REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 100 of 2005

STEPHEN KARIUKI WANGARI ……..…… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice Lessit and Ochieng) dated 23rd September, 2004

in

H.C.CR.A. NO. 744 OF 2001

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JUDGMENT OF THE COURT

On *28th June, 2001*, ***Stephen Kariuki Wangari***, the appellant herein, was convicted and sentenced to death on one count of robbery with violence contrary to ***section 296(2)*** of the Penal Code and the particulars of the charge were that on *11th February, 2001* at 9:00 p.m. at Majengo Estate in Thika, jointly with another not before the Court, while armed with a knife, they robbed ***Mwaniki Nganga*** of cash *K.Shs.300/=* and that during the robbery they used actual violence to the said Mwaniki Nganga. It appears that from the single conviction and sentence, the appellant filed two separate appeals in the superior court. The first appeal was registered as ***Criminal Appeal No. 738 of 2001***; the second one was registered as ***No. 744 of 2001***. Why the appellant chose to file two appeals at about the same time is a matter upon which we can only speculate.

Criminal Appeal No. 744 of 2001 was heard by *Lessit, J.* and *Ochieng, Ag.J.* (as he then was) on *1st July, 2004*. The two learned Judges reserved their judgment and eventually delivered it on *23rd September, 2004*. They dismissed the appeal against the conviction and sentence. Then some two years later, the appellant, through his then advocate revived ***Criminal Appeal No. 738 of 2001*** which had been left lying dormant. That appeal was heard by *Makhandia and Lessit, JJ* and by their judgment dated *13th June, 2006*, the two learned Judges allowed the appeal, quashed the conviction, set aside the sentence and ordered the release of the appellant unless he was held for some other lawful cause. Since the appellant was from prison when he appeared before us on *7th November, 2006* during the hearing of his appeal from the judgment of *23rd September, 2004*, it is clear to us that despite the order for his release in the judgment dated *13th June, 2006*, the prison authorities must have thought they had good cause for not releasing the appellant as his appeal had been dismissed by the High Court on *23rd September, 2004*.

We entirely agree with the stand taken by the prison authorities. The High Court, having dismissed the appellant's appeal on *23rd September, 2004*, became *non functus officio* and had no jurisdiction to hear another appeal from him unless their judgment of *23rd September, 2004* was, for some other lawful cause, set aside either by the High Court itself or by this Court. Nothing like that had happened and accordingly the hearing of ***Criminal Appeal No. 738 of 2001*** and the judgment consequent upon that hearing were all null and *void ab initio* and this Court must treat the second judgment with the contempt it deserves. We shall wholly ignore the second judgment dated *13th June, 2006*; in law, that judgment does not exist.

The appeal before us, however, is brought against the first judgment dated *23rd September, 2004*. The grounds of appeal contained in what the appellant designated as "Petition of Appeal" filed in the "*High Court"* on *4th October, 2004*, were three, namely:-

> "***1. That the learned judges erred in law in finding identification made by the complainant to have been correct without scrutinising closely the circumstances under which the same was made.***
>
> ***2. That the learned judges erred in law by failing to consider that there existed no conclusive evidence to link me with the commission of the said crime or to exclude the possibility of error or mistake in the purported identification.***
>
> ***3. That the learned judges erred in law in finding the charge proved against me whilsh (sic) there was no conclusive investigation done to prove beyond reasonable doubt my alleged involvement."***

These were the grounds heard and dismissed by *Lessit, J.* and *Ochieng, Ag. J.* on *23rd September, 2004*. The crime of which the appellant was convicted took place at 9 p.m. and according to Mwaniki Nganga, the victim of the crime, two people were involved in the attack upon him. He did not know any of the two. The appellant was arrested by the local Assistant Chief ***(P.W.2.)*** and his youth winger ***(P.W.3.).*** They said the appellant came upon them as he was being chased but they did not say how far appellant was from the scene where the complainant had been stabbed and how long it took the complainant to get to the scene where the appellant had been arrested. None of the people who were said to have been chasing the appellant was called to say that he had seen the appellant running away from the scene of the attack and that he followed the appellant from the scene of the attack upto where he found him under arrest by the Assistant Chief and his assistant. In a two page judgment, the trial magistrate merely recited the evidence given by the three witnesses and then concluded that there was some moonlight and, therefore, the complainant was able to identify the appellant. The superior court, in a three page judgment, confirmed the conclusions reached by the trial magistrate and the learned Judges thought the complainant must have identified the appellant by moon light. They however, did not consider how far the appellant had been chased from the scene and they also failed to say anything on the fact that none of the people who chased the appellant from the scene had been called to testify. We do not know what conclusion the two learned Judges would have come to had they considered these points. We must resolve the doubt in favour of the appellant. Mr. Kaigai, learned counsel for the Republic, did not support the appellant's conviction.

We accordingly allow the appellant's appeal, quash the conviction recorded against him by the trial magistrate and confirmed by the High Court on *23rd September, 2004*, set aside the sentence of death and order that the appellant shall be released from prison forthwith unless he is held for some other lawful cause. We would only add that this appeal illustrates in a vivid fashion, the need for the High Court to be extremely careful, so that they are not misled into making two directly contradictory orders on one and the same matter. Learning from the present experience it may be necessary for the High Court to find out from the appellants or their advocates if the appeal being urged before them is the only one lodged and pending on the matter.

Dated and delivered at Nairobi this 10th day of November, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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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