REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEL NO. 43 OF 2001
(Consolidated withCriminal Appeal No. 44 of 2001).

(Appeal from the original CM Kakamega CR No. 2061 of 1999)

HERBERT JUMBA MOTO

EVARASTO UKANDA ASAMBA…… APPELLANTS

VS

REPUBLIC …… RESPONDENT

JUDGMENT

Herbert Jumba Moto and Evarasto Ukanda Asamba being the 1st and the second Appellants respectively and one Reuben Ambani Matasya were jointly tried on a charge of robbery with violence Contrary to Section 296 (2) of the Penal Code. The particulars of this charge were that on the 28th day of October 1999 at Lusiola village, Eregi location in Kakamega District of the Western Province, jointly with others not before court, while armed with dangerous weapons namely pangas and slashers robbed Tafrosa Kadanda of one radio cassette make Trident with six compacts and cash Ksh.600/= all valued at Ksh.4,200/= and at or immediately before or immediately after the time of the such robbery injured the said Tafrosa Kadanda.

The first appellant faced an alternative charge of handling suspected stolen property contrary to Section 322 (2) of the Penal Code. The particulars of this charge are that on the 28th day of October 1999 at Vumila village Eregi location in Kakamega district of the Western province, otherwise than in the course of stealing dishonestly received or retained one radio cassette, 6 compacts knowing or having reason to believe them to be stolen good.

The 1st and 2nd appellants were convicted on the main charge and were both sentenced to death as prescribed by law. The 3rd accused Reuben Ambani Matasya was acquitted under Section 215 of the Criminal Procedure Code.

Being dissatisfied with the decision of the learned principal magistrate, the 1st and 2nd appellants now appeal to this court.

The 1st and 2nd appellants put forward five and six grounds of appeal respectively. However they may be summarized to six grounds as follows:

The first ground being that the learned trial principal magistrate erred in law and fact by convicting the first appellant on hearsay evidence tendered by the prosecution witness no. 5.

Secondly, that the learned principal magistrate erred when she failed to consider the 2nd appellant's defence of alibi.

Thirdly, that the trial principal magistrate erred in law and fact when she failed to give the appellants legal representation by counsel.

Fourthly, that there was no proper identification of the appellant.

The fifth ground is that the trial principal magistrate erred in convicting the appellants on contradictory evidence.

Lastly, that the prosecution did not prove its case to the standard of beyond reasonable doubt.

The appeal was strenuously opposed by Mr. Karuri who appeared for the Republic.

The prosecution before the trial court was supported by the evidence of six witnesses. It is said that Tafrosa Kadanda, the complainant was walking back home with Dismus Asunza, PW 2, from a funeral ceremony on 28.10.99 at around 5.30 a.m. when suddenly between two and three people emerged from the bush. At that time the complainant was carrying a radio and 6 cassettes said to be the property of Dismus Asunza. It is stated that the 1st appellant grabbed the radio cassettes and a sum of Ksh.600/= from the complainant and ran away from the scene. The 2nd appellant is said to have struck the complainant with a slasher on her right hand and on her back.

The complainant testified to the effect that she recognized the 1st appellant due to the bright moonlight.

The second appellant was arrested by members of the public who had answered the call for help from P.W I and P.W.2. He led the area chief and those who arrested him to the 1st appellant's home where the radio and cassettes were recovered.

A clinical officer, Ann Amino Wafula testified and produced P 3 form duly filled by her. The same contained the nature of injuries inflicted on the complainant. The slasher used to assault the complainant was also produced in evidence.

The appellants were placed each on his defence. The record does not reveal whether the appellants gave sworn or unsworn statement of defence.

We can only infer from the fact that they were not cross-examined that they tendered unsworn statement of defence. The 1st appellant's defence was that he was not arrested with any stolen property.

The second appellant gave more or less the same defence advanced by the 1st appellant in that he was not found with any stolen property.

On appeal the 1st appellant's complaint is that he was convicted on hearsay evidence of P.W.5. This ground was not responded to by the learned state counsel. We have perused the record and found out that P.W. 5, who was a village elder personally and in company of the 2nd appellant visited the 1st appellant's home and recovered a radio, cassettes and a slasher. Therefore we see no merit on this ground.

It was also argued that the trial principal magistrate did not consider the defence of alibi raised by the 1st appellant. Again the learned state counsel did not address us on this ground. However we have examined the record of appeal and state the 1st appellant did not raise the defence of alibi when he was put on his defence. We therefore dismiss this ground for lack of merit.

Another matter raised on appeal is that the trial principal magistrate erred in failing to consider the appellants for legal representation by counsel. The learned state counsel stated that the learned Principal Magistrate had no legal obligation to assign an advocate to represent the appellants. We are of the view that though the appellants argument is sound, we will not hesitate to state that the learned Principal Magistrate was under no legal duty to assign the appellant counsel to appear on their behalf. Consequently the ground is dismissed.

The other ground which was put forward for our consideration is that the identification of the appellants with the aid of the moonlight was not conducive. The learned state counsel urged us to reject this ground on the basis that the 2nd appellant was arrested by members of public when he was found still struggling with P.W.2 who held him.

We are of the view that there was no need for identification on the part of the second appellant because he was arrested on the scene of crime. However we are not impressed that the identification of the 1st appellant with the aid of moonlight is sufficient. We say so particularly if the appellant was not a person previously known to the witness. We are of the opinion that there was no cogent evidence to prove that the 1st appellant was at the scene of crime save for the fact that he was found with the stolen radio and compacts.

It is also argued by the appellants that they were wrongly convicted by the learned principal magistrate on contradictory evidence. The learned state counsel dismissed this ground stating that the prosecution’s case before the trial court was water tight. We have carefully perused the record of appeal. We think there are contradictious in the evidence of P.W.1, PW2 and PW 5 in regard to the recovery of the slasher used to assault complainant. P W 1, says that the 2nd appellant was arrested with the slasher. PW 5 says the slasher was recovered at the home of the 1st appellant. PW 2 says that the slasher was recovered on the ground of the scene of crime. This actually creates doubt. We say saw in view of the fact that we have formed the opinion that the 1st appellant was not properly identified at the scene of crime. In view of the doubts we have pointed out, we are of the view that the prosecution did not prove its case to the standard of beyond reasonable doubt.

There are two issues which we have noted from the record of appeal. The first item is that the prosecution’s case was conducted by a senior sergeant. The aforesaid prosecutor is not authorized to do so under section 85 (2) of the Criminal Procedure Code. The court of Appeal declared such trials as nullities in the case of **ROY RICHARD ELIREMA VS REPUBLIC Criminal Appeal No. 67 of 2002.**

It is our considered view that the trial was a nullity and there can never be a competent conviction or sentence.

The second matter which we have noted is that the complainant, PW 1, was recalled by the learned principal magistrate to testify when she realized that part of her evidence taken earlier were missing from the court record. This was done after the prosecution had even closed its case. We are of the view that this was wrong in that there is a possibility that the complainant was in court throughout when other witnesses were testifying. In such cases a witness is likely to change his or her testimony drastically to conform to what the other witnesses have said. We have taken time to examine the remaining part of the evidence compared to the evidence given when the complainant (PW 1) was

recalled. In her first testimony she told the trial court that she was able to see the assailants due to the fact that it was almost day time hence there was sufficient light. She however changed her story on being recalled and said that she was able to see the appellants due to the aide of moonlight. We are of the view that the trial principal magistrate erred in this respect and this caused a miscarriage of justice on the part of the appellants. We are of the view that the trial principal magistrate should have set aside the proceedings taken before and have the matter heard denovo before another court of competent jurisdiction.

In the final analysis and for the reasons we have stated the appeal is allowed. The conviction is quashed and sentence set aside. The appellants are hereby set free forthwith unless lawfully held.

READ AND DELIVERED THIS ……DAY OF ……2004

J.K. SERGON

JUDGE

G.B.M. KARIUKI

JUDGE.

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