Case Number:	crim app 92 of 90
Date Delivered:	28 Sep 1990
Case Class:	Criminal
Court:	Court of Appeal at Nakuru
Case Action:	-
Judge:	Richard Otieno Kwach, Joseph Raymond Otieno Masime
Citation:	Karanja & another v Republic[1990]KLR
Advocates:	-
Case Summary:	Criminal Practice and Procedure – consolidation of appeals – appeals to High Court by joint accused persons to be consolidated. Evidence - accomplice evidence - need for corroboration of such evidence - why corroboration is necessary - nature of the corr
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

KARANJA & ANOTHER……APPELLANTS

V

REPUBLIC……..……RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nakuru (Tunoi J) dated 10th November 1989 in High Court Criminal Appeals Nos 565 & 566 of 1988)

Criminal Practice and Procedure – consolidation of appeals – appeals to High Court by joint accused persons to be consolidated.

Evidence - accomplice evidence - need for corroboration of such evidence - why corroboration is necessary - nature of the corroboration evidence required.

The appellants were convicted of stealing goods in transit contrary to section 279(e) of the Penal Code (cap 63) and each sentenced to 31/2 years imprisonment with 8 strikes of corporal punishment.

The appellants had been tried and convicted together with one Muchiri.

For a reason not disclosed to the court, Muchiri's appeal was heard and disposed of ahead of the appeals filed by these two appellants, and his custodial sentence was substituted with a fine.

When the appeals of the two appellants came before the same judge, they were dismissed in their entirety.

In their second appeals, the appellants complained that Muchiri, their coaccused, had been given preferential treatment. They challenged their convictions mainly on the ground that they were based on the uncorroborated evidence of two accomplices.

The two witnesses whom the appellants contended were accomplices were pointsmen employed by Kenya Railways who manoeuvered the wagon in question to a point where the goods were offloaded.

Both the trial and first appellate courts had made a concurrent finding that these two witnesses were not accomplices and even if they were their evidence was corroborated. Held:

1. Where there has been a joint trial, all appeals filed by convicted defendants in the High Court should be consolidated and heard together unless there is clear indication that one or some of the defendants have not appealed.

2. Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held untrustworthy for three reasons:

a) He is likely to swear falsely in order to shift the guilt from himeslf;

b) As a participant in the crime, he is an immoral person who is likely to disregard the sanctity of the oath;

c) He gives his evidence either under a promise of a pardon of in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.

3. The corroboration which is required of an accomplice's evidence is in the nature of some independent additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon.

4. The corroboration evidence must affect the accused by connecting or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

5. It is not necessary to have confirmation of all the circumstances of the crime in the corroboration. Corroboration of some material particular tending to implicate the accused is enough and it is sufficient if it is merely circumstantial evidence of his connection with the crime.

6. The appellants were convicted on uncorroborated evidence of accomplices hence their conviction was unsafe.

Appeals allowed.

Cases

1. Rex v Asumani Logoni s/o Muza (1943) 10 EACA 92

2. R v Baskerville [1916-17] All ER 38; [1916] 2 KB 658; 86 LJKB 28; 115 LT 453

Statutes

Penal Code (cap 63) section 279(e)

Advocates

Miss Ndungu for the Respondent.

On September 28, 1990, the following Judgment of the Court was delivered.

These two appellants, together with a third accused, one Peter Kamore Muchiri (now deceased), were after a lengthy trial, convicted of stealing goods in transit contrary to section 279 (e) of the Penal Code.The particulars alleged that between 11th August, 1984 and 27th August, 1984 at Nakuru railways marshalling yard, in Nakuru District within the Rift Valley Province, jointly with others not before the court, stole 320 bundles of iron sheets valued at Kshs.570,000, from railway wagon No CLB 53330, while the said goods were in transit from Changamwe to Kenya Farmers Association, Nakuru. They were each sentenced to three and a half years imprisonment plus 8 strokes of the cane. The appeals of these two appellants to the High Court against both conviction and sentence, which were consolidated and heard together for convenient disposal, were dismissed, giving rise to the present appeal.

To avoid the prospect of having to hear two separate appeals arising from the original decision of the Principal Magistrate we inquired about the fate of Peter Kamore Muchiri. We were informed that he had filed an appeal to the High Court being Criminal Appeal No 575 of 1988 which for some unexplained reason had been heard and disposed of ahead of the appeals filed by these two appellants being Criminal Appeals No. 565 of 1988 and 566 of 1988. On checking the relevant court file we were able to confirm that Muchiri's appeal against conviction was dismissed but his custodial sentence was substituted with a fine of Kshs.40,000, which he paid. Affidavit evidence was placed before the judge to the effect that he was in poor health. When the appeals of these two appellants came up before the same judge shortly afterwards, he dismissed them in their entirety. One of the grounds of complaint in this appeal is that Muchiri was given preferential treatment and that there was no justification for not according all three of them equal treatment. We would like to state that as a matter of policy and so as to avoid unnecessary speculation, which more often than not has no basis in fact, where there has been a joint trial, all appeals filed by convicted defendants in the High Court should be consolidated and heard together unless there is a clear indication that one or some of the defendants have not appealed. If this procedure had been adopted in this case these appellants would have had no cause to complain about apparent discriminatory treatment by the learned judge.

The appellants have listed a number of grounds in their petitions of appeal upon which they seek to challenge their conviction the substantial ground being that their conviction was based on uncorroborated evidence of two accomplices. This ground was canvassed before the judge and he rejected it.

Miss Ndungu, the learned state counsel, who appears for the Republic has conceded both appeals and rightly so.

The two witnesses whom these appellants have throughout contended were accomplices, were two pointsmen by Kenya Railways who manoeuvred the wagon in question to the point at which the goods were offloaded. The first one was Francis Sunda (PW18). His evidence was that as he was directing the engine pulling the wagon the appellant, Joseph Karanja, who was carrying some papers in his hand asked the appellant, Hillary Mungai whether that wagon was carrying his property and Hillary Mungai confirmed as much. At that point, Joseph Karanja instructed Francis Sunda to move the wagon to the very end of the Kioni siding, which he did. It was his evidence that Joseph Karanja was wearing leather jacket and spectacles. Later on he said he saw the iron sheets being offloaded into a lorry under the supervision of Joseph Karanja. Later that night Sunda claims to have seen Joseph Karanja again at Hillary Mungai's house where he had gone at the invitation of Mungai who gave him Kshs.5,000 as chai and loan. He said in cross-examination that he was happy to receive free money and preferred not to ask any questions. He admitted that he had originally been charged with the same offence along with these appellants but the charge against him had been subsequently withdrawn by the police when he turned state witness. He also admitted that he had not known Joseph Karanja before and that this was his first encounter with him. The second time he saw him was at the police station when he identified him to a police officer.

The second pointsman was Joseph Kamau Gitonga (PW 19). He too said he saw Joseph Karanja at the siding holding papers and supervising the off-loading of the iron sheets. He confirmed Joseph Karanja's habit of wearing a leather jacket and spectacles and that he had not known Joseph Karanja before. He admitted that he too had been paid Kshs.5,000 by Hillary Mungai in the presence of Joseph Karanja and had been charged with the same offence subsequently withdrawn when he too turned state witness.

On the evidence, both the trial and the first appellate courts made a concurrent finding that these two

witnesses (PW 18 and PW 19) were not accomplices and that even if they were, corroboration of their testimony was to be found in the evidence of PW 9, PW 11 and PW 12.

Robert Maina (PW 9) was one of the drivers of the two lorries used to carry the goods from the wagon to a certain store at the behest of Muchiri. In his evidence he only talked about Muchiri. He made no mention of either Hillary Mungai or Joseph Karanja. So his evidence could not possibly corroborate the testimony of PW 18 and PW 19 when these two said they saw both appellants at the siding and later on at Hillary Mungai's house.

The driver of the other lorry was Mwathi Mwangi (PW 11). He too says he saw people loading iron sheets into the lorry driven by Robert Maina.

He said he was hired by Muchiri. He made no mention of either Hillary Mungai or Joseph Karanja. His evidence cannot therefore provide corroboration of the evidence of PW 18 or PW 19 either.

James Njuguna (PW 12) was the turnboy on the lorry driven by Robert Maina (PW 9). In his evidence as to the events at the siding he only mentioned Muchiri. He made no mention of either of these appellants. So the probative value of his testimonly is the same as that of the two drivers.

On our consideration of the evidence of these 5 witnesses, we have no hesitation in arriving at the inescapable conclusion that the two pointsmen were accomplices. If they knew nothing about the conspiracy why did they go to Hillary Mungai's house later in the evening to receive large sums of money" Their story that they did not know why they were paid and that they did not ask any questions was so utterly incredible as to be totally unworthy of belief. They were originally charged jointly with these appellants and they were clearly let off in return for their agreeing to give evidence against the appellants.

In our judgment, no reasonable tribunal directing its mind properly on this evidence could come to any other conclusion than that the two pointsmen were accomplices. The finding by the trial and first appellate courts that they were not is clearly erroneous and not sustainable on the evidence of the two pointsmen.

Although there may be cases of an exceptional character in which an accomplice's evidence alone convinces the court of the facts required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons. The accomplice is likely to swear falsely in order to shift the guilt from himself. As a participator in the crime, he is an immoral person who is likely to disregard the sanctity of an oath. He gives his evidence either under a promise of a pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution – see Asumani Logoni s/o Muza v Rex (1943) 10 EACA 92. An accomplice is of course a competent witness but corroboration should be found for his evidence before a conviction can be based upon it. The corroboration which should be looked for is, as laid down in the case of R v Baskerville [1916] 2 KB 658, some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime.

It is plain to us beyond a peradventure that the evidence in this case did not pass the acid test in Baskerville's case. The appellants were clearly convicted on uncorroborated evidence of accomplices. We consider that their conviction was unsafe and cannot be allowed to stand. Consequently we allow their appeals, quash the convictions, set aside the sentences and order that they be released forthwith from prison unless otherwise lawfully held.