IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 49 & 66 of 2001

1. JOSEPH CHUMA MUNYI

2. STEPHEN KINYUA GACHOKI ……….......…………… APPELLANTS

AND

REPUBLIC ……………………………… RESPONDENT

(Appeal from a judgment from the High Court of Kenya at Nyeri (Juma & Tuiyot JJ) dated 1st December, 2000

in

H.C.CR.A. NOS. 402, 403, 404, 405 & 406 OF 1998)

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JUDGMENT OF THE COURT

The two consolidated appeals herein were brought by ***JOSEPH CHUMA MUNYI*** and ***STEPHEN KINYUA GACHOKI*** respectively, to challenge their convictions for the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. It had been stated by Kerugoya Senior Resident Magistrate Mr. Njage, before whom they were tried, that the two appellants together with three other persons, had been charged with three counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. As we shall see shortly, the appreciation of the trial court about the charges facing the appellants was erroneous. Nevertheless, the court found the appellants and their co-accused, guilty of the lesser offence of simple robbery contrary to ***section 296 (1)*** of the Penal Code, because, as explained by the trial magistrate, "*it did not come out clearly in the evidence the nature of the weapons the accuseds were armed with during the commission of the offence*". In his view, unless the offender was armed with a dangerous or offensive weapon or instrument, there was no aggravated robbery. They were each sentenced to serve 10 years imprisonment and to suffer five strokes of the cane. They were also ordered to be under police supervision for 5 years on completion of the sentence.

The appellants and the co-accused appealed to the superior court against their convictions and sentences. The superior court (Juma & Tuiyot, JJ.) also fell into the same error as the trial court in appreciating the charges facing the appellants. The court said they were all charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The appellants were warned about the possibility of enhancement of their sentences if their appeals were unsuccessful but they proceeded.

In the end, the appeals of the appellants' co-accused were allowed and they were set at liberty. The appeal of ***Joseph Chuma Munyi (Munyi)*** against conviction in counts 1 and 2 was dismissed but was allowed on count 3. The conviction on the two counts was however enhanced to aggravated robbery since the robberies were committed by more than one person, on the authority of ***Johana Ndungu v Republic***, Criminal Appeal No. 116 of 1995 (unreported). He was sentenced to death. The appeal of ***Stephen Kinyua Gachoki (Gachoki)*** was allowed on counts 1 and 3. It was however dismissed on count 2 and enhanced to aggravated robbery. He too suffered the death penalty on that count. It is against that decision that the two appellants come before us on a second appeal. As such, only points of law may be raised.

The most glaring point of law is the misapprehension by the two courts below of the nature of the offences that faced the appellants in their trial. We must now advert to the charge sheet, which is on record. It was a substituted charge signed by the trial magistrate on 13th February, 1998, containing three counts and two alternative counts. Both appellants were charged in count 1 with the offence of robbery contrary to ***section 296 (2)*** of the Penal Code. In counts 2 and 3, both appellants were charged with the offence of robbery contrary to ***section 296 (1)*** of the Penal Code. Only the appellant, Munyi, faced the alternative charge of handling stolen goods contrary to ***section 322 (2)*** of the Penal Code but no findings were made on that charge by the two lower courts for the obvious reason that there were convictions on the main counts. There was no basis therefore for the statement by the two courts below that the appellants were charged with three counts of aggravated robbery. It follows that the appellant, Gachoki, could only have been convicted for simple robbery and the purported enhancement of his sentence by the superior court was unlawful. So was the enhancement of the conviction of the appellant Munyi on count 2. Learned Principal State Counsel Mr. Orinda readily conceded the appeal on those counts, and rightly so.

Learned counsel for the appellants Mr. Gichimu, however, sought to persuade us that even the conviction of Munyi for aggravated robbery on count 1 and the conviction of Gachoki for simple robbery on count 2 were erroneous in law. That is because there were confessionary statements recorded from the two appellants which were not properly admitted in evidence and were relied on without corroborative evidence; secondly, there was no re-evaluation of the evidence by the superior court, otherwise the contradictions in the evidence on record would have become obvious. What evidence led to the appellants' conviction?

The complainant in count 1, ***Joseph Gikunju Gatimu*** (PW1) owns a Toyota Hilux Pickup Reg. No. KUP 507. He was sleeping in his house in Gatuto village, Kirinyaga on 11th October, 1997 when at about 1.30 a.m. he was woken up by dogs barking and his watchman's screams. Suddenly the windowpanes and the main door of his house were smashed with stones and several people burst in flashing torches. They were asking for money and his car keys. He gave them the keys and some Shs.5,000/= and they drove off in his pickup. His watchman, ***Daniel Mutuma*** (PW2) had earlier been set upon by the same robbers, hit with a club and cut on the head with a panga. He became unconscious and was later taken to hospital for treatment. Neither PW1 nor PW2 could identify any of the robbers, but they recorded statements at Kerugoya Police Station.

The stolen vehicle was used to carry out two other robberies that same night. At about 2.30 a.m. it was driven to Kiamichiri market in Kabare location where ***Peterson Muriithi Njogu*** (PW3) owns a wholesale shop christened "*Master Enterprises*". The robbers called out PW3 who woke up screaming for help as they started breaking the door of his shop. He climbed into the ceiling and hid there as the robbers ransacked his shop and took away assorted shop goods. Inside the shop was also a Sony television set and a JVC video cassette deck belonging to ***David Wachira*** (PW4). Wachira had a video-show business in the market and used to store those items in PW3's shop. PW3 did not identify any of the robbers but reported the matter to Kerugoya Police Station.

The same night, the robbers hit the home of ***Teresiah Wanjiku Njenga*** (PW7) where her son, ***Sylvester Ngugi Njenga*** (PW5) was sleeping. He was woken up by a loud bang on the door and the robbers burst in. They stole various items including a radio speaker, shoes, mattresses, traveling bag and a wrist watch. The items were loaded into the vehicle and the robbers drove off. Neither PW5 nor PW7

identified any of the assailants. The matter was once again reported to Kerugoya Police Station.

Some ten or so days later, on information received, policemen from Kerugoya Police Station including ***IP David Wagombe*** (PW10) and ***Pc Francis Marimba*** (PW11) arrested the appellant, Munyi. From information given by Munyi during interrogation and in a confessionary statement under inquiry, the motor vehicle stolen from PW1 which Munyi confessed to have driven during the robbery was recovered in Mwea area of Kirinyaga. Also recovered were the motor vehicle's radio-cassette, a TV. set, video cassette deck, speaker and a carton of shop goods (cigarettes and chocolate packets). The car radio cassette in particular, was recovered in possession of Munyi. He also mentioned his other co-accused and led the police to the arrest of the second appellant, Gachoki. All the recovered items were positively identified by their owners, PW1, PW3, PW4 and PW5.

Gachoki too gave a charge and cautionary statement to ***IP Wilson Kamunde Kinyanjui*** (PW8) on 31st October, 1997. In it, he confessed the robberies at the shop of PW3 and at the home of PW5. As regards some of the shop goods – cigarettes and chocolates – it was the evidence of ***Peter Ngugi Kori*** (PW6), a shopkeeper at Kiage market in Kinyekine location, Kirinyaga, that in the middle of October 1997, two youngmen whom he identified in court as Munyi and Gachoki, took some two cartons containing Rooster cigarettes and Cadbury's drinking chocolate to his shop. They offered them for sale to him but he declined three times. The two persons however left the cartons there. On the third day, the police came to his shop in the company of Munyi. They asked about the two cartons which were said to have been sold to him but he denied having bought them although they were still in his shop. He gave them over to the police. Munyi had in his confessionary statement stated that he and Gachoki had sold the cigarettes and chocolates to PW3 who had paid them some Shs.3,000/= in two instalments.

Both Munyi and Gachoki repudiated the confessionary statements made to the police. It was not a retraction of statements made under vitiating circumstances, but a total denial that they ever made any extra judicial statements to the police. They asserted that the statements sought to be produced were concocted by the police officers who recorded them. Trials within the trial were however held and the statements were admitted in evidence.

It is trite that a repudiated or retracted confessionary extra judicial statement requires corroboration unless the court is otherwise satisfied that it is true. As this Court stated in ***Komora v Republic*** [1983] KLR 583 citing with approval, ***Tuwamoi v Uganda*** [1967] EA 84:

"***We would summarize the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".***

We think the two lower courts below were alive to the principles stated above and they sought corroboration for the confessionary statements. The trial court stated:

"***In the charge and caution statements and the statement under inquiry it is vividly narrated how the five accused jointly with others not in court, planned and executed the robberies. I am unable to believe that they are being framed. The 1st and 3rd accused persons even attempted to sell some stolen shop goods to PW6 Peter Njugi Kori. I believe him to be a faithful and reliable witness. I am satisfied that he told the truth. His evidence is corroborated by the confession given by accused No. 1 and accused No. 3".***

And the superior court stated:

"***The evidence against JOSEPH CHUMA MUNYI was that he was found in possession of a radio***

belonging to Joseph Gikunju Gatimu shortly after the robbery. In a charge and caution statement he stated how they stole the Pick-up and how he removed the radio from the said motor vehicle. Joseph Gikunju Gatimu testified how he identified his radio. We are satisfied that he was properly convicted on the First Count.

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As regards the 5th Appellant, Stephen Kinyua Gachoki there was no sufficient evidence to connect him with counts 1 and 3. There was however sufficient evidence to connect him with count 2. It was him and Appellant 3, Joseph Chuma Munyi, who had gone to sell the two stolen cartons of cigarettes and chocolate drink to PW6. The two cartons had recently been stolen. He was properly convicted on this count".

We have carefully considered the issue relating to the confessionary statements made by the two appellants and we are of the view that they were properly admitted in evidence after trials within the trial. We are of the further view that the statements are not only corroborated by other independent evidence on record but also that support for the appellants' complicity in the crime is found in the respective confessionary statements of the two appellants which were admitted in evidence and we are entitled to take that into account. This Court stated in ***M'Riungu v Republic*** [1983] KLR 455 that:

"***A confession by one accused person which imputes complicity on the part of his co-accused in the offence charged may properly be taken into account against the co-accused as well as against the maker of the confession where that confession has been found admissible and proved (Evidence Act (cap 80) section 32 (1). The first appellant's confession, though it had been repudiated, had been amply corroborated by the evidence of the recognition during the robbery of the first appellant by the victim of the robbery and further reference to his complicity in the offence was made in the confession of the fourth appellant which could properly be taken into account against him".***

On a proper consideration of the facts on record, all the circumstances of the case, and the principles of law applicable, we find nothing in law to fault the two courts below on their reliance upon the confessionary statements made by the two appellants. That ground of appeal fails.

As for the complaint that the evidence was not re-evaluated by the superior court, it is trite that an issue of law arises in such event – ***Okeno v Republic*** [1972] EA 32. It is not the duty of this Court however, on a second appeal to interfere with concurrent findings of fact made by the two courts below unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. See ***M'Riungu v R*** (supra). Such was the evidence that the stolen goods were recovered by the police on information received from the appellants and that the items were positively identified by their respective owners. The only point raised by Mr. Gichimu is that the cartons of cigarettes and chocolates were not proved to have been stolen from PW3 who had said in evidence that his shop goods were not recovered, and they were not found in possession of the appellant, Gachoki. But the damning aspect in that respect was the confessionary statement of Munyi which found independent corroboration from the witness Kori, PW6. Kori was believed by the two courts below and particularly the trial court which had the advantage of gauging his credibility by watching his demeanor and hearing him testify. We have no reasons to disbelieve him at this stage. We think there is no merit in that ground of appeal either, and we reject it.

What is the upshot of this appeal?

1. We dismiss the appeal of the appellant Joseph Chuma Munyi on count 1 and confirm his conviction thereon and the sentence of death imposed on him.

2. We allow the appeal of the appellant Joseph Chuma Munyi on count 2 and set aside the conviction and sentence imposed thereon.

3. We allow the appeal of the appellant Stephen Kinyua Gachoki on count 3 and set aside the

conviction and sentence imposed thereon by the superior court. We substitute therefor the conviction imposed by the trial court, that is to say, for robbery with violence contrary to section 296 (1) and uphold the sentence of imprisonment and other orders imposed by the same court. The amendments made in the Criminal Law (Amendment) Act 2003 which came into effect on 25th July, 2003 came too late for the appellant to escape the application of corporal punishment.

The sentence of ten years imprisonment is to run from the date of the magistrate's judgment.

We thus interfere with these appeals to the extent stated above, but otherwise, they are dismissed.

Dated and delivered at Nyeri this 12th day of May, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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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