



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Appeal 283 of 2004

(From original Conviction and Sentence in the Criminal Case No.2297 and 1658 of 2002 of the Principal Magistrate’s Court at Mombasa, L. Achode – PM)

**PHILLIP LEPUYANPUI 1ST
APPELLANT
LENKARUS LENAUKUYA alias MWOKOZI
..... 2ND APPELLANT**

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

Before this two judge bench is this consolidated appeal of the two appellants **PHILLIP LEPUYAPUI** (hereinafter referred to as the ‘1st appellant’) and **LENKARUS LENAUKUYA (ALIAS MWOKOZI)** (hereinafter referred to as the ‘2nd appellant’). Both appellants had been tried jointly before the learned Principal Magistrate, Mombasa on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**. The particulars of the charge stated as follows: -

“On the 28th day of December 2001 at about 9.30 am at Sevena area in Mombasa District within the coast Province jointly while armed with swords and rungu’s robbed **LONYA MOHAMED** of 2 Kaftans. One blanket, one night-gown, one trouser, one camera make Canon and a brown shaver all worth Kshs.33,400/= and at or immediately after the time of such robbery used personal violence on the said **LONYA MOHAMED LONYA.**”

The trial commenced in the lower court on 25.11.2002 and the prosecution called a total of seven (7) witnesses in support of their case. The brief facts of the prosecution case as narrated by the witnesses were as follows. The complainant **LONYA MOHAMED** was a house-servant in the home of one **BIGIEF TZRABINSKI** a British National who lived in Mombasa. On the material date of 28.12.2001 the said Mr.Tzrabinski was away on safari, but called to inform his house servant **PW.2** that he would be returning the following day. The 2nd appellant who was the guard at the same compound and his friend the 1st appellant then accosted **PW.2** and demanded that he give them the keys to the safe. **PW.2** pretended to lead them upstairs to his employer’s bed-room but upon getting there he pressed the security alarm. The 2nd appellant noticed what **PW.2** had done then rushed down and collected a ceremonial sword belonging to the owner of the house. He used this sword to cut up **PW.2** whilst the 1st appellant strangled him thereby causing **PW.2** to loose consciousness. In the meantime KK Security guards

responding to the alarm arrived at the compound. They apprehended the 1st appellant within the compound and recovered a bag containing some of clothes stolen from the house. **PW.2** was rescued from the house and brought outside, where he immediately identified the 1st appellant as one of the men who had attacked him. **PW.2** also named the other attacker as ‘**MWOKOZI**’ the 2nd appellant who worked as a guard in the same compound. Police then arrived and took **PW.2** to Coast General Hospital where he was admitted for treatment. The 1st appellant was taken to the police station together with recovered items. In March 2002, about three (3) months later, the 2nd appellant was traced to a residence in Nairobi where he had secured a new job. He was transferred to Mombasa where upon both were charged for this offence.

At the close of the prosecution case both appellants were ruled to have a case to answer and were placed on their defence. They both opted to give unsworn statements in which they denied the charges. On 21.8.2003 the learned trial magistrate delivered her judgement in which she convicted both appellants and imposed upon them the death penalty. It is against that conviction and sentence that the two appellants now appeal.

At the hearing of this appeal, both appellants appeared in person and relied on their written submissions. **MR. MONDA** learned state counsel appeared for the Respondent state and opposed the appeal.

This being a first appeal we are guided by the decision of the court of Appeal in the case of **AJODE – VS – REPUBLIC [2004] KLR 81** where it was held

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”

[See also **OKENO – VS – REPUBLIC [1972] EALR 32**]

We have perused the written submissions filed by both the appellants and note that they raise similar grounds of appeal. The three major grounds raised and which we intend to deal with are

- (1) Defective charge sheet
- (2) Failure to swear the Samburu interpreter prior to each court session
- (3) Identification

On the first ground the appellants allege that their trial was based on a defective charge sheet, since the particulars did not indicate that the weapons allegedly used in the attack were **“dangerous weapons”**. We have looked at the charge sheet and note that the particulars read **“jointly while armed with swords and rungu’s”**. the appellants take issue with the fact that the particulars did not include the terms **“dangerous”** and/or **“offensive”** when describing these weapons. Is this an incurable defect in the charge? We think not. Swords and rungu’s are intrinsically dangerous weapons even if they are not described as such. Further it is not necessary that the charge sheet include each and every element of the offence charged. The charge sheet is but a synopsis of the evidence to be called by the prosecution. The finer details of the offence will be revealed in the testimony of the witnesses, which the appellants would be at liberty to challenge by way of cross-examination. Lastly on this point **S.137 (a) (ii) of the Criminal Procedure Code** which deals with the **“Rules for the framing of charges and informations”** provides that: -

“(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;”

This provision of law makes it quite clear that it is not necessary to include each aspect of the offence in the charge sheet and failure to do so will not render the charge incurably defective. We find that the omission of the words **“dangerous”** and/or **“offensive”** to describe the weapons used in the attack is not fatal to the charge. In any event a case stands or falls not on the charge sheet but on the basis of the evidence adduced at the trial. As such we find no merit in this ground of the appeal and it is hereby dismissed.

The second ground of the appeal related to the swearing in of the interpreter. The record indicates that during the trial in the lower court; the trial magistrate was informed that though 1st appellant was fluent in Kiswahili the 2nd appellant would require translation into Samburu. Arrangements were made and on 25.11.2002 when the first witness began to testify a Samburu interpreter whose name was given as **EMPORO YIAN LEMBERS** was in court to translate the proceedings. This interpreter was sworn at the

start of the trial. Page 5 line 5 reads

“Court – Samburu interpreter sworn to interpret correctly.”

The appellants contend that this procedure ought to have been followed each time the case came up for hearing. The language of the subordinate courts in Kenya are English and Kiswahili (**S.198 (4) Criminal Procedure Code**). However provision is made for situations where either an accused or a witness does not understand the language of the court. **S.198 (1) of the Criminal Procedure Code** provides **“198 (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands”**

This is exactly what the trial magistrate did. The 2nd appellant needed to have the proceedings translated into Ki-Samburu for his benefit and a Samburu interpreter was availed. We note from the record that this translation into Ki-Samburu was available throughout the proceedings. The Criminal Procedure Code does not provide that an interpreter must be sworn before proceeding to translate the proceedings. This is an administrative detail which will ordinarily be handled by the Deputy Registrar of the court in question. There is no legal requirement that this procedure be conducted by the trial magistrate. In this case the trial magistrate may have decided as a matter of transparency to have the interpreter sworn in open court. This is commendable but failure to follow this procedure does not invalidate the trial at all. It is sufficient that translation was provided into a language which the 2nd appellant understood. The fact that the 2nd appellant was able to follow the proceedings is quite evident from his active participation and cross-examination of all the witnesses. There is in each court a court clerk who ordinarily translates proceedings from English to Kiswahili and vice versa. The court clerk is not sworn before each court session. Likewise it is not necessary to swear an interpreter before each court session as such an interpreter is not a witness and is not giving evidence before the court. We find no merit in this ground of the appeal and the same is hereby dismissed

On the question of identification there was only one eye-witness to the robbery incident who was **PW.2 LENYA MOHAMED** who was the complainant’s house-keeper. He told the court that on the material day the two appellants accosted him demanding that he give them the keys to his employer’s safe. He identifies 2nd appellant as his co-worker; who worked in the same compound as a guard. As such **PW.2** knew the 2nd appellant very well and even identifies him by his name **“MWOKOZI”**. The incident occurred at 9.00 am, it was in broad daylight thus visibility was good. Furthermore **PW.2** spent time with his attackers as they forced him upstairs to the bed-room trying to trace the location of the safe. **PW.2** is very clear and specific about the role played by each appellant in the robbery. 2nd appellant he says ran downstairs and collected his employer’s sword from the living-room where it was displayed. He used this to attack **PW.2**. The 1st appellant held **PW.2** by the neck and strangled him causing him to lose consciousness. It is clear that **PW.2** caught far more than a mere fleeting glance at his attackers. He had in our opinion, ample time and opportunity to see and identify them both. **PW.2** recognized the 1st appellant as a friend of 2nd appellant and gave his name as **“Yusufu”**. Therefore apart from visual identification, there is clear evidence of recognition as both appellants were well known to **PW.2** before this incident.

The evidence of **PW.2** with regard to the identity of these appellants is duly corroborated by the other prosecution witnesses. **PW.1** Mr. Tzrabinski who was the owner of the compound confirms that on the material date he arrived home to find his house turned upside-down and his house-helper **PW.2** in hospital. He confirms the fact of the robbery when he states at page 5 line 21

“I went upstairs and found it in a big mess. There was blood on the bed, on the cupboard and even inside ...I went downstairs to the garden and found my father’s naval ceremonial sword. My father is dead. He left it to me. Ordinarily I displayed it on my wall as a decoration. Now it was in the garden and covered in blood”

PW.1 confirms that the 2nd appellant was his watchman who had been in his employ for two years prior to this incident. He also recognizes the 1st accused as a friend to 2nd appellant and states at page 6 line 16 **“This man on my right [1st appellant] had been hanging outside my gate with my watchman for about a week before this incident. I never sought to know who he was nor his relationship with my watchman”**

PW.3 ANDREW CHERUIYOT tells the court that he was one of the KK Security guards who responded to the alarm on that morning. They arrived at the compound within minutes. They came across two men trying to flee. They gave chase and caught one man whom he identifies as the 1st appellant near the swimming pool. 1st appellant had with him a bag containing a blanket, shirt and trousers **Pexb.2** and

Pexb.3. The guards rescued **PW.2** who had been badly injured and **PW.2** immediately and without hesitation identified the 1st appellant as one of the robbers. **PW.2** also identified the clothes recovered on 1st appellant as those stolen from his employer's room during the robbery. **PW.1** did also in his evidence identify these same clothes as his.

The evidence of **PW.3** is corroborated in all its material respects by **PW.4 ARIFIELD MOSES MYENGESA**, who was also in the KK Security van that responded to the alarm from the complainant's house. He confirms that they arrested the 1st appellant next to the pool carrying a bag containing a blanket, shirt and trousers **Pexb.2** and **Pexb.3**. Both **PW.3** and **PW.4** are categorical that they arrested the 1st appellant inside the compound and not outside on the road. The 1st appellant was unable to explain what he was doing inside the complainant's compound. He was not one of his employees and had no right or authority to be there. More importantly, the stolen clothes found in the possession of the 1st appellant conclusively link him to this robbery. The robbery occurred at 9.00 am. Hardly ten minutes later 1st appellant is found trying to escape from the compound carrying some of the stolen clothes. This is a classic example of the doctrine of "**recent possession**". There can be no explanation for the 1st appellant's possession of the stolen clothes so soon after they were stolen, apart from that he was involved in the robbery.

In the case of the 2nd appellant, he did manage to escape after the robbery. This fact alone is indicative of a guilty mind on his part. It cannot be just a coincidence that on the day his employer's house is robbed the 2nd appellant vanishes into thin air not to be seen until almost three months later when he was traced to Nairobi and arrested. It is clear that 2nd appellant wanted to put as much distance as possible between himself and this incident. Apart from the identification of **PW.1** and **PW.2**, both **PW.3** and **PW.4** identify the 2nd appellant as the complainant's watchman. They both state that as security patrols in the area they have visited that compound several times and found the 2nd appellant on duty at the gate. His defence in which he denies ever having worked for the complainant is as the trial magistrate stated in her judgement "**nonsensical**". We are satisfied that the appellants have been properly identified both visually and by way of recognition as the perpetrators of this offence. The incident occurred in broad day-light. 1st appellant was arrested still at the scene attempting to flee with the stolen clothes. As such we find the evidence on identification to be water tight with no room for mistaken identity. As such this last ground of appeal is also dismissed.

On the whole we are satisfied that the incident in question amounted to a robbery as defined by **S.296 (2) Penal Code**. There was more than one perpetrator, both were armed and **PW.2** was seriously injured during the robbery. **PW.7 DR. LAWRENCE NGONE**, who produced the P3 form as an exhibit described the injuries which **PW.2** sustained which included multiple cuts and a fracture on the face. The sword used to inflict the cuts on **PW.2** was also recovered and produced in court as an exhibit **Pexb.1**. We are satisfied that the learned trial magistrate rendered her conviction on the basis of reliable, cogent and corroborative evidence. There is no doubt at all left in our minds that this conviction was sound both in law and based on the facts of the case. The learned trial magistrate did impose the only lawful sentence available for such a conviction which was the death sentence. As such we find absolutely no merit in this appeal and hereby dismiss it in its entirety. The conviction of both appellants by the lower court is upheld and the death sentences imposed are also confirmed.

Dated and Delivered in Mombasa this 26TH day of March 2010.

**M. IBRAHIM
JUDGE**

**M. ODERO
JUDGE**