REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 354 OF 2007

AGGREY MBAI INJAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 9717 of 2004 of the Chief Magistrate's Court at Kibera by H. Wasilwa – Principal Magistrate)

JUDGMENT

The appellant, **AGGREY MBAI INJAGA**, was convicted for the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. Thereafter, he was sentenced to suffer death as by law prescribed.

In his appeal, he has raised three issues, as follows:

"1. THAT the pundit magistrate erred in law while not according to me a fair trial, which contravened section 77(1) (2) of the Constitution.

2. THAT the pundit magistrate erred in both law and fact while not considering that Section 137 D of the C.P.C. and section 165 of the Evidence Act was violated.

3. THAT the pundit magistrate erred in law by not fully complying with section 169 (1) of the C.P.C. as she was duty bound."

When canvassing the appeal, the appellant told us that he did apply to the trial court for the charge sheet, witness statements and for an advocate. However, the trial court is said to have deprived him of all the said things.

As far as he was concerned, the trial court violated his constitutional rights by holding that his request for legal representation was nothing more than a deliberate effort to delay the trial.

The trial court is further faulted for failing to inquire from the appellant whether or not his relatives could hire an advocate to represent him.

Another issue raised by the appellant was that the witnesses who identified him in the Identification Parades had not described their attackers to the police. The alleged failure to describe their attackers is said to constitute a violation of **Section 137D of the Criminal Procedure Code,** and also **section 165 of the Evidence Act.**

In relation to **Section 169 of the Criminal Procedure Code**, the applicant submitted that because the trial court had proceeded to hear some witnesses in the absence of the appellant, it did not make sense for the said court to require him to be present when it gave the ruling by which he was put to his defence.

He also felt that because he had been excluded from the court when some witnesses gave their evidence, it was best that he should keep quiet when asked to put forward his defence.

In any event, the appellant believes that the record of the proceedings was jumbled-up because it did not indicate clearly whether he had been excluded from the court or not.

Furthermore, the appellant points out that whilst the trial was still going on, he had lodged an application to the High Court. However, whilst the matter was still pending, the trial court proceeded to deliver its judgment. He therefore submitted that he had been denied justice as his rights had been infringed.

The appellant also submitted that the trial court failed to give consideration to his defence. It is his view that the trial court should have explained, in the judgment, the reasons which led to the appellant not proceeding with his defence.

The appellant asked this court to consider that he is a layman, who had been in custody for long; but who had been denied an opportunity to defend himself.

In determining this appeal we will give due consideration to the foregoing submissions, together with the submissions made by Mr. Muriithi, the learned state counsel who represented the respondent.

We will also re-evaluate all the evidence on record, and draw therefrom our own conclusions.

The plea was taken on 10th December 2004. On that day, the appellant informed the court that he had an eye problem. He asked for treatment and also for the charge sheet.

The court promptly ordered that the appellant be accorded medical treatment, and also that he be given the charge sheet.

On 23rd December 2004, the appellant reiterated that he had an eye problem. He added, that he wanted copies of witness statements.
Once again, the court directed that the appellant be given medical treatment, together with witness statements.

After numerous mentions, the appellant again asked for witness statements on 1st March 1006. The court ordered that the statements be supplied to the appellant when the case would be next mentioned, on 15th March 2006.

However, the statements were not supplied on that occasion. Eventually, the appellant was supplied with the statements on 30th March 2006. Thereafter, the trial commenced on 10th May 2006.

PW 1, RAJNIN KANK J. DESAI, is the complainant. He testified how he was accosted by 3 armed gangsters, within his own compound, in Loresho Ridge.

He and his daughter, as well as his employees were tied up, whilst the gangsters ransacked the house. They then went away with **PW 1's** property, which they ferried using **PW 1's** vehicles.

PW 1 identified the appellant as one of the gangsters. **PW 1** had known the appellant because the latter had worked for him as a security guard within his compound. He explained that the appellant was an employee of the security company which **PW 1** had engaged to provide security.

PW 2, PETER BERU MUSUNGU, was a night guard in Westlands, as at May 2006. Prior to that, he worked as a guard, in Loresho.

On the material day, he reported on duty at the home of **PW 1**, at about 6.30a.m.

Thereafter, the accused arrived at the home of **PW 1**. According to **PW 2**, the accused was in the company of some other persons who were unknown to **PW 2**. However, **PW 2** had known the accused, because the two of them had previously worked together as guards.

The accused told **PW 2** that if he screamed he would be killed, because he (the accused) and the other men had come to work.

One of the men had a pistol. The said armed man ordered **PW 2** to remove his uniform, and **PW 2** complied. Thereafter, **PW 2** and the other guard who was on duty with him, were tied up with ropes, and they were then placed in one room whilst the robbers ransacked the house.

After PW 2 testified, the case was adjourned. When the trial was scheduled to resume, on 5th July 2006, the appellant sought an adjournment because he wanted to hire an advocate who would act for him.

The learned trial magistrate did give to the appellant a one month adjournment, during which period the appellant was to hire an advocate for himself.

However, even by 11th August 2006, the appellant had still not yet been able to hire an advocate. On that date, the court granted an adjournment because both the prosecution and the appellant asked for it.

On 14th September 2006, the prosecution was ready to proceed with the trial, but the appellant asked for another adjournment. His reason for seeking an adjournment was that he had not yet got an advocate who could represent him. The appellant asked the trial court to allow him some 3 months to look for an advocate.

The trial court did accommodate the appellant, by setting down the case for hearing on 8th January 2007. On that date, the prosecution had 4 witnesses in court, and was ready to proceed. However, the appellant was still not ready, as he was yet to get an advocate.

On that occasion, the trial court noted that the appellant had refused to have the trial proceed for a long period of time, on the grounds that he needed an advocate. As the court had already adjourned the case severally, on that same basis, it notified the appellant that he would be given the last adjournment.

When the trial was set to resume on 21st March 2007, the appellant informed the learned trial magistrate that the did not want

the case to proceed before that court. He also indicated that he did not yet have a lawyer.

As the court had already granted the last adjournment, it rejected any attempt to have the case adjourned again. It directed the trial to resume.

The appellant then told the court that he would not participate in the proceedings. Having said so, he returned to the cells.

After invoking the provisions of **section 77 (2) of the Constitution**, the learned trial magistrate held that the decision by the appellant, to remove himself from the presence of the court, would not derail the trial. Therefore she directed that the trial would proceed in the absence of the appellant.

PW 3, EUNICE MUENI, then testified. She used to work for **PW 1** as a house girl.

On the material day, she reported for duty at about 7.55a.m. when she got to the servants quarters, she found **PW 1's** driver, Peter, lying down on the floor of his house. The said house was opposite **PW 3's** room.

Peter was being guarded by a man who was armed with a pistol.

Later, the gangsters took **PW 1**, Peter and **PW 3** into the main house, where they were all tied up. They then ransacked the house and left with **PW 1's** property.

PW 3 identified the appellant as having been one of the robbers. She knew him because he had previously worked for **PW 1**, as a guard.

PW 4, STEPHEN MUSYOKI, was also a guard at the residence of **PW 1.** He reported on duty on the morning of 2nd July 2000. One of the people he found in the compound was the appellant, who had previously worked as a guard at **PW 1's** house.

When PW 4 asked the appellant how the work was on that morning, the appellant said that it was okay.

However, another guard, whose identity **PW 4** did not know, told the appellant to tie-up **PW 4**. The appellant did so.

Later, **PW 4** was taken into the main house, where he, and **PW 1; PW 3;** and **PW 1's** daughter were tied up.

PW 1, PW 2, PW 3 and **PW 4** all said that the robbery commenced early in the morning, and it went on until about 4.00p.m.

PW 5, SGT. MARTIN MWAKA, took photographs of two vehicles. The said vehicles were registration numbers; KAB 674Q and KAE 954E. He provided the said photos in court, as evidence of the vehicles which had been stolen, but which had been recovered thereafter.

PW 6, PC CHRISTOPHER SOME, was on duty at Spring Valley Police Station, when they received a report of a robbery that had happened at **PW 1's** house.

He went to the house with Corporal Maina, and found the house ransacked.

After one year, **PW 6** received information that the suspects were before the Kibera Court, where they were facing another case in which they were alleged to have been involved in another robbery.

PW 6 went to the court in Kibera and asked that the suspects be released to him, to enable him complete his investigations into the case herein.

When the suspects were handed over to **PW 6**, he organized for Identification Parades to be conducted. When the suspects had been identified, **PW 6** had them charged with robbery with violence.

The other suspect died while in custody.

The record of the proceedings shows that the witnesses who testified in the absence of the appellant from court, were **PW 3** and **PW 4**.

PW 5 and **PW 6** testified in the presence of the appellant. However, when they did so, the appellant declined to proceed.

After **PW 6** testified, the prosecution closed its case.

When the appellant was put to his defence, he remained silent. The court then fixed the date for judgment.

An analysis of the evidence on record reveals that the case put forward by the prosecution was more than sufficient to sustain the appellant's conviction.

He was recognized by the complainant, the house girl, as well as by his former colleague.

At no time did the appellant make any attempt to cover up his face or otherwise disguise his appearance. The appellant talked to **PW 2** and warned him that if he screamed, he would be killed.

Obviously, as **PW 2** used to work with the appellant, as guards, he was able to recognize him, as the incident happened in broad daylight.

PW 3 arrived at the home of **PW 1**, where he was then working as a guard. He met the appellant, who opened the gate for him. He then asked the appellant how the work was, and the appellant told him that it was okay.

Clearly, the appellant was recognized. We find that there was absolutely no room for any error in his said recognition.

And because the appellant had been known to the witnesses even prior to the incident, we hold that the exercise at which he was identified at an Identification Parade, was not necessary, in law.

If a suspect is known to a witness before the incident giving rise to the said suspect being charged with a criminal offence, the witness is said to have recognized the suspect. Therefore, the witness would have little, if any, difficulty in picking out the suspect from a parade.

An Identification Parade is intended to test the ability of a witness to pick-out a suspect whom he had seen committing a crime, if the said suspect was not known to him prior to the incident giving rise to the criminal charges against the suspect.

Secondly, the appellant was in company of other persons who were all involved in robbing the complainant.

Thirdly, the said group of robbers were armed with pistols, which are dangerous weapons.

Fourthly, the robbers caused physically injuries to the complainant. The broke his tooth and injured his mouth.

Although not all those facts needed to be proved to sustain a charge of robbery with violence, the fact that they were proved meant that the appellant was convicted on the strength of sound factual evidence.

Section 137 of the Criminal Procedure Code spells out the rules for the framing of charges and informations.

In this case, the appellant was described as follows, in the charge sheet;

" AGGREY MBAI NJAGA MALE LUHYA (from) VIHIGA DISTRICT."

To our minds that description met the requirements of **Section 137 (d) of the Criminal Procedure Code.** We so find because the description in the charge sheet is simply required to

"be reasonably sufficient to identify him....."

The next question that we address relates to **section 77 of the Constitution of the Republic of Kenya.** Pursuant to that section every person who is charged with a criminal offence was entitled to the secure protection of the law. He is therefore entitled to a fair hearing within a reasonable time, by an independent and impartial court.

If we understand the appellant correctly, he is complaining that the trial court proceeded to receive evidence against him whilst he was absent from court.

Pursuant to **section 77 92) of the Constitution**, an accused person is entitled to be present during his trial.

However, that right is subject to the following two exceptions;

(i) If the accused consents to the trial going an in his absence; or

(ii) If the accused so conducts himself as to render the continuance of the proceedings in his presence impracticable.

In the latter case, the court would be entitled to order the removal of the accused from court, and the trial may then proceed in his absence.
In this case, the appellant made a conscious decision to walk out of court. He told the court that he would not participate in the proceedings. Thereafter, he returned to the cells.

When the appellant chose to stay away from the proceedings, the trial court had no legal obligation to compel him to remain in court. Secondly, notwithstanding the decision to absent himself from the court, the said action of the appellant could not force

an adjournment.

We therefore hold that the decision of the trial court, to proceed with the trial in the absence of the appellant, did not violate any provision of the law.

But then again, it would be remiss of us to overlook the reasons advanced by the appellant, when he sought adjournments. He said that he needed time to hire an advocate.

In principle, an accused person is entitled to a lawyer of his choice. That is his constitutional right.

However, when a court has accorded to the accused sufficient time to engage the advocate of his choice, and the accused had not shown any signs that he would soon hire the said lawyer, the court is not obliged to keep the case in abeyance for an indefinite period of time.

In this case, the court had accommodated the appellant sufficiently.

When the accused chose to absent himself from the proceedings, it implied that he was unable to cross-examine the witnesses who testified whilst he was not in court.

However, even when the appellant was in court, at the time **PW 1** and **PW 2** testified, he did not ask them any questions, in cross-examination.

After the prosecution closed its case, the court placed the appellant to his defence. Contrary to the appellant's contention, the trial court acted properly when it required him to be present in court, when the court held that he had a case to answer.

The appellant needed to know whether or not he had a case to answer. Therefore, the trial court was right to have had him recalled to court, when it was about to deliver its ruling.

Finally, we have found nothing in the record of the proceedings which offends either **section 169 of the Criminal Procedure Code** or **Section 165 of the Evidence Act.**

In the result, the appeal has no merit. It is dismissed, and we confirm both the conviction and sentence.

Dated, Signed and Delivered at Nairobi, this 17th day of May, 2011

.....	**.....**
FRED A. OCHIENG	**MOHAMED WARSAME**
JUDGE	**JUDGE**