REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

CORAM: OMOLO, LAKHA & BOSIRE, JJ.A.

CRIMINAL APPEAL NO. 69 OF 1999

BETWEEN

JONAS AKUNO O'KUBASU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Tanui J) dated 2nd July, 1998

in
H.C.CR.A. NO. 72 OF 1998)
****

JUDGMENT OF THE COURT

JONAS AKUNO O'KUBASU , the appellant herein, was convicted in the Senior Principal Magistrate's court, Kakamega, on one count of corruption contrary to Section 3 (1) of the Prevention of Corruption Act, Cap 65 , and sentenced to serve two years imprisonment. His appeal to the superior court (Tanui, J.) was dismissed on 2 July 1998. He appeals to this Court against the whole of that decision.

The appellant was employed in the Public Service as a Locational Chief. He was charged that he corruptly received from Patrick Otende Masheka K.Shs.1,000/= in order to assist him in a disputed piece of land plot No. 412 Luanda Township - a matter in which the public body was concerned. We assume that the public body in this case was the Government of Kenya.

In support of its case, the prosecution called six witnesses whose evidence the trial court accepted, namely, that he was given K.Shs.1,000/= which he accepted to assist in a disputed piece of land. On behalf of the defence the appellant gave an unsworn statement and called three witnesses. The first appellate court dealt with the evidence with care and before doing so the learned Judge stated:

"This being a first appeal the appellant expects and is entitled to this court's re -examination of the evidence adduced afresh and to this court's conclusion giving allowance to the fact that it did not see and did not hear the witnesses who testified."

With respect, we agree. Having considered the prosecution case he considered the defence, concluded the analysis of the evidence and stated:

"The unsworn statement of the appellant was all denial of the charge. The fact that it was unsworn does not have much weight. ... In the result I find that the evidence against the appellant was overwhelming. This appeal i s therefore dismissed. ..."

This is perhaps a convenient point to turn to consider the supplementary petition of appeal filed on behalf of the appellant which raises only the following two grounds of appeal to question the validity of the appellant's conviction:

"1.THAT the learned first appellate Judge erred in law in commenting adversely to the fact that the appellant had given an unsworn statement.

2.THAT the learned first appellate Judge erred in simply echoing what the learned Trial Magistrate had stated in his judgment without reviewing the evidence afresh with anxious care and anxiety as was his duty."

As to the first complaint, we do not, with respect agree. We have carefully considered the comments of the learned Judge which we have set out in extenso above. We do not find anything adverse in what has been said. There can be no doubt that a judge in assessing the evidence in order to arrive at his verdict can take into account the fact that an accused person has not given evidence on oath, but this right must be exercised with caution and must not be used, as it was not in the instant case, to bolster up a weak prosecution case or be taken, as it was not, as an admission of guilt on the part of an accused person. We will refer here to a passage from the judgment of the Privy Council in the case of **CYRIL WAUGH V R (1950) AC. at p.211**. This was a case on an appeal from Jamaica but the position is similar in Kenya and the passage is applicable here:

"The law of Jamaica is the same as the law of England both as to the right of a judge to comment on a prisoner not giving evidence. .... It is true that it is a matter of judge's discretion whether he shall comment on the fact that a prisoner has not given evidence. ...."

Having carefully considered the alleged offending passage, we are satisfied that the learned Judge in exercising his right to consider and comment on the fact that the accused had not given evidence on oath did not go beyond what is permissible and did not consider the appellant's undoubted exercise of his statutory right as proof of his guilt. This ground of appeal, in our judgment, fails.

With regard to the second ground of appeal, it is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to re-hear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner or demeanour which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. On second appeal it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.

In the instant case, having regard to the passage from the judgment of the learned Judge first above set out, we are satisfied that the learned Judge had the right rule in mind and did not err in principle or otherwise in its application.

The principles above set out as to the duty of the first appellate court, however, were explained by the Court of Appeal for Eastern Africa in ***SHANTILAL MANEKLAL RUMBA V R (1957) EA*** ***570 at 573***

where Briggs, Ag. V.P. stated:

"We do not take this to mean that the appellate court shall write a judgment in a form appropriate to a court of first instance. It is sufficient on questions of f act if the appellate court having itself considered and evaluated the evidence, and having tested the conclusions of the court of first instance drawn from the demeanour of the witnesses against the whole of their evidence, is satisfied that there was evi dence upon which the court of first instance could properly and reasonably find as it did. If the conclusions of the appellate court are already expressed in terms such as these, that, in itself, is no indication that the appellate court has failed to mak e a critical evaluation of the evidence."

Having heard and carefully considered the arguments in the present appeal, for the reasons above stated, we are satisfied that the courts below had made no error of law or fact which would justify this Court in interfering with the conviction. Accordingly, the appeal is dismissed.

Dated and delivered at Kisumu this 23rd day of March, 2000.

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>