



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 154 OF 2007

TITUS MUINDI MUKOMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3095 of 2004 of the Chief Magistrate's Court at Nairobi by Ms. L. Mutende – Principal Magistrate)

JUDGMENT

The appellant, **TITUS MUINDI MUKOMA**, was convicted for the offence of robbery with violence contrary to **section 296(2) of the Penal Code**. He was thereafter sentenced to suffer death as by law prescribed. In his appeal to this court, the appellant has raised six (6) issues, which can be summarized as follows;

- (i) The Identification Parade at which he was identified, was a sham.*
- (ii) The Identification by the single identifying witness was not reliable as the said witness had failed to described the suspect to the police.*
- (iii) The appellant's rights under Section 72 (3) of the Constitution were violated as he was held in custody for over 53 days before being taken to court. Secondly, when the appellant raised the said issue, before the trial court, the said court failed to formulate the issue which should then have been forward to the High Court, for determination.*
- (iv) The Exhibit comprising print-outs from Safaricom was irregularly admitted in evidence; as there was no supporting certificate, as envisaged by Section 65 (8) of the Evidence Act.*
- (v) In any event, the information provided by Safaricom was in relation to a phone that was different from the one which the police were investigating.*
- (vi) Whilst the complainant lost a Toyota Prado; PW 6 and PW 8 talked about a Toyota Land Cruiser. The appellant believes that those vehicles are different.*

When prosecuting the appeal, Mr. Nyaberi advocate submitted that the Identification Parade at which his client was identified was simply a cosmetic exercise. His reason for that submission was that **PW 1** was shown a photograph of the appellant before he was invited to try and identify the suspect in the parade.

In any event, as the trial court noted, the alleged identification was by a single witness, who had not described the suspect to the police, before the parade was conducted.

As the police had not been given the suspect's description by the identifying witness, the appellant submitted that the police had no basis for showing his picture to the identifying witness.

This court was thus invited to conclude that there had not been any positive identification of the appellant. The second issue raised by the appellant was that his constitutional right was violated when he was held in custody for 53 days before being taken to court.

As if that were not enough, the trial court was faulted for failing to formulate an issue which would have been forwarded to the High Court, to enable that court determine the constitutional issue.

Meanwhile, as regards the print-out of the information from Safaricom, the appellant pointed out that the same was in relation to a mobile phone number **0722 521 045**. That number was said to be at variance with the mobile phone number **0720 275 070**, which the Investigating Officer had asked Safaricom to investigate.

Furthermore, the appellant submitted that the print-outs from Safaricom should not have been admitted in evidence because the same were not accompanied with a certificate pursuant to **section 65 (8) of the Evidence Act**.

As a consequence, the appellant submitted that there were gaps in the prosecution case; and also that the evidence adduced was inconsistent and incoherent.

As an example, the appellant pointed out that whilst the complainant was robbed of a Toyota Prado, other witnesses made reference to a Land Cruiser.

Another example given by the appellant was that there was no evidence to show that the phone belonging to him is the same one as the one that had been used earlier by the complainant.

In answer to the appeal, Ms Mwanza, the learned state counsel who had the conduct of the Respondent's case, submitted that the complainant did positively identify the appellant. She said that the identification was very positive as **PW 1** stayed with the appellant for 2 to 3 hours, during the day.

Having seen the appellant for that long, in broad daylight, **PW 1** was said to have found it easy to pick out the appellant from the Identification Parade.

The Respondent emphasized that the appellant was not picked out at the parade because the identifying witness had been shown his photograph earlier. Instead, the Respondent attributed the picking-out of the appellant, at the parade, to the positive identification by **PW 1**.

Meanwhile, as concerns the alleged violation of the rights of the appellant, as enshrined in section 72 (3) of the Constitution, the Respondent submitted that that was not a basis for an acquittal. We were told that the violation of section 72 (3) of the Constitution only gave rise to a claim for compensation.

In relation to the print out from Safaricom, the Respondent pointed out that the same was accompanied by a letter from the said service provider. Secondly, the appellant did not raise any objection to the production of the print-outs, although he was represented by an advocate, during the trial.

As regards the mobile phone handset which the complainant lost to those who robbed him, the Respondent pointed out that the sim-card used in the appellant's mobile phone, was first used in the handset belonging to the complainant. Therefore, the Respondent submitted that there could be no doubt that the appellant stole the handset from the complainant.

Meanwhile, the vehicle stolen from the complainant was said to be a Prado. The Respondent believes that the reference to a Land Cruiser was nothing more than a typographical error.

Ultimately, the Respondent submitted, the evidence on record was overwhelming.

When called upon to reply to the Respondent's submissions, Mr. Nyaberi, the learned advocate for the appellant submitted that a letter from safaricom could not be a substitute to the certificate contemplated by section 65 (8) of the Evidence Act.

And even though the appellant had a lawyer during his trial, he submitted that the prosecution was nonetheless obliged to follow the law.

We have re-evaluated the evidence on record, and have drawn our own conclusions therefrom. We shall now give consideration to the submissions made herein, within the context of the evidence adduced at the trial.

First and foremost, it is clear that at the time the complainant (**PW 1**) was robbed of the vehicle, he was all alone in the vehicle. Therefore, if he did identify his assailants, it would imply that there was only a single identifying witness.

In her judgment, the learned trial magistrate did caution herself about the danger of relying on the evidence of a single identifying witness, as the basis for a conviction. By doing so, the trial court definitely had in mind the correct approach to the legal issue at hand.

If a witness has identified a suspect during the occurrence of a criminal offence, the best way to test whether or not the said identification was positive, was by way of conducting an Identification Parade.

For an Identification Parade to be meaningful, it must be conducted in compliance with the rules which ensure that fairness is scrupulously safeguarded.

To our minds, the identifying witness cannot be said to have positively identified a suspect in an Identification Parade, if he was shown the said suspect before the parade was conducted.

In this case, the identifying witness was shown many photographs before the parade was conducted. It is his evidence that he picked out the appellant's photograph out of the many photos at the police station.

Whereas the prosecution insisted that the police did not pin-point the appellant's photo among the other photos; and even though that may be factually correct, the question that we ask ourselves is why did the police deem it necessary to show **PW 1** the photos before the parade was conducted.

Surely, if **PW 1** was so sure that he could positively identify the suspect, he did not need to be shown any photos before the

parade was conducted.

Secondly, we note that when **PW 1** gave his evidence-in-chief, he said;

“The police gave me a photograph and I identified the photograph. I was asked if I could identify him on parade. I said I could identify him.”

Later, when **PW 1** was cross-examined by Mr. Muoki advocate, he reiterated the same point: He said;

“I was shown a photograph after I said I could identify the person. There were many photographs on the wall at the CID Headquarters Nairobi.”

From the foregoing, it is clear that whereas there were many photographs on the wall at the CID Headquarters, Nairobi, the identifying witness was only shown one of the said photographs. Therefore, when he picked out the appellant from the Identification Parade, that could not be equated to identification. He was simply picking out someone because he had been shown that person’s photograph.

Meanwhile, as regards the contention that the trial court failed to formulate a question which would then have been forwarded to the High Court to determine, the answer is to be found in section 84(3) of the Constitution. That provision reads as follows;

“If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.”

In this case, the appellant did not request the learned trial magistrate to formulate a question, which was to be referred to the High Court for determination.

Had he requested the trial court to forward the question to the High Court, the trial court would have been obliged to do so, unless it was his considered opinion that the issue was frivolous and vexatious.

We find that the trial court cannot be faulted for not having asked the High Court to determine the issue as to whether or not the appellant’s constitutional rights had been infringed.

Reverting to the issue of **section 72 (3) of the Constitution**, we would add that if the constitutional rights of the appellant had been infringed, that would not, of itself, be sufficient ground to earn him an acquittal.

In **JULIUS KAMAU MBUGUA Vs REPUBLIC, CRIMINAL APPEAL NO. 50** of 2008, the Court of Appeal expressed itself thus, on the issue of the detention of an accused in custody for longer than permitted before he was first taken to court;

“The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.”

The next issue relates to the make of the motor vehicle which was taken from **PW 1**, by the robbers. The charge sheet makes reference to a Toyota Prado, registration number KAQ 526M.

PW 1 testified that the vehicle he was robbed of was a Toyota Prado.

However, **PW 6**, Cpl. Kennedy Onyango, said that the vehicle was a Landcruiser, registration number KAQ 526N.

Thereafter, **PW 8** testified that the vehicle was a Toyota Prado.

It is instructive to note that **PW 1** was the complainant. He was driving the vehicle in issue when the robbers carjacked him, robbing him of the said vehicle amongst other items.

Meanwhile, **PW 6** was a police officer attached to the CID Headquarters. His duties included the investigations of violent crimes. He stumbled onto the appellant when he (**PW 6**) was investigating a robbery case in which a Makueni Police Land-Rover was attacked by suspected gangsters. A police officer had been robbed of a pistol, and he had been seriously wounded.

In the process of investigating that case, he arrested the appellant and the 2nd accused. He then recovered a mobile phone from the appellant. In relation to this case, **PW 6** went further to investigate the mobile phone which he recovered.

Meanwhile, as regards the motor vehicle which the robbers stole from **PW 1**, the witness simply said that **PW 1** had also been robbed of a motor vehicle KAQ 526N, a Landcruiser.

That vehicle was never recovered.

Therefore, we hold the view that it was possible for **PW 6** to have made a genuine mistake when he referred to the vehicle as being a Landcruiser, instead of a Toyota Prado.

We say that it was a genuine mistake because both **PW 1** (who was driving the vehicle), and **PW 8** (who worked with the insurer, ICEA) confirmed that the vehicle was a Toyota Prado.

The insurer also produced the logbook for the vehicle, to confirm that the vehicle in issue was a Toyota Prado.

Therefore, the learned trial magistrate was right to have held that **PW 1** was robbed of a Toyota Prado.

We have already held that the manner in which the appellant was allegedly identified at the Identification Parade was not in accordance with the Forces Standing Orders or the requisite standards of transparency and fairness.

That would leave the mobile phone which was allegedly recovered from the appellant, as the only thread through which the appellant was linked to the robbery.

The robbery took place on 29th March 2004, whilst the phone was recovered on 14th December 2004.

During cross-examination, **PW 1** confirmed that when he recorded his statement, he did not mention the mobile phone. However, when he produced the receipt issued to him when he purchased his phone, the serial number matched the one on the recovered phone.

If that was the only evidence, it would have been wrong to use it to conclude that the appellant must have been one of the robbers. We say so because over a period of 8 months, a mobile phone may have changed hands severally; or to put the issue in a different way, the doctrine of recent possession would most probably have been inapplicable to the facts.

But, in this case, PW 6 did write to Safaricom;

“enquiring about the number of Safaricom lines that had been used in the phone.”

When Safaricom provided the information, it showed that the sim-card used on the handset from 29th March 2004 was the same one as that recovered from the handset recovered from the appellant.

In other words, the appellant was shown to have placed his own sim-card into the handset which was robbed off **PW 1**. He is shown to have done so on the very same day that **PW 1** was robbed of his phone.

How was that evidence tendered to the trial court?

The evidence was adduced through a print-out prepared by Safaricom. The print-out, together with the covering letter from Safaricom dated 18th November 2004, were produced in evidence by **PW 6**.

The question we ask ourselves is whether or not the covering letter could be deemed to constitute a certificate, as provided for by **section 65 (8) of the Evidence Act**. That section provides as follows;

“In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say –

(a) Identifying a document containing a print-out or statement and describing the manner in which it was produced;

(b) Giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) Dealing with any of the matters to which the conditions mentioned in subsection (6) relate, Which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.”

Amongst the requirements of subsection (6) are that the computer was operating properly, and it was fed with information of the kind from which the information contained in the print-out is derived. Furthermore, the computer should have been operated by a person having lawful control over it; and who was working in the ordinary course of his business.

It is our considered view that the most efficacious way of ensuring that evidence of print-outs or of statements produced from computers are admissible in evidence, would be by having the same produced by a person who was directly connected with the production of the said print-outs. By so saying, we must not be understood to be laying down an inflexible rule. We are simply suggesting a procedure that appears to us, to be capable of enabling the prosecution meet the requirements for admissibility of the said evidence.

In this case, the letter signed by the Fraud & Security Manager of Safaricom does not meet the requirements of the certificate anticipated by **section 65 (8) of the Evidence Act**. Therefore, the said evidence was inadmissible. Its authenticity and reliability was not verified.

The appellant was found in possession of some goods that had been stolen from the appellant. Those were a television set and a video recorder. In his defence, the appellant asserted ownership of the said items. However, we are satisfied that the said goods

did not belong to him. We say so because the receipts which he produced were proved to be fake. The said receipts did not match those that were issued by Kaributronics Limited.

If anything, the said Kaributronics Limited demonstrated that their receipts, bearing the numbers equivalent to those on the fake receipts, were issued to customers other than the appellant. Furthermore, the said receipts were issued for items which were different from those in respect to the items found in possession of the appellant.

Therefore, the appellant was found in possession of items that had been stolen from **PW 1**. As he was found in possession of recently stolen items, without any explanation, he was the robber who committed the subject robbery.

Accordingly, we uphold the conviction and the sentence. The appeal is dismissed.

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

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FRED A. OCHIENG
JUDGE

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MOHAMED WARSAME
JUDGE