IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 140 of 2006

SIMON KIPRONO LANGAT …… APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya

at Nakuru (Apondi & Kimaru, JJ) dated 9th March, 2006

in

H. C. Cr. A. No. 361 of 2002)

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JUDGMENT OF THE COURT

By what they designated "Judgment of the Court", Muga Apondi and Kimaru, JJ dismissed the appeal of Simon Kiprono Lang'at, "*the appellant*", hereinafter, from his conviction and sentence by a Senior Resident Magistrate at Molo who had tried the appellant and another man who is now dead on a charge of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. Upon their being convicted by the Magistrate on that charge the appellant and his deceased co-accused were duly sentenced to death. The High Court dismissed the appellant's appeal and confirmed the sentence of death. The date when the High Court judgment was delivered is not shown in the copy of the judgment we have in the record.

In all the circumstances, we think the conviction of the appellant was unsafe and cannot be allowed to stand. The trial of the appellant opened before Mr. Ng'eno, a Senior Resident Magistrate, on 7th January, 2002. Two witnesses, Emily Chepkurui Sigei (PW1) and Eunice Chepkorir (PW2) testified before Mr. Ng'eno. Their evidence was very brief and they explained how on 7th July, 2001, the appellant and another man attacked Emily and robbed her of Kshs.1900/- and the robbers then disappeared. After their evidence, the matter was adjourned and thereafter kept being adjourned for one reason or the other. Mr. Ng'eno was transferred during the pendency of the case and on 1st August, 2002, Mr. Kirui, another Senior Resident Magistrate, took over the trial. Mr. Kirui complied with ***section 200 (3)*** of the Criminal Procedure Code and the appellant told Mr. Kirui:-

"***I want the case to proceed from where it was left."***

The deceased co-accused, however, told the Magistrate:-

"***I want the witnesses recalled."***

The Magistrate then ordered that Emily and Eunice would be recalled. The Magistrate, however, proceeded to hear the evidence of the witnesses who were available in court, namely, Simon Maritim Ng'eno (PW1) and Inspector Kidwai (PW2). He thereafter adjourned the hearing which next resumed on 26th August, 2002 when Chief Inspector Paul Cheruiyot Rono (PW3), Emily Chepkurui Sigei (PW4) and Police Constable George Odera (PW5) testified. We note here that the evidence of Emily this time round was much more detailed and much more elaborate than when she testified before Mr. Ng'eno. Eunice Chepkorir again testified before Mr. Kirui as PW6. This time round Eunice said the offence was committed on 16th November, 2002 at about 2.30 p.m. Her evidence was also much more detailed than when she first testified before Mr. Ng'eno.

Mr. Githui, learned counsel for the appellant, told us that neither the trial Magistrate nor the two High Court Judges in any way attempted to deal with the inconsistencies in the prosecution case. We think that the recall of Emily and Eunice enabled the prosecution to put up a better case before Mr. Kirui than they had done before Mr. Ng'eno. Neither the Magistrate nor the superior court touched on that point. Again the two courts did not touch on the issue of Eunice saying the second time round that the offence was committed on 16th November, 2002 at 2.30 p.m. All along, the offence was said to have been committed on 7th September, 2001 at about 6.00 p.m. We are aware that witnesses are not expected to meticulously keep the dates and times when an offence is committed. But where there is such a wide disparity as between 7th and 16th and 2.30 p.m. and 6.00 p.m. some explanation should be provided for that. Neither the Magistrate, nor the superior court said anything about these matters.

Again Simon Maritim Ng'eno who was PW1 before Mr. Kirui said he had known the appellant since the appellant's youth. This witness visited the police station on his own mission the following day and he met Emily there reporting the attack on her. That shows that a day after the robbery, the police knew the persons who had been involved in the robbery and if the police had taken the trouble, Simon would have led them to where the appellant was to be found. Yet the appellant was not arrested until 15th October, 2001. No explanation was given for this and once again the two courts below did not touch on any of these issues. Mr. Githui submitted before us that had the two courts directed their mind to the issues, they may well have reached a different conclusion. We agree with Mr. Githui and must give the appellant the benefit of doubt. We accordingly allow the appellant's appeal, quash the conviction recorded against him, set aside the sentence of death and order that he be released from prison unless he is held for some other lawful cause.

Dated and delivered at Nakuru this 23rd day of April, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR