



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 15 OF 2005

JAMES MWANGI KARURU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu JJ) dated 7th October 2004

in

H.C.Cr. Appeal Nos. 455 & 468 of 2002)

JUDGMENT OF THE COURT

The appellant was convicted by the Principal Magistrate, Muranga, of three counts namely robbery with violence contrary to **section 296(2)** of the Penal Code, in count 1; burglary and stealing contrary to **sections 304(1)** and **279 (b)** of the Penal Code in count II and shop-breaking and stealing contrary to **section 306(a)** of the Penal Code in count III. He was sentenced to death in count 1; 5 years and 5 strokes of the cane in count II and 5 years and 5 strokes of the cane in count III. We note in passing that the learned magistrate erred in imposing one sentence in count II. The learned magistrate should have imposed sentence for the offence of Burglary contrary to **section 304 (1)** and a separate sentence for the offence of stealing contrary to **section 279(b)** of the Penal Code. The sentences imposed in the two courts should have been ordered to run concurrently.

His appeal to the superior court against the conviction and sentence was dismissed save that sentence of corporal punishment in count II and III was set aside. This is therefore a second appeal.

Washington Waweru (PW2), complainant in count II runs a bar at Wathenge trading centre in Muranga District. He had employed Hellen Njeri Wachira (PW1), complainant in count I (Hellen) as a barmaid. On 19th May, 2001 the bar was closed at 11.00p.m and Helen gave PW2 Kshs. 2,900 being the collection for the day. PW2 went to his house and Helen went to her room behind the bar. Later in the night the door of Helen’s room was broken with a big stone and three men entered into the room. They hit her on the head and demanded money. The robbers searched the room for money and stole 22 assorted beers and Kshs. 298. PW2 left his house and went to the bar when he heard a loud bang. Meanwhile, Helen led the robbers to the house of PW2 where the robbers searched the house for money. When PW2 returned to his house, he found the house broken into and the Kshs. 2,928 which he had left stolen. The breaking into the house of PW2 and the theft of the Kshs. 2,928 is the subject of count II.

On the morning of 20th May, 2001, Dickson Muchiri Mwangi (PW3) complainant in count III found his shop at Thuita trading centre broken into and various shop goods stolen. He reported at Iruri Chief's Camp. APC Njogu of Iruri Chief's Camp (PW5) to whom the reports were made went to the house of the appellant on the same morning and searched it. He found some properties in a nylon sack kept under the bed. He questioned the appellant. The appellant said the goods were his. On interrogation, the appellant took PW5 to the shamba where other properties were recovered hidden in holes at three different places. The appellant was arrested. Some of the recovered properties were identified by PW1 and PW2 as stolen from bar while PW3 identified others as stolen from his shop. On 25th May, 2001 the appellant made a statement under inquiry to IP Burudi (PW8). The statement which was a confession was repudiated at the trial. It was however admitted as evidence after trial –within-trial. At the trial, the appellant gave sworn evidence relating to the circumstances of his arrest and said that he learnt of the charges in court which he was not aware of.

The trial magistrate believed the evidence that some of the stolen properties were recovered from the house of the appellant and that the appellant led PW5 to the recovery of other stolen properties hidden in the farm of the appellant. He found that the repudiated statement was corroborated by the recovery of the stolen goods. The superior court re-evaluated the evidence and said in part:

“regarding the first appellant therefore, PW5 and his colleague searched the home on 20th May, 2001 and the items which had been stolen during the previous night recovered from the first appellant. Those alleged stolen from the shop of PW3 Dickson Muchiri Mwangi, were positively identified by him. Bottles of beer had been taken during the robbery incident only. The number of bottles recovered and the manner in which they had been hidden indicate they were not bottles an ordinary person was keeping in the ordinary way of life. They were recovered on 20th May 2001 during the day having been robbed the previous night so were shop goods relating to count III. They were recovered together meaning the robbers in count I were the thieves in count III.

Those were the same people PW1 led to the house of PW2 and they stole Kshs.2,920/- from that house”

The superior court agreed that the repudiated confession was corroborated by the evidence of PW5 relating to the recovery of stolen properties.

There are five grounds of appeal which Mr. Ng'ang'a learned counsel for the appellant argued together. The three main grounds of appeal are:-

1.
2.
3. **That the High Court Judges erred in law in upholding the judgment as apt on (sic) the weight of confessional statement that was retracted or obtained contrary to the Judges rules.**
4. **That the High Court Judges erred in law in upholding the lower court judgment but failed to observe that a relevant fact to corroborate the evidence of recovery lacks.**
5. **That the High Court Judges erred in law in upholding the death sentence and 5 years whilst the prosecution failed to summon crucial (sic) witnesses.**

In this case, none of the three complainants identified the robbers. The conviction of the appellant was wholly dependent on the recent possession of stolen goods and his confession. On the finding that an accused person was in possession of property recently stolen in the absence of any explanation by the accused to account for his possession a presumption of fact arises that the accused was either the thief or a receiver - see **Andrea Obonyo v. R. [1962] EA 542**. The law on the weight to be given to a repudiated confession is now settled – see **Tuwamoi v. Uganda [1967] EA 84**. The Court said in that case at page 91 para F, G:-

“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”

There are concurrent findings of fact by the two courts below that some goods were recovered in the house of the appellant in a sack kept under the bed. There was also concurrent finding of fact that the appellant led PW5 to his farm where a large quantity of stolen goods were recovered. There was ample evidence which was believed by the two courts below that some of the recovered goods were identified by PW1 and PW2 as the goods that Helen was robbed of and that the rest of the goods were shop goods which PW3 identified as the ones stolen from his shop. The appellant did not in his evidence refer to the evidence of the recovery of the goods nor give any explanation of how he obtained possession of the goods. The findings of fact were based on the credibility of the evidence of PW5. The trial magistrate was in a better position to assess the credibility of the witness. (see **Ogol v Murithi 1985 KLR 359**. There are no grounds for upsetting the concurrent findings of fact on the recovery of the stolen goods. The appellant was found in possession of the stolen goods a day following the robbery. A presumption of fact arises that he was in the circumstances of this case one of the people who stole the goods.

The confession was sufficiently detailed. The two courts below believed that the confession was voluntary and true. Moreover, the two courts below correctly found that the confession was amply corroborated by evidence of the recent possession of the stolen goods by the appellant.

The conviction of the appellant was based on overwhelming evidence and we do not find any merit in the appeal.

The appellant was sentenced to imprisonment in addition to the sentence of death. It is inappropriate to pass both custodial sentence and sentence of death at the same time. The prison sentences should be set aside. For those reasons, we dismiss the appeal but we set aside the custodial sentences imposed in count II and III.

Dated and delivered at Nyeri this 4th day of August, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E. O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR