IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 40 OF 2005

NAHASHON KARURI KARUE ……..……..……. APPELLANT

AND

THE REPUBLIC …….....…..…….. RESPONDENT

(Appeal from the Judgment and decision of the High Court

of Kenya at Nyeri (J. M. Khamoni & H. M. Okwengu, JJ) dated 14th October, 2004

in

H.C.CR. APPEAL NO. 453, 452, 412)

****

JUDGMENT OF THE COURT

This is a second appeal from the judgment of the superior court (J.M. Khamoni and H. M. Okwengu JJ) dated 14th October 2004. The superior court judgment relates to three consolidated first appeals from the decision of the Senior Magistrate's Court at Karatina (Mr. S. N. Nyagah S.R.M.) in Criminal Case No.445 of 2002 dated 3rd October 2002.

There were three accused persons in Criminal Case No. 445 of 2002 namely Nahashon Karuri Karue (hereinafter "***Nahashon***") who was the 1st accused, Godfrey Githui Karue (hereinafter "***Godfrey***") who was the 2nd accused and Ifraim Ngare Theuri (hereinafter "***Ifraim***") who was the 3rd accused. They were jointly charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code and all three were convicted after a trial, and sentenced to death that being the mandatory sentence for this offence.

The three accused appealed separately to the superior court in Criminal Appeal Case No.412 of 2002 in which the appellant was ***Ifraim***, Criminal Appeal Case No.452 of 2002, in which the appellant was ***Godfrey*** and Criminal Appeal Case No.453 of 2002 in which the appellant was ***Nahashon.***

The superior court in its judgment allowed the appeals of ***Ifraim*** and ***Godfrey*** and dismissed the appeal of ***Nahashon*** who then appealed to this Court.

The particulars of offence in the Charge Sheet relating to the three accused were as follows:-

*"**On the 25th day of July 2002 at Ngandu village in Nyeri District of the Central Province, jointly***

with others not before the court and while armed with dangerous weapons namely iron bars simis and knives, robbed Christopher Gathua Mukiri of a mobile phone make Siemens A 36, a charger and cash Kshs.500 all valued at Kshs.5,700 and at or immediately before or immediately after the time of such robbery used actual violence to the said Christopher Gathua Mukiri."

There was an alternative charge against ***Nahashon*** and ***Godfrey*** of handling stolen goods contrary to ***section 322(2)*** of the Penal Code relating to the same mobile phone and charger. This alternative charge was not referred to in the trial court or the superior court.

A petition of appeal was filed in the superior court on behalf of ***Nahashon*** on 15th October 2002. It contained the following four grounds:-

1. That I pleaded not guilty to the charge.

2. That the learned trial Magistrate grossly erred in both points of law and facts in overlooking that this incident was predecessed by a drinking party which left all parties concerned blurred and unable to offer sound judgment of the occurrences of that day.

3. That the parties concerned (Accused & Complainant) here in are friends to each other and relatives and could not have had any intent to commit a crime and at the same time drink together in an open bar.

4. That I am very naïve in matters of law hence my defence greatly lacks in material particulars.

5. That my willingness and voluntary nature to the recovery puts to light my remorsefulness to the occurrence of that day if there was any.

6. That the complainant's resitation in leading to my arrest shows that there existed no bad blood or suspicion of evit intent to warrant an attack on him by the accused persons.

7. I pray that this case be treated as a misdemeanor caused by intoxication and judged as such.

Mr. J. Macharia, learned counsel for the appellant ***Nahashon*** before this Court, relied on Grounds of Appeal filed on 31st July 2006 containing the following five grounds:-

1. The learned Judges erred in law in not addressing themselves to the alternative charge of handling stolen goods which required a finding thereon to decide whether the appellant was a thief or a handler.

2. The learned Judges having found that the complainant was drunk to the extent of possibly not being able to recognise the 1st appellant (sic), they went wrong in not giving the present appellant (sic) the benefit of the same doubt since the present appellant had explained that there were assailants other than the ones that were charged in the Senior Resident Magistrate's Court.

3. The learned Judges erred in law in failing to fully or adequately evaluate the case and the law involved.

4. It was unclear in the judgment of the Learned Judges' decision finding the present appellant guilty of robbery with violence whether they were referring to another person or to the present appellant.

5. The Learned Judges erred in not finding that the prosecution had not proved its case beyond reasonable doubt as required by law.

The superior court accurately summarised the prosecution case in these terms:-

"***The prosecution evidence was that on 25th July 2002 the complainant Christopher Gathua Mukiri***

was drinking at Karumaindo Bar at Ngando Trading Centre where he met the three appellants. He knew them well as 1st Appellant (i.e. Ifraim) was his former student and the 2nd and 3rd Appellants (i.e. Godfrey and Nahashon) his relatives. He bought them beers and they went on drinking up to 9.00 a.m. after which they moved to another bar leaving behind Robert Rimiru Gitonga (P.W.2) who had joined them at Karumaindo Bar. They did not stay long at the second Bar but left soon thereafter with the three appellants escorting the complainant.

On the way the three appellants turned on the complainant and attacked him cutting him on the right hand and head, stabbing him on the waist and also hitting him with a metal bar. The complainant fell down and became unconscious. He later regained consciousness and found his Siemens 36A mobile phone and its charger missing from his pocket as well as Kshs.500/-. He reported the matter at Kiamacimbi Police Station and was treated at Karatina District Hospital.

On 26/7/02 the complainant reported the matter to Cpl. David Kamonde (P.W.4) who was then attached to the flying squad at Karatina Police Station. P.W.4, P.W.2 and other police officers accompanied the complainant to the scene. Before they reached the scene however, the complainant saw and identified the 1st Appellant (*this was Ephraim****) as one of the three people who attacked him. The 1st appellant was arrested and taken to Kiamacimbi Police Station.***

On 29/7/02 Ephantus Kinyua Githaiga (P.W.3) met the complainant at Kiawarigi Trading Centre and learnt that the complainant was looking for the 2nd and 3rd appellants. P.W. 3 sent out feelers and traced the 3rd appellant *(this was Nahashon)* ***and managed to apprehend him..... P.C. James Ngatia (P.W.5) went to Kiamwangi Trading Centre and re-arrested the 3rd appellant. Upon interrogation the 3rd appellant*** *(Nahashon)* ***took P.W.5 and P.W.3 to his home to a place underneath some fence posts behind his house where the mobile phone was recovered. The 2nd appellant*** *(Godfrey)* ***who was also found at the home was also arrested. On further interrogation the 2nd and 3rd appellants*** *(Godfrey and Nahashon)* ***led the officers to a place on the path leading to the shamba where the charger was hidden in a hedge. Both the phone and the charger were identified by the complainant who produced a receipt for the items. The complainant was subsequently examined by P.W.6 a Clinical Officer at Karatina District Hospital who found that he had healed cut wound scars on the left orbital region, left cheek, loose teeth and healed scar on the scalp and right hand.....”***

In their respective defences ***Nahashon***, ***Godfrey*** and ***Ifraim*** had each made unsworn statements.

Ifraim denied any knowledge of the offence.

Godfrey explained how the police went to his home and removed a mobile phone from his house and thereafter arrested both ***Godfrey*** and ***Ifraim***.

Nahashon explained that on 31/7/02 he found the complainant drinking at Karumaindo Bar. The complainant bought him 8 glasses of beer and both the complainant and ***Nahashon*** became very drunk. ***Nahashon*** claimed that he was escorting the complainant home when the complainant was beaten by two people. Nahashon said that he tried to help the complainant but he, ***Nahashon*** was also beaten.

Nahashon further claimed that it was not until the next morning that he discovered that the complainant had given him a mobile phone when they were drinking in the Bar. Three days later ***Nahashon*** was arrested. At that time he still had the mobile phone which he had not given back to the complainant. He denied that he had stolen it from the complainant. ***Nahashon*** claimed that before then “*the complainant had been giving me even money for me to keep after he got drunk. The complainant was coming for it later on.”*

The superior court stated that it had reconsidered and evaluated the evidence and went on to say:-

“***We find that as concerns the 1st appellant*** *(Ifraim),* ***the evidence implicating him is the fact that he***

was one of the three men seen by P.W.2 leaving Karumaindo Bar with the complainant and the complainant claimed that the three men turned on him and attacked him. It is clear that the complainant had been drinking for some hours and was therefore drunk. In the absence of some other supporting evidence we would be hesitant to accept the complainant's evidence that the 1st appellant *(Ifraim)* ***was one of the three men who attacked him as the possibility of the complainant's judgment having been clouded by alcohol cannot be overlooked. Indeed the complainant admitted that he did not mention the 1st appellant when he went to make his initial report at the Police Station. It is true that the complainant had reason to be suspicious of the 1st appellant however suspicion no matter how strong is not evidence. Although there is sufficient evidence that the 1st appellant left Karumaindo Bar with the complainant there was some doubt as to whether the 1st appellant was still in the company of the complainant at the time of the robbery. The benefit of this doubt ought to have gone to the 1st appellant. We find therefore that the conviction of the 1st appellant was not safe."***

The superior court then turned to consider the position of ***Nahashon,*** the 3rd appellant before the superior court and the sole appellant before this Court.

The superior court was satisfied that ***Nahashon*** was one of the people who attacked the complainant and that he was not alone. The superior court concluded that ***Nahashon's*** evidence was not truthful and was rightly rejected and went on to find that the conviction against him was therefore safe.

The superior court completed its judgment by saying:-

"***We therefore find that the prosecution did not establish the case against the 2nd appellant*** *(Godfrey)* ***beyond reasonable doubt. The 2nd appellant's conviction cannot therefore stand.***

The upshot of the above is that we do allow the appeals in respect of the 1st and 2nd appellants. *(Ifraim and Godfrey).* ***We quash each of their convictions and set aside the sentence imposed. We order that each shall be set free unless otherwise lawfully held.***

As concerns the 3rd appellant *(Nahashon)* ***his appeal is dismissed in its entirety."***

There were concurrent findings of fact by the trial court and the superior court, which we agree with, to the effect that Nahashon was not telling the truth. The Senior Resident Magistrate was emphatic that he had no doubt that the mobile phone was found behind the house of the first accused Nahashon and that it was Nahashon who pointed out where it was hidden beneath some fence posts. He also found that there was no truth in Nahashon's claim to have been given the phone by the complainant to keep it for him. If that had been true it is our view that there would have been no reason for him to have hidden the phone and charger outside.

The Senior Resident Magistrate had the advantage of seeing the demeanor of the witnesses. We have not discerned any error of law in his judgment or that of the superior court.

For these reasons we hereby dismiss the appeal.

Dated and delivered at Nyeri this 27th day of October, 2006.

S.E.O. BOSIRE

……

JUDGE OF APPEAL

P. N. WAKI

……

JUDGE OF APPEAL

W. S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR