



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, GITHINJI & NYAMU, JJ.A.)
CRIMINAL APPEAL NO. 325 OF 2007

BETWEEN

JOHN KINYUA MIRITI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High court of Kenya at Nairobi by (Lesiit & Makhandia, JJ.) dated 18th July, 2006

in

H.C.CR.A. NO. 522 OF 2003)

JUDGMENT OF THE COURT

The appellant was convicted by the Principal Magistrate at Kibera, Nairobi on two counts of robbery with violence contrary to **Section 296 (2)** of the *Penal Code* and sentenced to death in each count. His appeal to the High Court was dismissed. Thus, this is his second appeal.

The complainant in the first count was **Mary Wangu**, (PW1) (Mary). The appellant was alleged jointly with others not before the court to have robbed Mary of cash Shs.2,700/=, 9 cups and a blanket on 7th November, 2002 using actual violence.

The complainant in the second count was **Simon Nesewa Lei** (PW2, (Simon) who is the husband of **Mary Wangu**. The particulars of the charge alleged that the appellant in similar circumstances robbed him of one wheel spanner, one wrist watch, one radio and one coat all valued Shs.1,350/= using actual violence.

The two complainants lived at Kadisi in Ongata Rongai. On the evening of 7th November, 2002 Mary was cooking in her kitchen while her husband Simon was in the main house. Her employee **Geoffrey Mwaura Jona** (PW3) (Geoffrey) was also in the kitchen. At about 7.15 p.m. five people who were armed with axes and pangas entered into the kitchen through the door which was ajar. They took Mary and

Geoffrey to the main house where Simon was and a person whom she recognized as the appellant demanded money. Mary took the appellant to the bedroom where she showed him money (Shs.1,700/=) kept under a table which the appellant took.

Thereafter, the appellant cut Mary with an axe on the face and hand and told her to sleep. The robbers also hit Simon with a sword on his left arm and stole his Shs.1,370/=. The robbers in addition stole cups, radio, wheel spanner, blanket and wrist watch. After the robbers left Mary sent her son and told him that he had recognized “*Kinyua*” the appellant. Mary thereafter reported the robbery at Ongata Rongai Police Station giving the name “*Kinyua*”, the appellant, as one of the robbers. Later the appellant was arrested by the members of public and taken to Ongata Rongai Police Station after which the appellant led **PC. James Kamilu Wambua** (PW5) to his house where a torch, a blood stained axe and two metal bars were recovered. The torch was later identified by Simon as the one stolen from him.

On 1st November, 2002 **IP Moses Mwangi** recorded a statement under inquiry from appellant, which was admitted as evidence at the trial without objection.

The appellant stated at the trial that on the day he was arrested ten people who are his cousins went to his house and asked him to accompany them to Ongata Rongai, which he did, and as they were taking tea at Ongata Rongai, one of his cousins left only to come back accompanied by police officers who arrested the appellant. The appellant stated further that he was taken to his house, forced to break his house but upon search, nothing was recovered from his house.

The trial magistrate made a finding that the appellant was recognized by Mary, Simon and Geoffrey; that the appellant’s statement which was not retracted “*corroborated*” the evidence of the three witnesses; and that the defence of the appellant which was a denial was not believable.

The appellant appealed to the superior court on five main grounds as summarized by the superior court, namely, that the circumstances prevailing at the scene were unfavourable for accurate identification of the appellant; that there were material contradictions in the prosecution case; that none of the exhibits were recovered from his house; that the statement under inquiry was not voluntary and, lastly that, the appellant’s defence was not given due weight. The superior court rejected the grounds of appeal and dismissed the appeal.

The appellant complains in this appeal that the superior court made erroneous findings on the issue of identification, voluntariness of the statement under inquiry; recovery of the exhibits and the weight of the appellant’s defence.

At the hearing of the appeal, Mr. Oira, learned counsel for the appellant made brief submissions in effect, that, the evidence of Mary, Simon and Geoffrey was not conclusive; that no investigations were carried out as members of the public who went to the scene were not asked to record statements; that the exhibits axe and stick were not taken to Government Chemist for analysis, and, lastly, that the prosecution case was based on grudge arising from a land dispute.

A second appeal to this Court is solely confined to points of law. The law is clear that where a right of appeal is confined to questions of law, an appellate court has loyalty to accept findings of fact of the lower courts and should resist the temptation to treat findings of fact as holdings of law or of mixed law and fact and further that the Court should not interfere with the findings of fact by the trial or first appellate court unless on evidence no reasonable tribunal could have made such findings: (see ***M’Riunga vs. Republic*** [1983] KLR 455).

It is convenient to consider the question of recovery of the exhibits particularly the blood stained axe and a torch from the appellant’s house. The appellant stated at the trial that the axe, torch and iron bars were not recovered from his house. There are however, concurrent findings of fact which are based on credible evidence that the articles in issue were recovered from the appellant’s house.

Nevertheless, the mere fact of the recovery of the articles in the appellant’s house is not conclusive

evidence that the appellant participated in the robbery. The torch allegedly identified by Simon as the one stolen during the robbery was not among the goods listed in the charge as the items which were stolen. Secondly, the blood stains on the axe were not proved by forensic evidence as having originated from Mary. Indeed, it is apparent that neither the trial court nor the superior court relied on such evidence.

The dispute about a plot of land allegedly belonging to the appellant was raised by the appellant when cross-examining Mary. She admitted that there was a plot given to the appellant by his grandfather but intimated that there is no dispute about the plot.

The appellant again cross-examined Simon about the plot but the latter categorically stated that he had no interest in the plot. The appellant did not pursue the issue further. He did not raise the issue in his defence nor explain the nature of the dispute. It is clear therefore that issue of land dispute as a motive for the report of robbery by Mary was a mere allegation which did not establish a grudge.

The appellant has also raised the issue of the admissibility of the statement under inquiry. The appellant states in ground 4 of the grounds of appeal that its recording was questionable and doubtful. There was ample evidence from IP. Moses Mwangi that the appellant made a statement under inquiry voluntarily. Furthermore, the record of proceedings of the trial shows that the appellant stated that he had no objection to the production of the statement and that he did not cross-examine IP. Mwangi on the statement. The appellant admitted in his written submissions filed in the superior court that he neither objected to the production of the statement nor cross-examined IP. Mwangi on the statement. The appellant submitted in his written submissions in the superior court that the procedure for recording the statement was not followed because the date when it is shown to have been recorded was on 1st November, 2002 which was before the robbery and his arrest; that the statement is not self recorded and that the police officer who escorted appellant to IP. Mwangi to record the statement did not give evidence. The appellant did not complain in the said written submissions that the statement was obtained either through torture or inducement. The statement shows that it was recorded on 11th November, 2002 and not on 1st November, 2002 as the appellant submitted. The superior court evaluated the evidence and concluded that there was nothing on record to suggest that the statement was improperly taken. We are satisfied that the evidence supported that finding.

On the main ground of appeal that the evidence of recognition was not positive, both Mary and Geoffrey testified at the trial that there was hurricane lamp in the kitchen. Further, all the three witnesses testified that there was also hurricane lamp in the main house. There was the evidence of Mary that the appellant was a son of her sister, that she had known the appellant since youth and that she told police and her son that she recognized the appellant as one of the robbers. According to the evidence of Simon, the appellant used to live with them and that the two complainants used to employ him. The appellant admitted in his statement under inquiry that he and another had been employed by Mary to cut trees.

In the circumstances, we are satisfied that there was credible and overwhelming evidence to support the concurrent findings of the two courts below that the three witnesses recognized the appellant as one of the robbers. The appellant confessed in the statement under inquiry that he was in the group of robbers who planned the robbery and proceeded to complainants' house but denied that he entered into the house. The finding of the two courts below that the confession supported the evidence of recognition cannot be faulted.

We are satisfied like the superior court that the conviction was safe.

On sentence, this Court has said time without number that it is improper to sentence an accused person to death on more than one count.

For the foregoing reasons, we dismiss the appeal with an order that the sentence of death in the second count relating to robbing, **Simon Newesa Lei** shall remain in abeyance.

Dated and delivered at Nairobi this 8th day of April, 2011.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR