IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appel 81 of 2006

1. EVAN THOINGO MWANGI
2. JESEE MWANGI IRUNGU

3. JOHN GACHANE ALIAS BAADAYE …..… APPELLANTS

AND

REPUBLIC …….....……. RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nyeri (Khamoni J) dated 3rd February, 2006

in

H.C.CR.A. NOS. 363, 364 & 365 OF 2000)

****

JUDGMENT OF THE COURT

The three appellants and one ***David Kamau Njoroge alias Chameleon*** who was the 5th accused at the trial were convicted by Principal Magistrate's Court, Murang'a, on two counts, namely, Count 1 – robbery with violence contrary to ***section 296 (2)*** of the Penal Code and Count 2 – rape contrary to ***section 140*** of the Penal Code. They were each sentenced to death for the offence of robbery and to life imprisonment, with hard labour and 5 strokes of the cane for the offence rape. The 1st appellant ***Evans Thiongo Mwangi*** was the 4th accused at the trial while the 2nd appellant ***Jesse Mwangi Irungu*** and the 3rd appellant ***John Gachane*** were the 2nd and 1st accused respectively.

On first appeal, the superior court dismissed their respective appeals against conviction and sentence for the offence of robbery with violence. The superior court however, allowed their appeals against conviction for the offence of rape and quashed the convictions.

On 14th April, 1996 at about 8.00 p.m. several robbers (about 6–8) raided the home of ***M I*** (PW1), the complainant, at , Murang'a District. They did not find the complainant at home. However, ***MW*** (PW2) the complainant's wife, the complainant's son ***EI*** (PW4) and the complainant's three daughters – A W (PW3), ***K W***(PW6) and ***BN*** (PW7) were in the house. The complainant's wife was sleeping on a sofa set in the sitting room when the robbers broke into the house. The complainant's children hid in different places in the house when the robbers struck. The robbers however found the complainant's children and took them to the sitting room where their mother was and tied them. The robbers said that they would remain in the house until the complainant arrived.

The complainant drove into his compound at about 11 p.m. and when the robbers heard the sound of his vehicle they locked his wife and children in one bedroom after which they went outside the house and attacked him while demanding money. Thereafter, the complainant was forced into the house where the robbers stole various household goods, loaded them into the complainant's motor vehicle Reg. No. KAE 426C Toyota Corolla and drove away.

The robbery was reported at Kahuro Police Station and on the following day the complainant's motor vehicle was recovered in Maragua area. On 26th April, 1996, the complainant, his wife and children identified John Gachane Mwangi (3rd appellant); Jesse Mwangi Irungu (2nd appellant) and Evans Thiongo Mwangi (1st appellant) at different identification parades conducted by Inspector Mwenda (PW15). On or about 24th April, 1996 the 3rd appellant John Gachane Mwangi led Sgt. Francis Mwaura (PW14) to Riamungwe area where a handbag (Exh. 3) was recovered allegedly from the house of Jesse Mwangi Irungu (2nd appellant). The handbag was identified by Ephantus Irungu

(PW4) as his at the trial.

Again on 30th April, 1996, the 3rd appellant took Sgt. Francis Mwaura to Nairobi, Mathare area where a radio cassette (Ex. 2) was recovered. The radio cassette was identified by the complainant through his initials "M.I." as his. Lastly, on 6th May, 1996, the 3rd appellant made a cautionary statement to I.P. Ochieng in which he confessed the commission of the offence. However, the 3rd appellant repudiated the statement at the trial.

The three appellants denied at the trial that they committed the offences with which they were charged.

The trial magistrate evaluated the evidence and made a finding that the three appellants were identified by the witnesses during the robbery saying in part:

"*However, the court has no doubt that 1st, 2nd and 4th accused were in this robbery because the accused were in the home of the complainant for a long time about 3 hours and most of the time there was electricity light on mainly they were tying (sic) the children with ropes and as the children were being served with food by Abigael and it was because there was light in the house that they could see the child yawning and therefore decide (sic) the child was hungry and they could be fed (sic). There was light in the house and that's why P.W.1 was able to see 4th accused as he asked him for the money he was using to buy coffee. He also saw 4th accused take the hurricane lamp and he saw the 1st accused had an iron bar and he saw the 2nd accused hit him on the right arm. PW1 was also able to identify 1st, 2nd and 4th accused in an identification parade.*

It was PWII's evidence that she was able to identify the 1st, 2nd and 4th accused. She said the robbers were with them from 8 p.m. to about 11 p.m. She said 4th accused asked her to tell them where the power saw was. PWII also identified 1st, 2nd and 4th accused in the parade ……

PWIII also saw the 2nd accused as he raped her. She was able to see 1st and 4th accused when they went for her from the room where they had all been locked and they raped her ……

PW IV also confirmed there was light in the house and he was able to see the robbers".

The judgment of the superior court shows that the appellants raised four issues in their respective appeals, namely, that the evidence of identification in respect of each appellant was not satisfactory; that the identification parade was not properly conducted; that there was no medical evidence or any other evidence to corroborate evidence of the complainant in respect of the charge of rape, and, lastly, that, the trial magistrate failed to adequately consider the evidence and therefore improperly rejected the defence of each appellant. The superior court evaluated the evidence relating to the identification of the appellants and said in part:

"*We are mindful of the fact that P.W.2 and P.W.3 also purported in the lower court to have identified the 5th accused during the robbery which identification turned out to be a mistaken identification as it was discovered that the 5th accused could not have participated in the robbery as he was in custody. We find however that unlike in the case of the 5th accused, the evidence of identification of the appellants by the three witnesses was fortified by the fact that they were all able to identify each of the appellants at identification parades as confirmed by the parade officer Inspector Mwenda (PW15) whose evidence shows that the parade was properly conducted. We are satisfied that the identification of each of the appellants by P.W.1, P.W.2 and P.W.3 was reliable and free from any mistake".*

The superior court also considered the defence raised by each appellant and said:

"***Although each of the appellants denied having committed the offences, their defences which was basically denial could not hold in the light of the clear and cogent evidence adduced against them".***

Mr. Gori, learned counsel for 1st and 3rd appellants submitted on the grounds of appeal filed by the appellants in person and on the supplementary grounds of appeal. In essence, the first supplementary ground of appeal is that the 1st and 3rd appellants were in custody before they were charged for 22nd days while the Constitution allowed the police to detain the appellants for only 14 days. It was thus submitted that the appellants were detained in custody for 8 days in violation of ***section 72 (3)*** of the Constitution.

In computing the period of 22 days, the learned counsel for the 1st and 3rd appellants relied on the record of the proceedings and the charge sheet. Mr. Orinda, learned Principal State Counsel for the Republic, submitted that according to the charge sheet, the appellants were brought to court within the 14 days stipulated by the Constitution. PC. Joseph Marunda (PW9) testified that the appellants were arrested on 22nd April, 1996. The proceedings show that the appellants were taken to court for plea on 7th May, 1996. The charge sheet shows that the appellants were arrested on 24th April, 1996 and that they were due to appear in court on 6th May, 1996. Whether the appellants were arrested on 22nd April, 1996 or on 24th April, 1996 it is apparent that they were taken to court within the 14 days prescribed by the Constitution. The appellants themselves have not said otherwise. The ground of Constitutional violation is not supported by the record.

The second supplementary ground relied by Mr. Gori is that the 1st appellant was acquitted by the trial magistrate under section 210 of the Criminal Procedure Code.

It is true that on 7th May, 1996 the trial magistrate ruled as follows:

"***The court therefore rules that the prosecution did not establish a prima facie case against the accused to require them to be put on their defence. They are acquitted on the statement under section 210 C.P.C.".***

However, the record shows that that ruling was in relation to the trial within trial to determine the admissibility of statements under inquiry allegedly made by the 2nd and 3rd appellants in this appeal to Chief Inspector Nyaga. The record further shows that after the close of the prosecution case, the trial magistrate on 22nd June, 1999 ruled that the appellants had a case to answer and complied with ***section 211*** of Criminal Procedure Code.

There cannot be any confusion in this case. The "*acquittal"* of the 3rd appellant under ***section 210*** of the Criminal Procedure Code on 7th May, 1996 was in relation to the statements under inquiry and not in relation to the charges of robbery and rape.

Although a trial-within-trial should as far as possible comply with the procedure prescribed for trials, it is inappropriate to use such words as "*acquittal"*, "*conviction"* because in holding a trial-within-trial a trial the court is merely determining the admissibility or otherwise of an extra judicial statement as evidence in the trial. The task of the court at the conclusion of a trial-within-trial is simply to admit or reject the contested statement, and the issue of an acquittal does not at all arise at that stage. Although the use of the word "*acquittal"* was inappropriate in this case it has not occasioned a failure of justice.

Most of the grounds of appeal contained in the memorandum of appeal filed by each appellant in person raise factual issues particularly regarding the circumstances of identification of each appellant.

The 2nd appellant, however, has in the supplementary memorandum of appeal filed by his counsel, Mr. Muchiri wa Gathoni, raised a legal issue – that the superior court erred in law in failing to evaluate and analyse the evidence. We have already quoted the pertinent portions of the judgment of both the trial court and the superior court. It is clear that the trial magistrate considered in detail the question of the identification of each appellant and concluded that each appellant was indeed identified by several witnesses.

The issue of identification was again raised in the superior court and after exhaustive analysis of the evidence the superior court was satisfied that each of the three appellants was positively identified by several witnesses and that the identification parades were properly conducted. Thus, there are concurrent findings of the fact of the identification of each appellant. This Court can only interfere with the concurrent findings of fact if it is shown that the two courts misdirected themselves in some relevant matter.

It has not been shown that there was any misdirection by either of the two courts. Indeed, the superior court even considered a relevant matter – that although the witnesses claimed to have identified David Kamau Njoroge (5th accused) during the robbery it transpired that he was in prison custody on the date of robbery. However, as the superior court correctly observed, no identification parade was conducted in respect of the 5th accused and none of the witnesses purported to identify him at the identification parade. The superior court considered this discrepancy but was nevertheless satisfied that the identification of each appellant was reliable and free from error.

The 1st appellant Evans Thiongo was convicted on the basis of the identification by the witnesses and on the basis of recent possession of a trouser belonging to P.C. Joseph Marunda (PW 9), a boy friend of Kesiah Wairimu (PW6), the complainant's daughter. According to the evidence P.C. Joseph Marunda had given it to his girl friend Kesiah Wairimu to wash and was among the clothes stolen from the complainant's house.

The 2nd appellant Jesse Mwangi was convicted solely on the evidence of identification as the evidence that the home where the handbag was recovered belonged to him was unreliable. The evidence of identification was overwhelming and credible.

The 3rd appellant John Gachane was convicted on the basis of the identification by prosecution witnesses, the confession made to IP Ochieng and the recent possession of the handbag and radio cassette. Although the confession was repudiated, it was corroborated by the evidence of identification and the recent possession of stolen goods.

On our own analysis of the evidence, we are satisfied that the three appellants were properly convicted.

In the result, we dismiss their appeals as regards their conviction. The sentences were lawful and we have no jurisdiction to interfere.

Dated and delivered at Nyeri this 6th day of June, 2008.

R. S. C. OMOLO

……

JUDGE OF APPEAL

E. M. GITHINJI

……

JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR