



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL APPEAL NO. 109 OF 2008

JAMES MWANGI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the ruling in Criminal Case No. 5098 of 2005 of the Chief Magistrate's Court at Makadara by Karani (Miss) – Resident Magistrate)

JUDGMENT

The appellant, JAMES MWANGI MAINA, was convicted on 2 counts of Robbery with violence contrary to **Section 296 (2) of the Penal Code**. He was then sentenced to death.

In his appeal, the appellant has raised six (6) issues which can be summarized as follows;

- (i) The plea was taken in an unprocedural manner, as the appellant was not cautioned about the consequences of his conviction.*
- (ii) By rejecting the appellant's application for the recall of PW 1 and PW 2, the trial court violated the rights of the appellant.*
- (iii) The alleged identification of the appellant was based on doubtful basis.*
- (iv) The case was not proved to the required legal standard.*
- (v) The death sentence was unconstitutional as the trial court did not give the appellant an*

opportunity for mitigation.

(vi) The trial court erred by rejecting a reasonable defence, which had cast doubt on the prosecution case.

When canvassing the appeal, the appellant submitted that during the taking of the plea, the trial court should have explained to him that if he was convicted, he risked being sentenced to death. In his view, the failure to provide that explanation was prejudicial to him.

He also submitted that the rejection of his application for the recall of **PW 1** and **PW 2**, for further cross-examination denied him his constitutional rights. In particular, he says that his rights under **section 77 (2) (a) (b) and (c) of the Constitution** were violated.

His reasoning was that he was denied the opportunity, time and facilities to prepare for his defence.

The bulk of the appellant's submission centred on the issue of Identification.

He said that neither **PW 1** nor **PW 2** indicated how long they looked at him or how long the robbery incident lasted.

Secondly, he faulted the trial court for failing to note that the alleged eye-witnesses did not indicate the nature or intensity of the lighting that was present at the time of the robbery. As far as the appellant was concerned, the witnesses should have indicated whether the light was from either bulbs or efflorescent tube; the colour of the bulbs or the tubes; and the position of the said lighting.

The appellant also said that the witnesses had failed to indicate the means by which they had identified him.

Meanwhile, if **PW 2** had known him for 2 years prior to the incident, the appellant says that **PW 2** would have reported to the police that he was a thief. As **PW 2** did not report to the police, the appellant says that that implied that **PW 2** did not actually know him before the incident.

Furthermore, the appellant believes that the wife to **PW 1**, together with the bar attendants would have been crucial witnesses, as they were present during the robbery. However, the prosecution failed to call them as witnesses.

The appellant also submitted that the police should have made available the cartridges from the bullets allegedly fired by **PW 3** when he was chasing the 2 thugs.

And, as one of the said thugs was shot dead, the appellant says that his death certificate and a post-mortem report should have been produced by the prosecution.

In any event, none of the items that had been stolen from the 2 complainants were recovered from the appellant. Therefore, he submitted that that shows that he was a victim of mistaken identity.

As regards his defence, the appellant believes that it was not only reasonable, but also that it cast doubts on the prosecution case. Therefore, it ought not to have been rejected.

Finally, on the issue of sentence, the appellant described the death sentence as arbitrary, unconstitutional and inhuman. Furthermore, the trial court was faulted for failing to accord to the appellant, an opportunity for mitigation prior to sentencing.

In answer to the appeal, Miss Maina, learned state counsel, submitted that the conviction and sentence was sound.

The respondent summarised the evidence, and submitted that the appellant was identified positively. The

court was asked to dismiss the appeal.

In this matter we are the first appellate court. We are therefore obliged to re-evaluate all the evidence on record, and to draw therefrom our own conclusions.

We have undertaken that task, whilst bearing in mind that, unlike the trial court, we did not have the benefit of observing the witnesses when they were testifying.

PW 1 was the complainant on Count 1, whilst **PW 2** was the complainant on Count 2.

PW 1 testified that he and his wife had a bar in Kayole. On 25th July 2005 the couple arrived at the bar, at between 9.00a.m. and 10p.m.

His wife went behind the counter to collect the money already made that day. Meanwhile, **PW 1** sat on the outer part of the bar.

PW 1 saw 5 boys enter the bar, where they bought a bottle of wine. The boys then left. However, they returned shortly thereafter.

Upon their return, 2 boys entered the counter; one went next to **PW 1** whilst the other 2 stood by the door. The boys ordered everyone to lie down. They then stole a total of KShs.7,500/- and **PW 1**'s phone.

After the 5 boys left, **PW 1** used his wife's mobile to call the police. The police responded swiftly by going to the scene.

When **PW 1** phoned his number, he heard sounds in the background, suggesting that the person who had his phone, was at a bus-stop.

PW 1 accompanied the police to the bus-stop, where he pointed out 2 of the robbers. The police pursued them. An exchange of gun-fire erupted, resulting in the police fatally injuring one robber. But the appellant escaped.

Meanwhile, before the police had arrived, the robbers attacked **PW 2** at his "Simu ya Jamii" shop, and robbed him of his said "Simu ya Jamii".

3 days later, **PW 2** saw the appellant, whom he had identified as one of the robbers. **PW 2** pointed out the appellant to the police officers, who included

PW 3. It is then that the appellant was arrested.

PW 3 testified that he was a police officer. On 25th July 2005, he was with PC Wekesa, on patrol duties within Kayole. They were also with PC Chemosit.

PW 3 testified that PC Wekesa received a call from **PW 1**, about a robbery at **PW 1**'s bar.

PW 3 rushed to the scene, with his colleagues. **PW 3** shot dead one of the robbers, after a shoot-out. The other robbers escaped.

PW 2 told **PW 3** that he was familiar with one of the robbers who escaped.

3 days later, **PW 2** called **PW 3**, after **PW 2** saw the appellant near Saba Saba stage. **PW 3** rushed to that place, where he arrested the appellant after

PW 2 pointed him out.

When the appellant was put to his defence he alleged that he was arrested on 28th May 2005, when he had just alighted from a matatu.

He said that the police searched him and some of his friends. The police found bhang with one of the said friends. For that reason, they were all arrested.

The others were released after paying KShs.2,000/- each. But as the appellant did not have money he was charged with the 2 counts of robbery with violence.

Having evaluated the evidence on record, we note that the trial court did not explain to the appellant the consequences of a conviction for a person charged with the offence of Robbery with violence.

However, there is no legal requirement that the court before which a plea is taken, should tender to the accused an explanation of the consequences of his conviction.

It is only when a person facing a capital offence indicates that he wishes to plead “Guilty” to the charge, that the trial court is advised to not only repeat the process (so as to ensure that the accused had clearly understood the charge and the particulars thereof); but to also notify the accused about the consequences of his said plea.

As regards the rejection of the appellant’s application for the recall of **PW 1** and **PW 2**, we note that the appellant did not give any reasons why he wanted to have the 2 witnesses recalled.

Therefore, in our considered opinion, the trial court cannot be faulted for rejecting the application.

It must be understood that there cannot be an automatic entitlement to have witnesses recalled simply because an accused person has asked for the same. The accused person should give plausible reasons for his application. If he fails to do so, he cannot blame the court for rejecting his application.

As regards the evidence of identification, we find that that is intertwined with the whole question regarding the sufficiency (or otherwise) of the evidence tendered by the prosecution.

PW 1 testified that when he was being robbed, there was electric light in the bar. He also said that the incident lasted about 5 to 10 minutes.

Therefore, the circumstances prevailing were not at all harsh. There was electric lighting, and the time was sufficient.

PW 1 first saw the 5 boys as they bought wine at the counter. The boys then went out before returning. **PW 1** had the opportunity of seeing the appellant clearly. That is why he was able to recount their movements so vividly.

PW 1 said that the appellant is the one who was guarding him. He and the appellant were talking, and **PW 1** was able to see a mark on the appellant’s fore-head.

During the trial, **PW 1** was able to show to the learned trial magistrate, a visible scar on the appellant’s

left side of the head. That satisfied us that **PW 1** did identify the appellant positively during the robbery.

PW 1 then pursued the robbers. He was able to see them from a distance, as the robbers were running downhill. **PW 1** said that it was possible to see the robbers from a distance, upto the bridge.

So if **PW 1** identified the appellant so positively, and also pursued the robbers, why was no recovery made from the appellant?

PW 1 said that the robber who took the money and the phone ran away. That explains why none of the items were recovered from the appellant.

Meanwhile, as regards **PW 2**, he recognized the appellant during the robbery. However, the appellant escaped.

3 days later, **PW 2** pointed out the appellant to the police officers, who then arrested him.

PW 2 said that there was electric light in his shop. He also said that he saw the appellant clearly.

When the police arrived at the scene, shortly after **PW 2** had been robbed, **PW 2** told them that he was familiar with the appellant. In effect, **PW 2** did tell the police officers, at the earliest opportunity, that he knew the appellant.

3 days later, **PW 2** saw the appellant, and he then phoned **PW 3**. When **PW 3** arrived, **PW 2** pointed out the appellant.

According to **PW 3**, when the appellant saw **PW 2**, he started running away. The appellant only stopped when **PW 3** threatened to shoot him.

As it is **PW 2** who pointed out the appellant to the police officers who arrested him; and also because **PW 2** had known the appellant prior to the robbery, there would be no useful purpose to be served by conducting an Identification Parade.

To our minds, the death certificate or the post mortem report of the appellant's accomplice were not relevant pieces of evidence in the case against the appellant. Similarly, the spent cartridges that may have been recovered from the scene of the shoot-out between the police and the robbers were not essential pieces of evidence.

It is, of course, true that an accused person need not prove his innocence.

In this case, the trial court rejected the defence because it was deemed to be a sham. That conclusion was largely derived from the appellant's failure to suggest to the arresting police officer, when cross-examining him, that he was only arrested because his friend was found with bhang.

In our considered view, that finding by the learned trial magistrate cannot be faulted.

In any event, the evidence adduced by the prosecution was so overwhelming that the appellant's defence did not cast any doubt on it. Therefore, we hold that the conviction was sound.

As regards the sentence, the record shows that the trial court gave to the appellant an opportunity for mitigation.

Article 26 of the Constitution of the Republic of Kenya reiterates that;

“Every person has the right to life.”

However, the same said Article also makes it explicitly clear, at **sub-Article (3) that;**

“A person shall not be deprived of his life intentionally, except to the extent authorized by this Constitution or other written law.”

In **GODFREY NGOTHO MUTISO Vs. REPUBLIC, CRIMINAL APPEAL NO. 17 OF 2008**, the Court of Appeal had occasion to comment on that sub-Article.

This is what the court said;

“We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed.”

The Court of Appeal went further to express itself as follows;

“We must re-emphasize that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has had submissions of each particular case.”

Therefore, that legal authority does not back the appellant’s contentions that the death penalty was either unconstitutional or inhuman.

In conclusion, we find no merit in the appeal. It is therefore dismissed. We uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi, this 14th day of February, 2012.

.....
FRED A. OCHIENG
JUDGE

.....
L.A. ACHODE
JUDGE