REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

Criminal Appeal 42 of 2009

ANTHONY KIRIMI KIRUBI ..... APPELLLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ) dated 24th February, 2005

in

H.C.CR.A. No. 249 OF 2002)

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JUDGMENT OF THE COURT

The appellant, ***ANTONY KIRIMI KIRUMBI*** was convicted by the Principal Magistrate's Court at Maua for the offence of robbery with violence contrary to ***Section 296(2) of the Penal Code*** and sentenced to death. The full particulars of the charge were that:

On the 17th day of June, 2002, at Kathangume Village Ankamia Location in Meru North District within the Eastern Province, jointly with others not before Court being armed with dangerous or offensive weapons namely a rifle, robbed Geoffrey Mugambi Nchebere of cash Kshs.1,200/= and one dozen of Daimon dry

cells all valued Kshs.1,700/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence, to the said Geoffrey Mugambi Nchebere."

The appellant appealed against the conviction and sentence to the superior court but the appeal was dismissed. This is, therefore, a second appeal which only turns on points of law.

Geoffrey Mugambi Nchebere (PW 1)who was the complainant in the matter, was operating a shop at Amunga Trading Centre. On the 17th June, 2002 at about 9 pm, his shop was invaded by a group of robbers who fired gunshots. The complainant was able to identify the appellant who he said came in with the robbers and he saw the appellant hit the lamp and it went off. The robbers stole money and torch batteries. The complainant managed to escape while screaming as he made his way from the scene.

Members of public including M'Eruguro Ithirwa (PW 2) responded to the complainant's distress and came to his rescue. The complainant immediately mentioned the appellant as one of the members of the gang who invaded his shop. Julius Kariithi Njiru (PW 3) also heard the gunshots at the market at about 9 pm. PW 3 used to share the same house with the appellant who he said left the house about 8 pm while he was armed with a torch. Immediately after the gunshots were fired, the appellant returned to the house.

The appellant was followed almost immediately by many people who arrested him on allegations that he was part of a gang of robbers who had raided and stolen from the complainant's shop. By the time the appellant was flashed out by members of public, he had attempted to hide under the bed. The appellant was arrested and escorted to Mikinduri Police Station where he was re-arrested by P.C. Joseph Marewa and charged with the offence of robbery with violence.

During the trial and especially the cross-examination of PW 1 and PW 3 who in our view were the two crucial prosecution witnesses, the appellant while questioning them alluded to the defence that he was kidnapped by unknown people who forced him to take them to the complainant's shop.

The learned trial magistrate and also the superior court evaluated the evidence of the two material witnesses against the appellant's defence and both courts were satisfied that the appellant was not compelled by duress or kidnapping to commit the offence but rather he was the master mind of the robbery. The superior court after considering the grounds of appeal arrived at a concurrent judgment with the learned trial magistrate and concluded in part:

"We have carefully perused and keenly considered the evidence. We find the evidence of both the complainant and the neighbour PW2, M'Eruguro Ithiriwa to be candid and credible. So was the evidence of PW3 Julius Kariithi Njiru. We believe as did the trial magistrate that the appellant was at the scene of crime and was participating in the robbery. We accept the evidence that he was doing so voluntarily and was not being forced by other robbers as the appellant claimed in his defence. We note that after the robbery the appellant had an open opportunity to inform the complainant and later, his housemate PW3 Julius Kariithi that he had committed the offence under duress. He, however, returned to the house in company of Miriti, sat on the bed discussing things but mentioning nothing about the kidnapping...

He failed to raise the defence of being kidnapped before the prosecution was started. He also failed to raise or suggest such defence to prosecution witnesses before the latter left the witness stand. He only sprung the "kidnapping" defence when he was testifying in his defence."

When the appeal came up for hearing, the appellant was subjected to an age assessment examination and the medical report indicated that he was below the age of 18 years when he committed the offence.

Mrs Ntarangwi, learned counsel for the appellant, argued three grounds of appeal, firstly, she submitted that the defence by the appellant had raised the defence of duress at the earliest opportunity during the cross-examination of the prosecution's witnesses, but both courts failed to take it into account especially bearing the tender age of the appellant. Secondly, both courts failed to consider that the prosecution did not prove to the required standard that the two torch batteries and 20/= coin did not belong to the appellant; there were no distinctive features adduced by the complainant to show the items belonged to him. There was no evidence to show the batteries were the same as the ones listed in the charge sheet. Thirdly, the appellant's was sentenced to life imprisonment despite his tender age.

This appeal was opposed by Mr Kaigai, learned Principal State Counsel, for the State. He submitted that the evidence against the appellant was overwhelming. Both the trial court and the superior court were justified by the reasons adduced that the defence of duress was not plausible. Moreover, the appellant tried to hide under the bed when the complainant came looking for him and he was arrested with some of the stolen items.

We shall address the three legal issues arising from this appeal seriatim. First, the issue that the superior court failed to re-evaluate the entire evidence; our view that is borne out of the re-evaluation of the record is that the appellant who was a minor and was not having legal representation in his own way brought out the issue of duress at the earliest opportunity that was available to him. It is evident that he put the question alluding to the defence of duress to PW 1 and PW 3 during cross-examination. Therefore, in our view the appellant's defence that he was kidnapped and committed the offence while under duress was not a mere afterthought as was concluded by both courts.

Had the superior court considered that aspect borne by the evidence in cross examination and obviously bearing in mind the tender age of the appellant, the statement that *"He only sprung the "kidnapping defence when he was testifying in his defence…"*, was erroneous and not borne out of the record. We find that both courts failed to consider that the appellant sustained the defence of compulsion in cross-examination, which defence was plausible in the circumstances and there was no basis for dismissing it as an afterthought.

Regarding the recovery of two battery cells and 20/= coin that were recovered from the appellant when he was arrested, we are of the view that there was no evidence to prove that they were part of the complaint's property that were stolen a while ago. The appellant claimed the batteries and the coin as his property and there was nothing in evidence to show that the complaint identified and proved those items were indeed his properties. No evidence was adduced to show the batteries matched what was indicated in the charge sheet.

On the issue of sentence, Mr Kaigai conceded there was failure of justice as the trial court did not consider the age of the appellant. However on the conviction, he urged us to sustain the conviction but make an order for an appropriate sentence.

We have considered the issue of sentence with concern because by the time the appellant was arraigned in court on 19th June 2002, the appellant was a minor. However the appellant was not subjected to an age assessment examination until 27th March 2003, when the matter was for appeal. However, after the appellant's age was established to be below 18 years, he ought to have been tried by the Superior Court during the appeal and sentenced according to the provisions of the ***Children's Act 2001*** which had become operational on 1st March 2002. Bearing in mind that the appellant's age was established during the hearing of the appeal, the learned judges overlooked the issue of his age.

Under the ***Children's Act***, any person under the age of 18 years is a child and if found to have been in conflict with the law, he should be tried and sentenced according to the provisions of ***Part XIII of the Children's Act*** which makes provisions on child offenders. Since the learned trial magistrate did not address the issue of age, it was incumbent upon the superior court to take due regard of the provisions of the Children's Act when sentencing the appellant especially the provisions of ***section 191(1) of the Act*** which provides:

"In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways:-

.....

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of boastal institutions;

(h) by placing the offender under the care of a qualified counselor;

(i) by ordering him to be placed in an educational institution or a vocational training;

(j) by ordering him to be placed in a probative hostel under the provisions of the Probation of Offenders Act;

(k) by making a community service order; or

(l) In any other lawful manner."

The purpose of the sentences provided for above are meant to correct and rehabilitate a young offender; that is any person below the age of 18 years. A life sentence is not provided for and certainly it cannot promote the best interest of a child because it does not give the child an opportunity to reform and realize his potential. So far, we were informed the appellant has been serving the sentence passed under the ***Borstal Institution Act***; and it is our hope that his rights as a child were protected.

For the aforesaid reasons, we allow the appeal, quash the conviction and set aside the life sentence imposed on the appellant. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith. This judgment is delivered pursuant to the provisions of ***Rule 32 of the Court of Appeal Rules.***

Dated and delivered at Nyeri this 5th day of July, 2012.

M. K. KOOME

JUDGE OF APPEAL

K. H. RAWAL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR