



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 356 OF 2010**

***(From original conviction and sentence in Criminal Case No. 1355 of 2006 of the Principal Magistrate's Court Narok - S. M. Githinji, Principal Magistrate)***

**PETER MBARIA JOSEPH.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was initially charged with three other accused with the offence of robbery with violence contrary to Section 296(2) of the Penal Code (*Cap. 63, Laws of Kenya*).

On Count I, the prosecution's case against the appellant was that during the night of 14<sup>th</sup>/15<sup>th</sup> day of November 2006 at Wafoo Reserve in Narok District within Rift Valley Province, jointly with others not before the court while armed with dangerous weapons, namely pistols and simis robbed Nahashon Lontubu of two mobile phones, both Nokia 1100 plus cash 8,000/= all valued at Ksh 17,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence upon the said Nahashon Lontubu.

On Count II, the prosecution's case against the appellant was that during the nights of 14<sup>th</sup> and 15<sup>th</sup> day of November 2006 at Wafoo Reserve in Narok District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistols and simis robbed John Kaisuki Lontubu of (1) Mobile phone make Samsung S/NO. 351837/00597396/1 (2) wrist watch make Yankee (3) a simi (4) a knife (5) spear and (6) cash Kshs 8,100/= all valued at Kshs 25,899/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Kaisuki Lontubu.

It said that the 2<sup>nd</sup> Accused escaped from prison custody and was never traced, and 3<sup>rd</sup> and 4<sup>th</sup> accused were acquitted for lack of evidence. The appellant was convicted and was sentenced to death.

Aggrieved with both his conviction the appellant appealed to this court originally on 7 grounds, but he abandoned those and substituted 5 grounds pursuant to the provisions of Section 350(v) of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*). The substituted grounds of appeal were -

- (1) that the pundit trial magistrate erred in law and in fact in contravening the appellant's constitutional right under Section 77(1) of the Constitution.***
- (2) that the pundit trial magistrate erred in law and in fact in failing to accord the appellant***

*adequate interpretations as envisaged under section 198(1) of the Criminal Procedure Code.*

**(3) that the pundit trial magistrate erred in law and in fact in not observing the provisions of Section 77(2)(b) of the Constitution at some stages of the trial.**

**(4) that the pundit trial magistrate erred in law and in fact in not noting that the prosecution witnesses were people of doubtful integrity.**

**(5) that the pundit trial magistrate erred in law and in fact in declining to evaluate the appellant's defence statement alongside the prosecution evidence contrary to section 169(1) of the Criminal Procedure Code.**

And for those reasons the Appellant prayed that his appeal be allowed in its entirety. The appellant also made written submissions in support of his Petition of Appeal (*the Petition*).

In our respectful view, grounds 1 - 3 of the Petition raise constitutional and statutory procedural issues, and grounds 4 and 5 of the Petition raises evidentiary issues.

On the 1<sup>st</sup> - 3<sup>rd</sup> grounds the Appellant argued that his rights to a fair hearing before an independent and impartial court under 77(1) of the former constitution were contravened. The Appellant cited as an example of such contravention his application to the learned trial magistrate to disqualify himself which the trial magistrate declined.

Section 77(1) of the former Constitution provided that where a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The appellant's case is that the trial court ruled out some of his questions as being irrelevant to the issues in question, to which the appellant took offence and asked the trial magistrate to disqualify himself. The trial magistrate declined to do so in these words -

**"1<sup>st</sup> Accused - I apply for the court to disqualify itself. When I was closing the case there are some questions the court guided me not to put to the complainant on the ground that they were not relevant."**

**"2<sup>nd</sup> Accused - there is a Prison Officer who assaulted me. He is called Ateba."**

**"Court - All courts in this Republic are guided by the same criminal justice system. No court will grant the accused person the freedom to venture into irrelevant issues in the matter during cross-examination. The 1<sup>st</sup> accused's application lacks merit and is dismissed." He has the right to appeal against this decision. For the 2<sup>nd</sup> Accused the officer in charge G.K. Prison Narok should investigate the allegation and take the necessary action."**

On the allegation of bias, it is clear from the learned trial magistrate's ruling for the application to disqualify himself, that he found no reason to do so. It is indeed the duty of every judicial officer conducting a criminal trial or civil case to guard against the waste of precious judicial time by either parties or their counsel indulging in matters or questions which are irrelevant to the issue at hand. The court cannot be said to be partial or incompetent by so acting. There was no challenge that the court was not properly established. In any event the Appellant did not exercise his right to appeal against the decision of the learned trial magistrate as clearly advised by the court.

On the question of language, Section 198(4) of the Criminal Procedure Code provides that the language of the High Court and Court of Appeal shall be English, and the language of the subordinate courts shall be English or Swahili. And Section 198(1) provides that where evidence is given in a

language not understood by the accused, and he is present in person, it shall be interpreted to him in a language which he understands. We may, of course add that by dint of Article 7 of the Constitution the official languages of the Republic are Kiswahili and English.

We observe that when the proceedings commenced on 27/11/2006, the Record at p.1 clearly indicates "**interpretation - English/Swahili (Eng/Swa).**" There is thereafter no indication that the language of the court changed to being other than which the appellant did not understand.

Indeed if the appellant did not understand the language of the court, he does not explain how or in what language he and his co-accused managed to cross-examine the prosecution witnesses, or indeed for the appellant to apply to disqualify the trial magistrate or even give his defence. It is in our respectful opinion, not open to an appellant to take part in proceedings in the lower court and turn round on appeal that he did not understand the language in which the proceedings were conducted or merely that the record does not show. It is in our respectful view adequate for the trial court to indicate at the commencement of the trial in what language the trial is conducted, if it is not in English or Swahili, the language of the courts.

Both of these grounds of the Petitions therefore fail.

Grounds 3-4 inclusive we said, were evidentiary. The question or issue here is whether there was evidence to connect the Appellant with the robbery on the material night. In fact the appellant raises this question himself in the opening paragraphs of his written submissions. He says ...

***"The appellant does not dispute the highlights on the prosecution charge sheet that the ill-fated complainants were indeed attacked and robbed on the material night, but central to his dispute is his involvement."***

That indeed is the question, the appellant's involvement. The answer lies in the evidence of PW1 and PW2, that though they did not recognize the appellant during the commission of the robbery, two days thereafter, the appellant was arrested from his house at Harmony Area, Narok Town, at about 8.30a.m. and he was found in possession of a cell-phone Samsung A-800 Serial No. 35 1837/00/597396/1 one wrist watch, Yankee in make, and a knife in its sheath all of which were identified by PW1 and PW2 to belong to PW2, and part of the items he was robbed from him on the material night. The appellant never offered any or any reasonable explanation on how he had gained or came to be in their possession only 2 days after the said robberies. They were second hand items and personal in nature which would make them unattractive to change hands fast.

The doctrine of recent possession postulates that if a robbery is committed or a house is broken into and certain property has been stolen from the premises or persons living in those premises, and that very shortly afterwards, a man or person is found in possession of that property, that is certainly evidence from which the court can infer that he is either the house breaker, shop breaker or robber of such goods.

Again as the learned trial magistrate correctly observed, though PW1's items taken during the robbery were not recovered it is clear from the evidence that both offences were committed by the same group of persons.

The evidence led by the prosecution was such as to justify the conclusion that the appellant was one of the robbers. The evidence here reached a degree of certainty to sustain a conviction in a criminal trial.

We therefore agree with the learned trial magistrate's conclusion that the Appellant's defence was a mere denial, and does not at all cast any doubt to the appellant's involvement in the commission of the offences in Count I and II.

We confirm the conviction and sentence passed on the appellant by the lower court, his appeal has

no merit at all and we dismiss the same.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 3<sup>rd</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**

**W. OUKO**  
**JUDGE**