



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 182 & 183 of 2005

1. MURIUKI NGURE MUNYI

2. GODFREY IRERI GITHINJI APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ.) dated 14th April, 2005

in

H.C.CR.A. NOS. 332 & 349 OF 2002)

JUDGMENT OF THE COURT

The 1st appellant *Muriuki Ngure Munyi alias Karana* and the 2nd appellant *Godfrey Ileri Githinji alias Hassan* were jointly charged with four others before the Senior Resident Magistrate Kerugoya with one count of robbery with violence contrary to **section 296 (2)** of the Penal code. The record of appeal however, indicates that the charge against the 3rd accused Reuben Muthee Maru was withdrawn on 16th March, 2000 and that it is only the two appellants and one Francis Muriithi Mwea, the 6th accused, who were prosecuted for the offence. The 6th accused was acquitted after trial. The record does not show what happened to the charge against Duncan Gikunju alias Gitu (4th accused) and Paul Gichuki Gikunju alias Kirio (5th accused). When this anomaly was noticed, the appeal was adjourned at the request of the Principal State Counsel on 31st July, 2006 and the Deputy Registrar was ordered to rectify the record.

The appeal was fixed for hearing for 22nd October, 2007. The record had not however been rectified. The appeal was again adjourned so that the Deputy Registrar could provide all the information before the next hearing of the appeal.

The Officer-in-Charge, Embu Main prison, has filed a report in court showing that Duncan Gikunju (4th accused) and Paul Gichuki Gikunju (5th accused) and others were discharged from prison on 12th August, 1999 to attend S.R.M.'s court Kerugoya but the two were not escorted back to prison on that day and that he received information from the escorting officer that the remandees attempted to escape and a shoot out ensued in which they were shot dead. The officer in charge Kerugoya Police Station has filed a report which states, among other things, that Paul Gikunju and Duncan Karimi Gikunju and others attempted to escape while being escorted from Kerugoya Law Courts to Embu remand prison on 12th

August, 1999 but were shot dead and that an *Inquest File No. 7 of 1999* was opened and later marked closed with no further action.

The *O.B. No. 12* of 12th August, 1999 of Kerugoya Police Station confirms that five prisoners including the 4th and 5th accused were shot dead as they attempted to escape.

The Senior Resident Magistrate, Kerugoya has, in addition, explained that the Court Inquest file and the Inquest Register could not be found as all criminal files were burned by an unknown arsonists on 16th March, 2003 and that the case of the 3rd accused Reuben Muthee Maru was withdrawn after he died in custody.

All this information should have been disclosed to the trial magistrate and a formal application made to terminate the proceedings against the 4th and 5th accused. That was apparently not done, hence the mystery in the record.

The death of five prisoners in what appears to be obscure circumstances is an extremely grave matter which should be thoroughly investigated by the Attorney General. As we found no evidence that such investigations were carried out, we order that a copy of this judgment be served on the Attorney General or the Deputy Public Prosecutor.

The trial magistrate convicted the two appellants of the lesser charge of robbery contrary to **section 296 (1)** of the Penal Code and sentenced each appellant to 10 years imprisonment plus 10 strokes of the cane. The appellants appealed to the superior court against the conviction and sentence. The superior court set aside the conviction for robbery contrary to **section 296 (1)** of the Penal Code and substituted a conviction for aggravated robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced each appellant to death.

The appellants' appeal to this Court is based on several grounds.

The prosecution case was dependent on the evidence of Andrew Karari Kagwi (PW1), the complainant; the evidence of identification at identification parades and on the extra judicial statement recorded from each appellant.

The background facts are as follows:

On 7th February, 1999 the complainant was asleep at his house. At about 3 a.m. the security light was smashed and it went off. Thereafter people started smashing the glass window of his house as they screamed. Three people entered into the house through the rear window. They had torches and axes. They opened the rear door and led the complainant outside where he found other robbers. The complainant was led to his shop which is about 50 metres from his house and the robbers smashed all the security lights in the vicinity. The complainant was asked to open his shop, and as he was opening, the lights from a passing motor vehicle shone on them and the robbers panicked and retreated. The complainant took that opportunity opened his shop and went to the safe to look for money. The robbers however did not enter into the shop but instead cut open the window of a neighbouring shop which they mistook to be the shop of the complainant. The robbers apparently escaped. The police went to the scene the following day. The complainant realized in the morning that the robbers had stolen a radio cassette and Shs.5,000/= from his house.

The appellants were arrested at Kutus Town by P.C. Joseph Mule (PW5) on 2nd March, 1999. On 13th March, 1999 I.P. David Wangombe (PW3) recorded a statement under inquiry from Muriuki Nguni the 1st appellant which the 1st appellant later repudiated. On 15th March, 1999, I.P. Jacinta Wangechi (PW4) conducted an identification parade where the complainant allegedly identified the two appellants. Lastly, on 16th March, 1999 I.P. Duncan Wangombe recorded a cautionary statement from Godfrey Ileri Githinji, the 1st appellant. The statement was however repudiated. The 1st appellant gave sworn

evidence at the trial. He testified that he had known the complainant for 17 years, a fact he disclosed to I.P. Jacinta Wangechi who conducted the identification parades and that the charge and the statement under inquiry were a frame up.

The 2nd appellant similarly gave sworn evidence at the trial denying that he was involved in the robbery.

The trial magistrate was satisfied that the appellants were identified by the appellants and that they confessed the offence in their respective statements.

The superior court was similarly satisfied that the appellants were properly convicted.

At the hearing of the appeal, Mr. Macharia, learned counsel for the appellant contended that since the language used in the trial was not indicated, a failure of justice was occasioned and the appeal should be allowed solely on that ground. Mr. Orinda, the Principal State Counsel conceded the appeal on this ground.

The record shows that there was an interpreter and that the appellants fully participated in the trial. They cross-examined all the six witnesses who gave evidence in depth. Moreover, the appellant made their defence, were subjected to cross-examination and they answered the questions put to them by the prosecution. They did not complain either to the trial court or to the superior court that they were not afforded facilities of an interpreter or that they did not understand the proceedings. Furthermore, the appellants have not said in this Court that the trial was conducted in a language which they did not understand.

In the circumstances of this case, the point raised about the language is in our view, without merit.

The appellants have however raised an important legal issue in the supplementary memorandum of appeal, namely, the failure by the superior court to re-evaluate the evidence and come to its own decision. In support of that ground, Mr. Macharia submitted that the two courts below did not consider whether the prevailing circumstances were favourable for positive identification.

The complainant testified that he identified the appellants with the aid of the light from security bulbs.

It is true that the trial magistrate did not consider the circumstances under which the complainant identified the appellants to find out if they were conducive to positive identification of the appellants.

However, the superior court considered the prevailing circumstances and concluded that the conditions were difficult. The superior court said in part:

“This was evidence of a single identifying witness in difficult conditions but it is believable because there is nothing to suggest that PW1 was not reliable, his claim to identify the appellants at the scene having been boosted by his identification of the appellants at the police identification parade which was properly conducted”

The identification parades were conducted on 15th March, 1999 over one month after the house of the complainant was raided. The 1st appellant in his evidence on oath discredited the identification parades. He testified that he had known the complainant for 17 years, a fact which he disclosed to I.P. Jacinta Wangechi who conducted the identification parade, and that in a previous parade the complainant had failed to identify the appellant as one of the robbers. It is clear from the evidence of P.C. Patrick Kasuku (PW6) that the appellants were not arrested because they were identified in relation to the raid on the complainant's premises. Rather the appellants were arrested with the assistance of informers after spate of robberies in Kerugoya town. Without proper identification of each appellant by the complainant during the robbery, the identification parades would have no evidential value.

The evidence of the complainant relating to the theft and to the identification of the robbers is of poor

quality. His evidence shows that the robbers smashed security lights before they gained entry into his house. It is not true therefore that he identified the robbers through the security lights. Even when he was taken to his shop which the robbers did not enter, the robbers first smashed the security lights in the neighbouring shops. Moreover, there was no concrete evidence that the complainant was robbed of any money or radio cassette. He did not say that the robbers demanded any money from him or that he gave them any money. All he said was that he had some Shs.5,000/= in the house and that when the robbers entered into his house he looked for it but could not find it.

The complainant did not give the description of the radio cassette or say where exactly it was in the house. He did not further produce any documents of ownership. He merely said that he found the money and the radio cassette missing. Further, the evidence of the amount of money that he found missing is at variance with the amount in the charge sheet. According to his evidence, he found Shs.5,000/= missing whereas the particulars of the charge sheet stated that he was robbed of cash Shs.4,000/=.

The appellants repudiated their respective confessions. Those confessions were recorded about two weeks after the appellants were arrested. It is clear that the police were investigating several robberies. The two courts below did not direct themselves regarding the evidential value of repudiated or retracted statements nor did they make specific findings that they believed the confessions to be true. The law is that a trial court should accept with caution a confession which has been retracted or repudiated or both repudiated or retracted and must be fully satisfied that in all the circumstances of the case that the confession is true (see *Tuwamoi vs. Uganda* [1967] EA 84). On own evaluation of the evidence, we are not satisfied that the prosecution either proved the theft as alleged or at all, or that the appellants were among the people who raided the complainant's home.

We are further satisfied that had the two courts below properly directed themselves on the evidence, they would have found that there was no cogent evidence to support the conviction of each appellant.

In the result, we find that the appellants were not properly convicted. Accordingly, we allow the appeal of each appellant, quash the conviction in respect of each appellant and set aside the respective sentences. Each appellant shall be set at liberty unless otherwise lawfully held.

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

S. E. O. BOSIRE

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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