IN THE COURT OF APPEAL
AT NAKURU

(CORAM: TUNOI, O'OKUBASU & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 64 OF 2010

BETWEEN

DANIEL KURIA GUYO ……..... APPELLANT

AND

REPUBLIC ……...…....…… RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nakuru (Maraga & Mugo, JJ.) dated 24th September, 2009

in

H. C. Cr. A. No. 244 of 2006)
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JUDGMENT OF THE COURT

In the trial court, the Chief Magistrates Court Nakuru, the appellant was charged with the offence of robbery with violence contrary to ***section 296 (2***) of the Penal Code. The prosecution alleged that on the 26th day of March, 2005 at Njoro Township in Nakuru District within the Rift Valley Province the appellant jointly with others not before court, robbed Nelson Kimathi (complainant) of her National Identity card, ATM card, one mobile phone make Bird and cash Kshs.2,500/= all amounting to Kshs.10,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Nelson Kimathi.

According to Nelson Kimathi PW 1, a police constable, on 26th March, 2005 at 10.30 pm he was at Njoro Trading Centre on police patrol in casual clothes in the company of other police officers on official duties, when a group of four (4) men attacked him and robbed him as stated in the particulars of the charge set out above. PW 1 who is also the complainant claimed that he nabbed the appellant red handed at the scene and further claimed that his small index finger was fractured in the cause of the robbery. The witness claims to have maintained his grip on the appellant until members of the public came to his rescue, at which point a good Samaritan phoned Njoro Police Station and the appellant was taken to the police station. The prosecution called four witnesses while the appellant gave an unsworn statement. In his defence the appellant denied any involvement in the robbery and claimed that the complainant had fabricated the charge following a disagreement centred on a girl the complainant claimed to be his girl friend. The trial resulted in the court convicting the appellant. He was sentenced to death on 16th October, 2006.

Dissatisfied with the verdict the appellant appealed to the superior court. However the superior court (D. K. Maraga and M. G. Mugo, JJ) dismissed the appeal.

The appellant has now come to this Court by way of a second and final appeal. During the hearing the appellant was represented by Kanyi Ngure and the State was represented by V. O. Nyakundi, State Counsel II.

Mr. Ngure relied on the grounds set out in the supplementary memorandum of appeal filed in Court on 14th April, 2011 as follows:

"1. THAT the Learned Trial Magistrate erred in Law by relying on the Testimony of a single witness to convict whereas the testimony was in itself Self-contradicting and incredible and thus the charge of Robbery with violence was not proved to the required standards.

2. THAT the Learned Trial Magistrate and the first Appellate Court Judges erred in Law when they found that the complainant's evidence had been well corroborated whereas the testimony of the other witnesses was unreliable, doubtful and did not add-up.

3. THAT the Learned Judges of the High Court erred in Law in affirming the conviction of the Appellant whereas the evidence was not subjected to a fresh, exhaustive and conclusive analysis independent from that of the Trial Court.

4. THAT the learned Judges of the High Court erred in Law in affirming the conviction of the Appellant without acknowledging the fact that the Appellant's defence at the Trial was both reasonable and plausible.

Mr. Ngure in his submissions faulted the trial court in convicting the appellant on the evidence of a single witness namely PW 1, whose evidence was self contradicting in that the complainant who was a police officer in his evidence in chief testified that although he was in civilian clothes and in the company of other police officers when the robbery took place, but under cross examination he stated that he was alone when the robbery took place and that he was rescued by members of the public as he clung to the appellant; that the evidence of PW 1, upon which the conviction was based was not corroborated by that of PW 2, PW 3 or PW 5 as held by the first appellate court and there were several contradictions including that surrounding the alleged injuries as to how and by whom they were inflicted since the appellant was allegedly firmly held by the complainant and further Mr. Migwi, PW 2 another police constable, testified that he received a call to the effect that some suspects had been arrested by members of the public and PW 1, whereupon he went to the scene of the robbery in the company of PC Munai and PW 4 and rearrested the appellant and thereafter booked the appellant in the OB Book and subsequently charged him. On the same point, Jonathan Moromoch (PW 3) a clinical officer, who examined PW 1 testified that he had reported to him that he had been attacked by people known to him and that his clothes were torn including those he was wearing.

Mr. Ngure further reinforced his submission touching on the contradictions in the evidence adduced by the prosecution by drawing the Court's attention to the evidence in chief of police constable Joseph Munai, PW 4 who testified that on 26th March, 2005 while on duty at 11.00 pm when they were about to book off duty, three people came to the police station and reported that someone was being robbed and had been beaten outside Tausi bar within Njoro town. In the company of PC Munai they proceeded to the scene of the crime. At the scene they found PC Nelson Kimathi and the appellant who was said to have been intercepted by members of the public. They rearrested the appellant.

On ground two, Mr. Ngure submitted that the recording in the O. B. book was that the appellant had been booked for attempted robbery. The above pieces of evidence Mr. Ngure concluded, constituted material contradictions in the prosecution case and did not corroborate PW1's evidence at all.

On ground 3, Mr. Ngure contended that the 1st appellate court did not properly re-evaluate the evidence because if it had done so, the contradictions specified above could have been noted by the court and

therefore this amounted to failure to in its duty. In this regard, counsel submitted that it is significant that no member of the public was called as a witness yet at least one of the key witnesses had suggested that it is members of the public who had assisted in effecting the arrest of the appellant.

On ground 4, the learned counsel submitted that as the prosecution's case was riddled with contradictions and the defence of the appellant that the case was fabricated, ought to have been given weight since in the circumstances, the defence had created a reasonable doubt.

In supporting the conviction and sentence, Mr. Nyakundi submitted that the prosecution case was overwhelming in that the appellant was literally caught red handed as PW1 clung to him throughout until he was arrested; that members of the public reported the matter to the police and that the alleged contradictions were not material; that the appellant had also said that he had been framed by his mother and brother due to a land dispute, an allegation that had no relevance to the offence he was charged with; that the two courts below had considered the appellant's defence and found it unreliable and finally, Mr. Nyakundi relied on the holdings in the case of ***Patrick Macharia vs Republic, Nyeri Criminal Appeal No. 120 of 2008 (unreported)*** where the appellant was caught red handed and the case of ***Michael Muriithi vs. Republic, Nyeri Criminal Appeal No. 498 of 2007 (unreported)*** where it was held that the Court could still convict where contradictions in evidence were not substantial.

We have anxiously considered the grounds raised in this appeal including submissions of counsel on each of the grounds. We agree with the appellant's counsel. The contradictions as identified by the learned counsel are in our view both real and material. To illustrate the point it is not clear why the complainant at the point of attack was not assisted by the other police officers on duty. Thus in cross examination, PW1 said that he was alone when the incident took place and a good Samaritan had phoned the police to come to his rescue at the scene. On the other hand the evidence of police constable Migwi PW 2 and Munai PW 4 was to the effect that a report of the murder was made by members of the public who apparently were never called as witnesses including those who allegedly reported the incident.

In view of the contradictory and weak nature of the prosecution's evidence as described above, we think that failure to call the members of the public who had allegedly reported the robbery, would justify the drawing of adverse inference that if they had been called they could have turned the scales in favour of the defence. Moreover, in our view the appellant's defence of fabrication stemming from a common girl friend does in a substantial way shake the prosecution case in a manner which in our view, raises a reasonable doubt concerning the appellant's guilt.

In the circumstances the inculpatory facts do not in our view irresistibly point to the guilt of the appellant and the doubt ought to have been resolved in favour of the appellant.

In this regard we re-echo the holding in the case of ***Kiragu vs Republic [1955] KLR 1*** where this Court held:-

"It is trite law that subject to certain well known exceptions a fact may be proved by the testimony of a single witness however in exercise of its duty this Court has to satisfy itself that in all the circumstance of case, it is safe to act upon it."

In view of the contradictions as set to above we hold that the conviction is not safe because it was pegged on PW1's evidence which evidence is in turn clearly self contradictory. Again it is apt to recall the holding of the Court in the case of ***Ndungu Kimanyi vs Republic [1979] KLR 282*** where the Court held:-

"The witness in a criminal case upon whole evidence is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore unreliable inordinate witness which makes it unsafe to accept the evidence."

Finally, as regards the appellant defence we think the 1st appellate court ought to have considered it at the point of re-evaluating the prosecution evidence. This was not done and as a result, we think, it does create

a reasonable doubt which should have been resolved in favour of the appellant. In the circumstances the position we have taken is underpinned by the second holding of this Court in the case of ***Ouma vs Republic [1986] KLR 619*****:**

"At the time of evaluating the prosecution's evidence, the court must have in mind the accused person defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility to the defence being true. If there is doubt the benefit of that doubt always goes to the accused person. That does not appear to have been done in the case."

We say the same here, the defence raised a possibility of a fabrication in the face of a rather troubled prosecution case. All in all, we find merit in this appeal.

In the result we hereby quash the conviction and set aside the sentence and order that the appellant be forthwith set at liberty unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nakuru this 9th day of June, 2011.

P. K. TUNOI

.....
JUDGE OF APPEAL

E. O. O'KUBASU

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR