REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO.8 OF 2009

(As consolidated with Busia HC Criminal Appeal No. 7 of 2009)

NICODEMUS DEDE MAGIO..1st APPELLANT

FIDELIS WANDERA MAKOKHA.................................2nd APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal against judgment of Hon. A.O. Osodo Principal Magistrate

dated 26th January 2009 in Busia PM Criminal Case No. 622 of 2007)

JUDGMENT

1. This judgment is in respect to Busia High Court criminal appeals No. 8 and 9 of 2009 which were consolidated by this Court on 29th June, 2016 under Busia High Court Criminal Appeal No. 8 of 2009. Following that consolidation Nicodemus Dede Magio becomes the 1st Appellant whereas Fidelis Wandera Makokha is the 2nd Appellant.

2. The 1st Appellant was the 2nd accused person and the 2nd Appellant was the 1st accused person in Busia Principal Magistrates' Court Criminal Case No. 622 of 2007. In the main count they had jointly been charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence disclosed that on 1st May, 2007 at Namunyweda village in Busia District within Western Province, together with others not before court while armed with dangerous weapons (pangas and rungus) they robbed Vincent Ouma Elia of cash and assorted items all valued at Kshs. 47,450/- and at, or immediately before, or immediately after the time of such robbery used personal violence to the said Vincent Ouma Elia.

3. The 2nd Appellant was faced with an alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. It was alleged that on 7th May, 2007 at Budenge village in Busia District within the Western Province otherwise than in the course of stealing he retained one Sony radio cassette and a power inverter knowing or having reasons to believe that the same were stolen goods.

4. At the conclusion of the trial, the appellants were found guilty of the main count, convicted and sentenced to suffer death. The appellants being dissatisfied with the decision of the trial court have preferred this appeal.

5. Before proceeding to highlight the grounds of appeal, I find it necessary to give a brief history of this matter. The appellants' appeals were initially summarily rejected under Section 352(2) of the Criminal Procedure Code by this Court (Muchemi, J) on 5th May, 2009. The appellants moved to the Court of Appeal at Kisumu and in a judgment delivered on 19th June, 2015 the rejection of the appellants' appeals was set aside thus necessitating the hearing of these appeals on merit. That explains the delay in the disposal of the appeals.

6. When this matter came up for hearing before me on 24th October, 2016 the appellants referred to grounds of appeal which had not been filed in court. They were given time to file those grounds of appeal which were treated as amended grounds of appeal and are the ones to be considered in this judgment. The "amended" grounds of appeal were filed on 24th October, 2016.

7. The appellants contend that their trial and conviction was based on a defective charge sheet. It is their case that although the charge sheet indicated that the date of their arrest was 7th May, 2007, the date the incident was entered in the Occurrence Book (O.B.) was indicated as 14th August, 2007 meaning that the offence was committed long after they were arrested and were already in custody. Further, that the charge

sheet was neither signed by the Officer Commanding Station, the Prosecutor nor the Magistrate.

8. In their second ground of appeal, the appellants submit that their constitutional rights were breached as they were not taken to Court within twenty-four hours of their arrest as provided by Article 49(1)(f) of the Constitution. They point out that they were arrested on 7 th May, 2007 and taken to Court on 22nd May, 2007 which was about 15 days after their arrest.

9. The appellants' third ground of appeal is that their trial was a nullity as the language used in the court proceedings was not indicated. They assert that the name of the court interpreter is not indicated in the court record. It is their case therefore that their right to be tried in a language they understood was breached.

10. In the fourth ground of appeal, the appellants fault the trial court for relying on inadequate, flimsy, far-fetched and distorted evidence of recognition or identification. They submit that a witness maybe honest but mistaken. They point out alleged contradictions in the evidence of the complainant who testified as PW1. It is their case that at one time the complainant testified that he had given the names of the robbers to the police but on cross-examination he stated that he did not name the robbers in the statement he recorded with the police.

11. Through the fifth ground of appeal the appellants contend that their right under Article 49(1)(i) of the Constitution was breached by the arresting officer PW4 Corporal Wilson Kinyamol who failed to inform them of the reason for their arrest. It is the appellants' case that at the time of their arrest they were told that they were being arrested for being in possession of changaa.

12. Through grounds six and seven of the appeal, the appellants fault the trial court for relying on contradictory evidence and assert that they were identified in the dock and such identification was unreliable as witnesses tend to think that the police have arrested the right person.

13. Finally, the appellants lambast the trial court for failing to evaluate their alibi evidence and for shifting the burden of proof on them.

14. The appellants cited various authorities in support of their arguments.

15. Mr. Obiri who appeared for the State opposed the appeal. He submitted that there were no defects in the charge sheet as contended by the appellants. He pointed out that Section 134 of the Criminal Procedure Code had been complied with as the charge sheet specified the offence and the particulars thereof.

16. It was his case that the question as to whether the appellants were named in the O.B. is a matter of identification. He pointed out that PW1 and PW2 Wilkister Akumu Ouma had identified the appellants and the source of light had been disclosed as a torch with new batteries, a lamp and the moon. He submitted that the robbers had spent some time with PW1 and PW2 and that was sufficient time to identify them.

17. On the issue of violation of constitutional rights, the State, relying on the Court of Appeal decision in **Julius Kamau Mbugua v Republic [2010] eKLR** asserted that even where breach of constitutional rights is proved, the remedy lies elsewhere and such violation does not in any way vitiate the criminal trial. It was the State's submission that a delay in bringing an accused person to court should not render his trial a nullity.

18. Turning to the alleged violation of the appellants' right to be tried in a language they understood, Mr. Obiri submitted that the appellants actively participated in the trial and it cannot be said that failure to indicate the language used prejudiced them in any way. He cited various authorities to demonstrate that a trial should not be vitiated where there is no evidence to show that an accused has been hampered by failure to have an interpreter.

19. On the failure to call the investigating officer, it was submitted for the State that the appellants were not prejudiced as the investigating officer was only meant to produce exhibits which exhibits were produced by the arresting officer.

20. The State took the position that there was no need to hold an identification parade in this matter as the appellants were known to the witnesses prior to the robbery. Further, that the appellants were arrested with the stolen property.

21. On the appellants claim that their alibi defence was not considered by the trial magistrate, the State submitted that the same had not been raised and the trial Court could not have considered an issue that had not been placed before it.

22. In **Okeno v Republic [1972] E.A. 32** the duty of a first appellant court was summarized as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424."**

23. As a court sitting on appeal, I am guided by the fact that I never saw nor heard the witnesses testify. I, however, have a duty to re-evaluate the evidence tendered before the trial court in order to reach my independent conclusion.

24. The issues that require the attention of this Court are whether the charge sheet was defective; whether the appellants' constitutional rights were breached and the effect of such breach; and whether the appellants were properly identified at the scene of crime.

25. Before considering the evidence adduced in the trial, I will first consider issues that do not require analysis of the evidence.

26. A perusal of the typed proceedings of the lower court shows that when the plea was taken on 22nd February, 2007 the language used by the court was not recorded. Maybe the handwritten notes of the trial court would disclose otherwise but unfortunately they do not form part of the record of appeal.

27. The 1st Appellant submitted that he does not understand English. Whatever language was used, the court record confirms that the charges were read over and explained to the appellants and each of them responded by pleading not guilty. In some of the subsequent mention dates a language used was not indicated. It was incumbent upon the court to indicate the language used as the right to trial in a language understood by an accused person is protected by the Constitution. This right was even protected by the retired Constitution which was in force at the time the appellants were being tried. However, it is noted that when the witnesses testified the court record shows that the languages used were English and Kiswahili.

28. As pointed out by Mr. Obiri for the State, the appellants actively participated in the trial. The 1st Appellant was actually represented by counsel. It cannot be said that the appellants never understood the proceedings and were thus disadvantaged in mounting their defence.

29. In the case of **Mwendwa Kilonzo & another v Republic [2013] eKLR** the Court of Appeal explained the applicable principle in this area by stating that:

> **"We appreciate that the aspect of language and ensuring that an accused person is given the facility of interpretation when he requires it is central in ensuring that the accused person is not prejudiced because he could not follow proceedings due to language barrier. In fact such trial will end in an injustice particularly if the accused is found guilty. Courts therefore have a duty to ensure that an accused person is able to follow its proceedings in a language he understands. That is the law and the case of *Bishar Abdi vs Republic Cr. A 57/2008* emphasizes it. In the present appeal however, we have come to the conclusion that the appellants did follow the proceedings before the learned trial magistrate conducted in a language they understood, though that was not noted on the record. As we have stated, they did not complain to that court; they cross-examined witnesses and their statements in defence were taken down. They did not raise the issue of language as a challenge either in the trial court or in the High Court where one of them had a lawyer. And there was always a court clerk on hand, whose role is to provide interpretation if required. Accordingly, we do not find that the appellants herein were prejudiced in this case. This ground therefore fails."**

30. Considering the circumstances of the case before me, I also conclude that the appellants cannot be heard to complain that the failure of the Court to indicate the language used during the taking of plea and the mentioning of the matter prejudiced them in any way. One of them had an advocate who could have taken up the issue with the trial Court if indeed there was a language barrier. In fact the language used when the witnesses testified is indicated to be English/Kiswahili. Their appeal on this issue therefore fails.

31. Did the delay in taking the appellants to court within twenty-fours breach their constitutional rights? The law in force then was Section 72(3) of the repealed Constitution which provided that a person arrested for an offence punishable by death was to be taken to court within fourteen days. The appellants were tried during the time of the repealed Constitution. However, it is noted that the provisions of the previous Constitution may not have been complied with as the appellants were taken to court on the fifteenth day which was outside the fourteen days provided by Section 72(3).

32. In **Julius Kamau Mbugua v Republic [2010] eKLR** the Court of Appeal explained how pre-trial constitutional violations should be treated by stating that:

> **"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the court assumed jurisdiction over the accused.**
>
> **However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial-related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate remedy – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police *per se* is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72(6) expressly compensatable by damages."**

33. The appellants have not shown that they suffered any prejudice by being taken to Court one day late. In fact it would be an abuse of the rights of victims of crime to terminate a criminal trial on the basis that there was a slight delay in taking the suspect to court. The appellants' appeal cannot succeed on this ground and the same fails.

34. Was the charge sheet defective? The charge stated the offence and contained the particulars of the offence. It therefore complied with the requirements of Section 134 of the Criminal Procedure Code. The appellants knew the offence they were charged with and the particulars stated in the charge sheet gave them reasonable information as to the nature of the offence charged. This ground of appeal also fails.

35. There was the unexplained failure to call the investigating officer. The appellants made heavy weather about this lapse. The 1st Appellant even went ahead and told the Court that he had told the investigating officer that the property recovered from his house was left there by a customer by the name Augustine who had failed to pay for the changaa he had taken.

36. In **Bwaneka v Uganda [1967] E.A.768,** Sir Udo Udoma, C.J. lamented at length about the failure to call investigating officers in trials before magistrates' courts and concluded that **"without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial court with respect to the prosecution case appears to be incomplete."** The failure to call the investigating officer was however found not to be fatal to the prosecution's case and the appeal was dismissed.

37. The Court of Appeal faced with a similar situation in **P.M. & 2 others v Republic [2014] eKLR** held that:

> **"Failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his/her evidence would have been against the prosecution. The question that ponders our mind is whether the evidence of the investigating officer would be prejudicial to the appellants. We think not, the investigating officer would collect, collate and repeat what PW1, PW2, PW3, PW4, PW5 and PW6 as well as other prosecution witnesses stated. We are of the considered view that failure to call the investigating officer and other witnesses was not fatal to the prosecution case. In all cases, the investigating officer is not an eye witness and in the instant case, the testimonies of the eye witnesses was sufficient to convict the appellants."**

38. The principle I get from the two cited authorities is that it is necessary for the prosecution to call the investigating officer in its case but where failure to do so causes no harm, a conviction should ensue. In order to dispose of this ground of appeal, I therefore need to consider the evidence adduced so as to decide whether the evidence of the investigating officer was crucial to the prosecution case in this matter.

39. The final ground of appeal is that of identification. In his evidence in chief, the complainant told the court that on 1st May, 2007 at about 10.00 p.m. he was in his house with his wife PW2 when he heard the dogs barking. He went out to establish why the dogs were barking and on switching on his torch he saw some people. He told the court that he **"knew one of them as Ouma Makokha (accused1).**" The people directed him to get back to the house.

40. Inside the house there was a lamp which was on. Ouma ordered him to shut up and cut him on the head with a panga. The 1st Appellant (the 2nd accused in the trial) tied his hands with a rope. They then demanded money and took Kshs. 23,000/- from him. They also took away assorted items including a Sony radio cassette and a power inverter. They were then led out of the house and taken to other houses before being abandoned in the bush about two kilometres away.

41. It was PW1's testimony that at the bush the 1st Appellant was left guarding them. PW1 told the court that he saw the 1st Appellant because there was moonlight. After the 1st Appellant left they raised an alarm and PW3 Peter Ojiambo went to their rescue and untied them. They were later escorted to Sio Port Hospital from where they proceeded to the police station and reported the matter.

42. On cross-examination by the 2nd Appellant, the complainant stated that he mentioned names of the appellants to the police although he never mentioned them in his first report. He told the Court that he did not lead the police to the arrest of the appellants.

43. On cross-examination by counsel for the 1st Appellant, PW1 testified that he did not attend any identification parade and he only saw the appellants in Court.

44. PW2 told the Court that after the dogs barked her husband (PW1) left the house. She then heard people order him back into the house. Inside the house the 2nd Appellant cut her husband on the head with a panga. Thereafter the 1stAppellant tied his hands with a rope. The 2nd Appellant then turned on her and assaulted her demanding money. They then took the money and household items.

45. Thereafter they were led to a bush about three to four kilometres away where one of the robbers whose face resembled that of the 1st Appellant was left guarding them. PW2 told the Court that when the matter was reported to the police she told them that she knew the 2nd Appellant. She did not know the 1st Appellant well although she had seen him before.

46. When cross-examined by the 2nd Appellant, the witness told the Court that she used to see him at Sio Port and at his home. She also stated that she told the police that she did not know the robbers.

47. Upon cross-examination by counsel for the 1st Appellant PW2 stated that she had seen the 1st Appellant at the police station and there was no identification parade held. She also stated that she had not mentioned the suspects in the statement she recorded with the police.

48. PW3 who went to the rescue of the complainant and his wife told the Court that after he untied them they told him that they did not know the robbers.

49. PW4 told the Court that on 7th May, 2007 at about 7.00 p.m. an informer told him that there were some criminals drinking changaa. They proceeded to the home of the 2nd Appellant where they arrested the 2nd Appellant, the 1st Appellant and six other people. They also recovered a Sony radio cassette and a power inverter. The items were later identified by the complainant.

50. On cross-examination by the 2nd Appellant, the witness told the Court that the 2nd Appellant had claimed that the recovered items were his. When cross-examined by counsel for the 1st Appellant he stated that the 1st Appellant was to be charged for being in possession of changaa.

51. The question is whether the evidence on identification was good enough to send the appellants to the gallows. The appellants gave unsworn testimony. The 2nd Appellant who was the first to testify told the Court that he was arrested from his house on 7th May, 2007 at

about 7.00 p.m. He was arrested together with his customers and 20 litres of changaa, a radio and an inverter recovered. It was his testimony that the radio and inverter had been left behind by three of his customers who had taken changaa on credit.

52. The evidence adduced in this case is that of identification through recognition. In **Peter Musau Mwanzia v Republic [2008] eKLR** the Court of Appeal explained how the evidence of identification through recognition should be treated. The Court stated that:

> **"However, even in cases of recognition, the law still demands that care be taken before a conviction is entered. In the well-known case of R vs. Turnbull (1976) 3 ALL ER 549 at page 552, it was stated that:**
>
> **"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."**
>
> **We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident."**

53. PW4 testified how the appellants were arrested. He stated that:

> **"I was at the police station when I got information there were some criminals in the area drinking changaa. We proceeded to Budenge village and found the 2 accused persons drinking changaa. We arrested them and conducted a search on them. We found 20 litres of changaa from accused 1's house. I also found a radio cassette, SONY –MFI 1, a power inverter – MF1 7. The accused 1 failed to prove ownership of the two items. I took the accused persons together with the two exhibits to the police station. I summoned the complainant and he came to identify the exhibits to be his. He produced the receipt for the two items.**

54. On cross-examination by the 1st Appellant's counsel, PW4 stated that:

> **"I am the arresting officer in this case. I arrested about 8 people in that home. Accused 1, accused 2 among others. The others were charged with being in possession of changaa. Accused 2 was to be charged with being in possession of changaa. The complainant came and identified accused 1 and accused 2, saying that he knew them as villagers. I did not search accused 2's home."**

55. I agree that the arresting officer was not under any obligation to disclose the particulars of his informer. The question that begs an answer is; how did the informer know that it was the appellants who had robbed the complainant? The complainant and his wife (PW2) testified that they knew the 2nd Appellant well. PW2 stated that she even knew the home of the 2nd Appellant. No explanation is available on record as to whether PW2 and PW3 led the police to the home of the 2nd Appellant. PW2 upon cross-examination stated that she did not know any of the robbers.

56. The person who went to the rescue of PW1 and PW2 told the Court that when he enquired from them whether they knew the robbers, they told him that they did not know them. This evidence is supported by the fact that the names of the robbers were not recorded either in the O. B. or in the statements they recorded with the police. Doubt is therefore raised about the evidence of PW1 and PW2.

57. In this particular case, the failure to call the investigator was fatal to the prosecution case. No nexus was established between the arrest of the appellants and their recognition by PW1 and PW2. It is only PW1 or PW2 who could have pointed out the appellants to the police. There is no evidence that they did so. These key witnesses found the appellants already arrested by the police. In fact PW4 stated that the 1st Appellant was to be charged for being found in possession of changaa. It is likely that he was only charged with this offence after the complainant identified them **"as villagers."** The identification of the 1st Appellant at the scene of crime was very shaky. PW2 talked of a person who resembled the 1st Appellant being left to guard them in the bush where they had been abandoned.

58. As for the 2nd Appellant, one can easily get the impression that he was well known to PW1 and PW2 prior to the robbery. However, as already pointed out, it is not known how the police knew that he was among the people who had robbed PW1 and PW2. They (PW1 and PW2) were not present when the appellants were arrested so as to identify them to the police. The impression one gets is that this was an ordinary changaa raid. The 2nd Appellant in his testimony told the Court that the stolen items that were recovered from his house had been left there by his customers who had taken the illicit brew on credit. His testimony was plausible and the trial Court ought to have taken it into account.

59. Looking at the evidence that was adduced in this matter, I find that the conviction of the appellants was a risky undertaking. They ought to have been given the benefit of doubt. Their alleged identification by PW1 and PW2 did not lead to their arrest. The chain of evidence was broken and the appellants ought to have benefited from the lapse on the part of the prosecution. Their appeals succeed. The conviction of each one of them is quashed and their sentences set aside. Each one of them is consequently set free unless otherwise lawfully held.

Dated, signed and delivered at Busia this 30th day of Nov., 2016.

W. KORIR,

JUDGE OF THE HIGH COURT