERI ……..…..…..……. APPELLANT

AND

REPUBLIC …….…....……..… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ) dated 21st January, 2009

in

HCCR.A NO. 311 OF 2006)

JUDGMENT OF THE COURT

The appellant was charged before the Senior Principal Magistrate's Court, Kiambu, with robbery with violence contrary to ***s. 296(2) of the Penal Code, Cap 63 Laws of Kenya***. The particulars of the offence were that on 26th February, 2006, at Ndenderu Village in Kiambu District, in Central Province, the appellant, in the company of others not before the Court, robbed one ***SAMUEL NJUGUNA KAMAU*** of KShs.1000/-, and at, or immediately before or immediately after the time of such robbery, used actual violence upon the said Samuel Njuguna Kamau.

The facts in the appeal are pretty straight forward. On the material day, the complainant, Samuel Njuguna Kamau met Robert Njoroge Kangethe (PW2) and David Mwaniki Giati (PW 3) at Ndenderu shopping centre. PW 3 gave the complainant KShs.1,000/= to take to his (PW 3's) home. PW2 and PW3 then left for Gachie.

The complainant decided to take a short-cut through Ndenderu at which point he was accosted by the appellant and two other people. The appellant held him by the neck and together with the other two people, beat him up and robbed him of KShs1,030/= and some coins. The complainant managed to gallantly hold to his phone and telephoned PW 2 and PW3 and informed them that he had been robbed. When the appellant and his accomplices saw members of the public coming to the scene, they fled.

The complainant then gave chase, caught up with the assailants and started fighting them. He held fast to the appellant as the other two slipped away and escaped. When PW 3 arrived, he found the complainant

holding the appellant, after which they took him to Rweno Police Post/Station. The robbery took place in broad daylight between 10.00 am and 11.00 am.

After hearing evidence, the Senior Principal Magistrate, on 16th June, 2006, convicted the appellant and sentenced him to death as prescribed by law.

Dissatisfied with the verdict, on 21st June, 2006, the appellant appealed to the High Court against the conviction and sentence. The appeal was heard by J. B. Ojwang, J *(as he then was)* and M. Warsame, J *(as he then was)* who, by a judgment dated 21st January, 2009, dismissed the appeal, upheld the conviction and affirmed the sentence imposed by the trial magistrate. The appellant then filed this second appeal against the said judgment of the High Court.

On 26th January, 2006, the appellant lodged his own memorandum of appeal raising some six grounds of appeal. However, when Mr Evans Ondieki was assigned to represent the appellant, he lodged a supplementary memorandum of appeal on 16th April, 2013, under ***Rule 65 (2) of the Court of Appeal Rules***. At the hearing of this appeal the appellant was represented by Mr Ondieki while the respondent was represented by Mrs G W Murungi, Senior Assistant Director of Public Prosecutions, who supported the conviction. This being a second appeal, under ***section 361 of the Criminal Procedure Code,*** only matters of law may be considered. Although the supplementary memorandum of appeal raised twelve grounds of appeal, Mr Ondieki argued four main points.

The first point raised by the appellant was that the superior court had erred in shifting the burden of proof to the accused. Mr Ondieki relied on a passage on page 6 of the judgment of the superior court to advance this ground. The relevant extract reads:

"It is not logical, nor can it be true, to say as the appellant does, that he was part of the gang fighting and robbing the complainant, save that he personally did not extract anything from the complainant; if his companions took the complainant's property, he was in league with them in the enterprise of robbery, and he was consequently, a robber like them-and that is the tenor and effect of s. 296(2) of the Penal Code (Cap 63)".

With due respect, we cannot understand how the above passage shifts the burden of proof from the prosecution to the accused person. Shifting the burden of proof, which the law does not countenance, entails requiring the accused (the appellant in this case) to prove facts that it is otherwise the duty of the prosecution to prove for its case to succeed. We agree with Mrs Murungi that neither in the above passage, nor in the rest of the judgment did the superior court suggest that it was the duty of the appellant to prove any facts, which he had not done. All that the learned judges did was to reach their own conclusion after fully re-evaluating the evidence presented by the appellant and the prosecution as they were entitled to do in a first appeal.

Mr Ondieki also assailed the above passage as conclusions arrived at by the court independent of the evidence adduced. In our view, the above passage is consistent with the evidence that was adduced before the trial court. The appellant in his unsworn statement testified that he had fought PW1. This was also the evidence of the complainant and PW3. Before the superior court, the appellant had among other things contended that no incriminating evidence or exhibit had been found in his possession when he was arrested. It was in this context that the superior court made the remarks complained of. It is our view that those remarks are not conclusions unsupported by evidence. They are pertinent conclusions that squarely addressed the appellant's contention that having been involved with others in beating and robbing the appellant, he was not acting in concert with them merely because nothing incriminating was found on him. We do not see any merit in this ground of appeal.

The second ground that Mr Ondieki urged was that the superior court misdirected itself by failing to analyze the appellant's evidence. He submitted that the evidence of the appellant that he had fought with the complainant was wrongly treated as a confession and that the fight the appellant testified to having been involved in could have related to an entirely different occasion and fight. He further submitted that

from the evidence of the complainant, there was half hour gap between the robbery and the arrest of the appellant which raised reasonable doubt whether the evidence related to the same fight and whether there was continuous transaction in the offence.

For her part, Mrs Murungi submitted that the superior court had properly analyzed the evidence before reaching its conclusions and that the alleged half hour gap was based on misreading of the evidence.

We observe that the trial court noted that the appellant had denied any involvement in the offence but that he had conceded fighting PW1. For its part, the superior court noted that the robbery was accomplished in a state of commotion and fighting and that the appellant did not deny that he was at the *locus in quo* and was involved in the fighting. In these circumstances, we do not see how the trial court and the superior court could be said to have treated the appellant's unsworn evidence as a confession. Nor is there any substance in the suggestion that the fight that the appellant had testified to being involved in could have been a different fight from that which led to his arrest and ultimately being charged. The evidence on record is clear about the date of the fight, the place of the fight, the approximate time, and the parties involved. More importantly, there is consistent evidence that the appellant was arrested at that fight.

On the alleged 30 minute gap, the evidence of PW1 was as follows:

"I was beaten all over. When they saw members of public coming, they left me and ran away. I telephoned Mwaura and Robert Njoroge and informed them what had transpired. They were going to Gachie. <u>They came after about half an hour</u>. I gave chase to my assailants. Caught up with them."

The appellant sought to interpret that evidence to mean that the complainant telephoned his two friends who were en route to Gachie, waited for them for half hour to arrive, then chased after his assailants. We agree with Mrs Murungi that a proper reading of the evidence does not admit to such interpretation. The complainant chased the assailants immediately. When his friends arrived after half hour, PW3 found him holding fast to the appellant. Clearly the half hour related to the time PW2 and PW3 took to arrive, not the time taken by the complainant to chase after the appellant and his accomplices. We do not find any merit in this ground either.

The appellant's third point was that the superior court erred in failing to appreciate that ***section 77 (2) (f) of the former Constitution of Kenya as read with section 198 (1) of the Criminal Procedure Code (Cap 75)*** were violated in respect of the appellant.

Section 77 (2) (f) of the former Constitution provided as follows:

"(2) Every person who is charged with a criminal offence -

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge…"

Section 198 (1) of the Criminal Procedure Code provides:

"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

According to Mr Ondieki, the appellant understood the *Kikuyu* language and testified in *Kikuyu*. However some witnesses testified in *Kiswahili* and there is no evidence of interpretation to the appellant. Mrs Murungi submitted that this complaint was an afterthought as the appellant had participated in the proceedings and had not raised any objection that he did not understand any part of the proceedings.

In ***<u>STANLEY KARIMI KAGO & ANOTHER V REPUBLIC</u>, CR NOs. 228 & 234 OF 2006,*** this Court sitting in Nyeri considered a complaint that the trial court had not indicated the language used by the appellant and some of the prosecution witnesses. The court noted that there is no law that requires that the court record the language used by every witness. Though it is desirable to do so, it is not mandatory. The

Court concluded as follows:

"We have examined the record and confirmed that indeed the trial court did not record the language used when eight of the nine prosecution witnesses testified. The only occasion when the language is indicated is when the 3rd prosecution witness testified. However, at the commencement of the trial the record shows the following:

"DATE 30.10.01
MAGISTRATE W. N. NJAGE PM
PROSECUTOR IN CHARGE IP Gichangi
CC Ben
INTERPRETATION ENG/KISWAHILI
Accused Present."

Thereafter, although the language used in respect of eight witnesses is not indicated, the record shows that the coram, including the court clerk (CC) was the same throughout the trial. It is the court clerk's function, among other things, to interpret the language where necessary. The record shows that Ben, the court clerk, was present throughout the trial. The record also shows that the appellants cross-examined every witness, and at no time complained about their inability to understand the language. They fully participated in the trial, and did not even raise this issue in their first appeal before the superior court. Clearly, this is an afterthought, and although it is their right to raise a point of law at any stage of the litigation, we are unable to discern any prejudice caused to them by reason of this failure on the part of the trial court. There is clearly no miscarriage of justice here."
In this appeal, the record of the trial court does show that *Kiswahili* was the language of the court. All the prosecution witnessed testified in *Kiswahili* and were cross-examined by the appellant. The record also shows that throughout the proceedings, there was a court clerk who serves as the interpreter. On the days when the three prosecution witnesses as well as the appellant testified, there was a court clerk by the name, Wainaina. The appellant did not raise this issue before the trial court or the superior court. In view of the court record, we do not find any merit in this ground also.

The last ground was that some essential witnesses were not called and therefore the prosecution case was not proved beyond reasonable doubt. Mr Ondieki submitted that according to the evidence of PW2, there were "*some other men*" who had accompanied PW3 to where the complainant had caught up with the appellant, and these other men were not called as witnesses. He also submitted that the investigating officer had not been called as a witness. For her part, Mrs Murungi submitted that the prosecution had called three direct witnesses whose evidence was believed by the trial court and the superior court and that such evidence was sufficient to sustain the conviction.

Section 143 of the Evidence Act (Cap 80) provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In an appropriate case, conviction can be based even on the evidence of a single witness. In this case both the trial court and the superior court were satisfied with the evidence that was adduced against the appellant. In ***ADAN MURAGURI MUNGARA V REPUBLIC, CR NO. 347 OF 2007,*** this Court sitting in Nyeri stated as follows:

"As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

We do not find any basis for interfering with the findings of the superior court. Accordingly, this appeal has no merit and is hereby dismissed.

Dated and delivered at Nairobi this 24th day of May, 2013.

G. B. M. KARIUKI

JUDGE OF APPEAL

P. M. MWILU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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