REPUBLIC OF KENYA

Gikuni v Republic

High Court, at Nairobi

Criminal Appeal Nos 449 & 450 of 1985

(Appeal from the Resident Magistrate's Court at Kiambu, R M Mutitu Esq)

Advocates

Appellant absent, not wishing to be present and unrepresented

A Haq for Respondent

October 14, 1985, Mbaya J delivered the following Judgment.

These two appeals have been consolidated.

The appellants were charged with the following offences:

> 1st Count: Bar breaking and committing a felony contrary to section 306(a) of the Penal Code. The particulars of the offence alleged that the appellant, jointly with one Joseph Ndungu Murage, and others not before the court broke and entered the house of John Mukuna s/o Wanyeki PW 1 from where they stole the property specified in the charge sheet. 2nd Count: Robbery contrary to section 296(1) of the Penal Code. The particulars allege that both the appellants, with another person not before the court robbed Salome Ngendo d/o Ngei PW 3 of the properties specified in the charge sheet.
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> 3rd Count: Rape contrary to section 140 of the Penal Code. The particulars of the offence stated that both the appellants, with another not before the court, had carnal knowledge of Salome Ngendo d/o Ngei PW 3 without their consent.
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> 4th Count: Being in possession of an instrument of house breaking etc. Contrary to section 308(1) of the Penal Code. The first appellant was alone charged that he had in his possession an iron bar.

After trial Joseph Ndungu Murage was acquitted on the 1st count whereas the appellants were convicted. The appellants were also convicted on the 2nd and the 3rd counts, and the 1st appellant was acquitted on the 4th count. The appellants were then sentenced as follows:

1st Count: 4 years and 2 strokes of the cane each;

2nd Count: 6 years and 3 strokes of the cane each with 5 years police supervision on completion of sentence.

3rd Count: 7 years imprisonment, and the 1st appellant to receive 3 strokes of the cane.

The prison terms were to run concurrently. The appellants now appeal against their convictions and the sentences. I will deal with the evidence of each of the appellants separately.

The first appellant in my view was properly convicted of the 1st and the 2nd counts since he was found in possession of coins and cigarettes which must have been stolen from the complainants PW 1 bar. He gave Kshs 10 to PW 3, and he was also found in possession of PW 3's watch, which was duly identified by PW 3 to be hers. The State however concedes as regards the 3rd count that there is not the necessary corroboration for the offence of rape. The result here therefore, is that I dismiss the 1st appellant's appeal against the convictions on the 1st and the 2nd counts, but allow his appeal against conviction on the 1st and the 2nd counts, but allow his appeal against conviction on the 3rd count. I quash his conviction on the 3rd count and set aside the sentence imposed on him over that count.

Now for the 2nd appellant. The State does not support his conviction on the 1st count because the only evidence against him is uncorroborated evidence of a co-accused. The State also does not support his conviction on the 3rd count for the similar reasons given in connection with the 1st appellant. I agree with learned counsel for the state that the convictions of the (2nd appellant on the 1st and the 3rd count cannot be sustained. I quash them and set aside the sentences relating to them. But on the 2nd count the 2nd appellant was properly convicted and his appeal against conviction on that count is dismissed.

It is only to the extents indicated where these appeals succeed.

October 14, 1985

Mbaya J