REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI
(CORAM: GICHERU, SHAH & OWUOR, JJ.A.)
CRIMINAL APPEAL NO. 63 OF 1999

BETWEEN

ALI MWANGI MUTHARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from an Order of the High Court of Kenya at Nyeri
(Justice Juma) dated 4th February, 1999

in
H.C.R.C. NO. 303 OF 1998)
****

JUDGMENT OF THE COURT

The appellant Ali Mwangi Muthara, was, on the 16th day of July, 1998, convicted of the offence of robbery contrary to section 296(1) of the Penal Code and was sentenced to a term of five years' imprisonment and was ordered to receive three strokes on the cane; he was also ordered to be under police supervision for five years after completion of his jail term, by J.S. Muchelle Esquire, Principal Magistrate, Nyeri.

The particulars of the charge against the appellant were that "on the 1st day of June, 1998, at Nyeri Town in Nyeri District within the Central Province, jointly with another not before court, robbed Daniel Wambugu Wariahe of K.Shs.10,000/=, wrist watch make Rado and one Ten Canadian Dollar note all valued at K.Shs.22,530/="

The appellant appealed against both the conviction and sentence to the High Court at Nyeri and advanced grounds of appeal which, put in precis form, are as follows:

1.That the learned trial magistrate erred in law and in fact in failing to consider the absence of evidence of an identification parade at which parade he could have been (or not) identified.

2.That the evidence of P.W.1., the complainant was not corroborated.

3.That his defence was not considered by the learned trial magistrate.

The learned Judge of the superior court (Juma, J.) before whom the appeal file was placed dismissed the appeal summarily under section 352(2) of the Criminal Procedure Code. This is what the learned Judge said:

> "I certify that I have perused the record and I am satisfied that the appeal has been lodged without any sufficient ground for complaint. Appeal summarily rejected, Section 352(2)."

Mr. Oluoch who appeared for the Republic conceded, and in our view, correctly so, that the summary dismissal of the appeal in the High Court was wrong. He confirmed that at least two of the grounds of appeal, that is those numbered 2 and 3 by us above, raised points of law or of mixed law and fact. Mr. Oluoch submitted that the appeal before the High Court ought to be admitted for hearing and be heard on merits. He submitted further that this Court ought not to assume the powers of the High Court as this Court could not go into the issue of sentence.

We will deal with Mr. Oluoch's submissions in the order we have set out above. The summary dismissal of the appeal, in our view, was wrong. The learned judge had no jurisdiction, in view of the grounds of appeal we have set out above, to reject the appeal summarily.

It was clearly stated by this Court in the case of **Okang vs. Republic** [1982-88] 1 KAR 276 that where questions of law are raised in the petition of appeal to the High Court, that court has no jurisdiction to reject the appeal summarily. Accordingly, we quash the summary rejection of the appellant's appeal to the High Court.

The question that now arises is: Do we remit that appeal for hearing by the High Court or do we deal with the same in this appeal? Section 3(2) of the **Appellate Jurisdiction Act** provides as follows:

> "(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction vested in the High Court."

This sub-section clearly gives jurisdiction in an appeal to this Court, power to step into the shoes of the High Court and exercise its jurisdiction. The possible exception could be where this Court would exercise jurisdiction in regard to a sentence meted out by the two courts below as provided for in section 361(1) of the Criminal Procedure Code which bars this Court from hearing a second appeal on a matter of fact or sentence (except where sentence is enhanced by the High Court). Severity of sentence is a matter of fact for the purposes of a second appeal to this Court. It will transpire during the course of this judgment that we would not be concerned with the sentence.

Exercising the jurisdiction donated to us by section 3(2) aforesaid we will proceed to decide this appeal on merits as the High Court ought to have done.

The appellant with another person not before Court allegedly waylaid the complainant at about 2:00 a.m. near "Stage Bar" in Nyeri Town. According to the complainant the place was well lit. There was no evidence of how the place was lit. Was it street lighting, was it light outside the bar, was it moonlight? There is no evidence of the nature of the light. Yet the learned magistrate proceeded to find that it was lit by security lights. That finding, with respect, is a misdirection and tends to water down the evidence as regards the appellant being properly identified by the complainant. There is a possibility that the complainant was mistaken in identifying the appellant.

The appellant, when arrested some eight days after the alleged robbery, was found in possession of a "Rado" wrist watch and a ten Canadian dollar note. The complainant identified that watch as his whereas the appellant claimed that he had bought the watch from a vendor near his kiosk in Mombasa. There was no identifying mark shown on the said watch to show that it belonged to the complainant only. Such fake "Rado" watches are sold in the streets. A genuine Rado watch which is a costly watch is sold by a dealer who would issue a proper receipt for it. The complainant said that he had a receipt for the watch but he did not produce it.

The complainant claimed, as his, the ten dollar note that was found upon the person of the appellant. Again there is nothing to show that it belonged to the complainant. A ten dollar note is not a rarity in Kenya.

The complainant's version of events was to the effect that the appellant attacked him. The appellant in his retracted confession statement stated that he found the two items from the complainant's purse which he took from the complainant when he was lying near a shop, when the purse was protruding from the complainant's pocket.

The appellant's retracted statement, cannot in any manner be related or connected to the complainant's evidence. We cannot therefore place any weight on that retracted statement.

The learned magistrate whilst considering the defence of the appellant considered the unsworn statement only. He did not consider the appellant's sworn testimony given during the trial within the trial.

All that we have gone into shows that the conviction was based on unsatisfactory factors. This appeal is therefore allowed. The Conviction in question is quashed and the sentence is set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 19th day of May, 2000.

J.E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR