IN THE COURT OF APPEAL OF KENYA

AT NYERI
Criminal Appeal 16 & 17 of 2005

JAMES MURIUKI KAMAU ……..…… 1ST APPELLANT

FRANCIS MAINA WERU ……...……. 2ND APPELLANT

AND

REPUBLIC …… RESPONDENT

(*Appeal from a Judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ) dated 18th November, 2004* In H.C. Cr. A. No. 58 & 60 of 2002)

****

JUDGMENT OF THE COURT

The two appellants jointly with one Charles Nderitu Gakuru, who died after conviction and sentence, were charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. It was alleged that on 11th February, 2001 at Rititi Trading Centre, in Nyeri District, the three jointly with others not before court, while armed with dangerous or offensive weapons, namely Toy pistol , pangas, iron bars, simis and clubs, robbed Lydia Gathigia Nyamu one B/W T.V. make Sanyo S/No. 192622, one radio cassette make Phillips S/No. 700503, one Afrigas cylinder, sewing machine head make singer S/No. 054057 and a Thermos Flask all valued at Kshs.28,300/- and that they used actual violence to the said Lydia Gathigia Nyamu during that robbery. Each appellant faced a separate count of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code.

The trial of the appellants (and their co-accused Charles Nderitu Gakuru) commenced on 13th June, 2001 before the learned Senior Resident Magistrate at Nyeri (M. Rintari Gitonga). The prosecution called a total of 14 witnesses to testify against the appellants. The appellants were put to their defence and each of them made unsworn statement in his defence.

The learned trial Magistrate considered all the evidence before her and came to the conclusion that the prosecution had proved its case against the appellants on the charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code. In convicting the appellants the learned trial Magistrate, in her judgment stated:-

"***After considering all evidence and on record I am satisfied that the prosecution have proved their case beyond all reasonable doubts (sic) regarding the accused persons and I convict them of the offence of robbery with violence contrary to section 296(2) of the Penal Code."***

As a result of the foregoing each appellant was sentenced to death as prescribed by law.

Being dissatisfied with both conviction and sentence the appellants preferred an appeal to the superior court. That appeal (which consolidated the two appeals) was placed before the superior court (Khamoni & Okwengu, JJ) for determination. That appeal was however, dismissed by the judgment of the superior court dated 18th November, 2004. In dismissing the appellants' appeal, the learned Judges stated:-

"***From the totality of all that evidence, we are satisfied that the learned trial Magistrate was justified in rejecting the defence advanced by the Appellants. Their conviction was proper and we find no good reasons to interfere with any of the sentences."***

Still dissatisfied with the foregoing the appellants have come to us by way of second and final appeal.

When this appeal came up for hearing before us on 29th October, 2007 Mr. H.K. Ndirangu appeared for the 1st appellant James Muriuki Kamau, while Mr. C.M. Kingori appeared for the 2nd appellant, Francis Maina Weru. Mr. C.O. Orinda, the learned Principal State Counsel, appeared for the State.

On behalf of the 1st appellant, Mr. Ndirangu filed a Supplementary Memorandum of Appeal citing the following four grounds:-

"**1. The superior court erred in law in upholding conviction by the learned Senior Resident Magistrate Court after finding major contradiction in the evidence proffered (sic) against the appellant.**

2. The superior court erred in law and fact in failing to come to the inevitable conclusion that there was no evidence against the appellant to sustain a conviction on robbery with violence contrary to section 296(2) Penal Code and hence wrongfully convicted the appellant.

3. The superior court erred in failing to analyze the evidence adduced and which would have led to the inevitable conclusion that the doctrine of recent possession did not apply in the circumstances.

4. The superior court erred in law in not appreciating the lower court failure to consider the defence raised by the appellant thus coming to the wrong conviction."

And on behalf of the 2nd appellant Mr. Kingori filed a Supplementary Memorandum of Appeal setting out the following six grounds:-

1. The learned trial magistrate erred in law in not recording the plea and proceedings therefrom to hear and determine the case.

2. The learned trial magistrate and the first appellate court erred in law in not proceeding in the appellant's language and failing to record the language of the proceedings.

3. The learned trial magistrate and the first appellate court failed to appreciate that there were glaring inconsistencies in the prosecutions evidence and failing to resolve the same in favour of the appellant.

4. The learned trial magistrate and the first appellate court erred in law in relying on and upholding the evidence on the recovery of the stolen items whereas the same did not satisfactorily connect the appellant with the robbery.

5. The learned trial magistrate and the

first appellate court erred in law by

placing reliance on the evidence of

identification of the appellant whereas

the same was not satisfactory.

6. The learned trial magistrate and the

first appellate court erred in law in

placing undue weight on the evidence

of p.w.3 (a minor) whereas there was

no sufficient corroboration to qualify

the same."

Mr. Orinda conceded the appeal on the ground that the language used by the witnesses was not stated and hence, in his view, there was a mistrial. Mr. Orinda went further and informed us that the State would not be asking for a re-trial.

It was rather unfortunate that the learned trial Magistrate did not indicate what language was used by various witnesses who testified before her. The trial court's record shows that the witnesses were sworn but there was no indication as to what language was used.

Sample this:-

"***PW1 sworn/states:***

I am Lydia Gathigia Nyamu from Rititi. I am a teacher at Kianjogu Secondary School……."

"***PW2 sworn/states:***

I am Michael Mumenya Nyamu. A pupil at DEB Karatina in Standard 2……..."

The foregoing pattern was repeated in respect of all the witnesses and even the appellants. The second witness was a minor but the record shows that he was interviewed and that the court was satisfied that he could give evidence. The record does not indicate how the minor was interviewed. The correct procedure to be followed when children are tendered as witnesses was set out by this Court in **Johnson Nyoike Muiruri vs. Republic [1982-88] 1 KAR 150**.

The above was cited with approval in the recent decision of this Court in **Kinyua vs. Republic [2003] KLR 301**.

Apart from failure to state the language used it would appear that there were difficulties in evidence itself. This was detected by the learned Judges of the superior court who stated as follows in the course of their judgment:-

"***We have found it difficult to see coherence on consistency in parts of the prosecution's case."***

And towards the end of their judgment the learned Judges expressed themselves thus:-

"***As we indicated at the beginning, coherence or consistency lacked in some aspects of the evidence adduced. It now emerges that the problem was not only on the side of the prosecution. It was also on the side of the Appellants."***

In view of the foregoing we are satisfied that the appellants were not only subjected to a mistrial but were convicted on rather unclear evidence. We are therefore in agreement with the learned Principal State Counsel when he conceded the appeal. Accordingly the appeal is allowed, the conviction quashed and the sentence of death set aside. The appellants are to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 2nd day of November, 2007.

P.K. TUNOI

……

JUDGE OF APPEAL

E. O. O'KUBASU

…….

JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.