



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

CRIMINAL APPEAL 317 OF 2007

LIVINGSTONE MURIUKI MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Principal Magistrate's Court at Murang'a in Criminal Case No. 2052 of 2006 dated 13th September 2007 by T. W. Murigi – S.R.M.).

J U D G M E N T

Livingstone Muriuki Mwangi alias Mukii, hereinafter referred to as “the appellant” was arraigned before the Principal Magistrate’s court at Murang’a on four counts of robbery with violence contrary to Section 296(2) of the Penal Code, one count of escape from lawful custody contrary to section 123 of the Penal Code and finally one count of being in possession of cannabis sativa contrary to section 3(1) as read with section 3(2) (a) of the Narcotic drugs and Psychotropic substances control Act. He entered a plea of not guilty on each count and thereafter his trial ensued. The magistrate however after the evidence had been tendered by the prosecution found the truth lay in the prosecution version of events. She rejected the appellant’s sworn statement of defence as untruthful. The court went on to hold that indeed the appellant was among the persons who had robbed the complainants. On identification of the appellant, the learned magistrate held that the factors prevailing, the bar being well lit, the appellant being familiar face in Murang’a town and the fact that the robbery was committed over a long period of time made it easy for the identification of the appellant among the group of robbers on that night. Accordingly conditions obtaining during the robbery were thus quite favourable for positive identification of the appellant. The learned magistrate then convicted the appellant on the 1st and 3rd counts of robbery with violence, the 5th count of escaping from lawful custody and 6th count of being in possession of cannabis sativa. Upon conviction as aforesaid the learned magistrate sentenced the appellant to death on the two counts of capital robbery as is required by the law, 2 years imprisonment for escaping from lawful custody and 6 months imprisonment on the count of being in possession of cannabis sativa.

In sentencing the appellant as aforesaid, the learned magistrate fell in to error. The usual practice which the court of appeal has on several occasions pointed out, is that where an accused has been convicted in more than one capital offence as well as non-capital in the same trial, he should be sentenced in one capital count only as a person cannot be hanged more than once. The other sentences should then be held in abeyance. See **Boru & Another v/s Republic (2005) KLR 649**. We shall revisit this issue of sentence again towards the end of this judgment.

Unhappy with the decision of the trial court, the appellant has come to this court by way of appeal. The grounds of appeal include claims that there was no indication of the language of the court and which was understood by the appellant in the record, that the witnesses were inconsistent and contradictory and that

the, trial court was wrong in finding that there had been proper identification the appellant whilst the appellant's photographs had been pasted all over the police station on the day of the identification parade.

To effectively consider these issues it is pertinent that we set out the background facts that informed the prosecution case. The complainant in count I, **John Kimani Githaiga** testified that he was a manager at South Tetu Bar and Restaurant situate in Murang'a Town. He recalled that on 15th October 2004 at about 3.30 a.m. he was in the bar and had about twenty customers. He suddenly saw six men two dressed in jungle jackets burst into the bar and walk straight to the counter. One of them ordered everyone in the bar to lie down on the floor. Whereas four of the men were armed with pistols, the rest had runguns. The watchman who took his time to comply with the order was hit with a rung on his mouth and threatened with death. That one of the men then ordered the counter man to open the counter and demanded for all the money in the cash box. That one of the men who had a gun then went to where the complainant was lying and ordered him to hand over his mobile phones and money and that is when he gave him his Omax watch worth Kshs.400/= and cash Kshs.500/=. The other customers lost their money and mobile phones as well to the robbers. Thereafter the robbers moved to the next counter and robbed the counter man of money, alcohol and cigarettes and in the last counter the cashier lost to them Kshs.6,500/=:, cigarettes and alcohol worth 2800/=. The cashier in the 1st counter however lost Kshs.4,000/= and alcohol and cigarettes worth Kshs.5,200/=. He further testified that the bar was well lit and he was able to identify one of the robbers since he knew him physically. That robber was the appellant. That on 15th October 2006 he attended an identification parade and he identified the appellant as one of the robbers that attacked and robbed them on the material day.

Upon cross-examination by the appellant, he testified that he reported the robbery via telephone and the police came to the scene. That then he was lying down he was able to see the robbers and he told the police that he could identify one of the robbers since he usually saw him walking in Murang'a town near his bar. Upon re-examination, he testified that the police visited the scene and took details of the robbery and he recorded his statement the following day.

PW2 **Peter Murigi Kamande** testified that he was a bar attendant at South Tetu Bar and recalled that on 15th October 2004 at about 3.15 a.m. he was in the counter when two men armed with pistols ordered him to open the counter and give them all the money and then lie down. That he complied and they took Kshs.700/= and cigarettes and then left. That after the robbers left they countered their losses and reported the matter at Murang'a police station. That the customers who had also been ordered to lie down on the floor were robbed and the manager later called the police who visited the scene. It was his evidence that he was not able to identify any of the robbers.

PW3 **Lucy Muthoni Ndegwa** testified that she was a bar maid at South Tetu Bar. On 15th October 2004 at about 3.30 a.m. she was serving customers when a man whom she had earlier served left and walked in with four other men dressed in AP Uniforms and demanded for the cash sales for the day. That she gave out Kshs.6,500/= from the cash box and another Kshs.900/= of her own money. All the bar patrons who had been ordered to lie on the floor were ransacked and robbed of their money and mobile phones. That the bar had three counters and the robbers stole from each of the three counters. That since the bar was well lit, she was able to identify one of the robbers whom she usually saw in town though she did not know his name. That robber was the appellant and he was armed with a gun during the robbery. That they reported the robbery and later on 15th October 2006 she was summoned to the police station to attend an identification parade. However she was later informed that the suspect had refused to participate in the parade.

Upon cross-examination, she maintained that she usually saw the appellant in town though she did not know his name. That while recording her statement with the police she informed them that she could identify one of the robbers.

PW4 No. 665466 P.C. **Marin Nyuguto** testified that on 5th October 2006 at around mid day in the company of **Corporal Wachira** (PW6) they were informed by the D.C.I.O. that the appellant who was the most wanted criminal had been spotted travelling in motor vehicle Registration No. KAD 951V

Saloon heading for Sagana. That they followed the vehicle and intercepted it at the bridge that borders Sagana and Murang'a towns. It was his evidence that the vehicle had five occupants, three men and two ladies and upon conducting a quick search, **Corporal Wachira** recovered a roll of bhang from the left trouser pocket of the appellant. They arrested the appellant and on their way to Murang'a, the appellant jumped from the moving vehicle but they managed to chase and re-arrest him. It was his further evidence that the police had earlier circulated his photograph within Murang'a District since he was wanted for a series of robberies. He submitted the roll of bhang to the government Chemist who upon analysis confirmed that it was indeed cannabis sativa.

PW5 No. 75665 acting **Inspector Benjamin Kiprono** testified that he was attached to Murang'a police station and recalled that on 10th July 2006 he was approached by **P.C. Tinga** (PW7) and **Corporal Wachira** (PW6) to conduct an identification parade in respect of the appellant. The appellant consented to the participation in the parade which was conducted within the station yard cells, a closed area. It was his evidence that he had five witnesses and the first witness **Dickson Githii Kinyua** positively identified the appellant by touching and so did the second witness **John Kimani** who also identified the appellant by touching. However it should be noted that **Dickson Githii Kinyua** who was the complainant count was never called to testify. That after he was positively identified by the two witnesses, he became defiant and refused to participate any further in the parade since he said he saw the 1st identifying witness being signalled and that his picture was within the police building.

PW6 No. 45792 **Corporal Stephen Wachira** testified that he was attached to the C.I.D Murang'a. He testified along the same lines as PW4.

PW7 No. 61733 **Corporal Charles Tinga** was the investigating officer in the case. It was his evidence that on 15th October 2004, the complainants reported at Murang'a police station that they had been robbed of their money and mobile phones while in South Tetu Bar at about 3.30 a.m. by a gang of about six armed men. That while recording their statements, the witnesses gave him the description of the robbers and the description fitted two suspects one of whom was the appellant. It was his evidence that the complainants informed him that the bar had lights on and he visited the scene. That further he visited the homes of the appellant at Mjini but could not trace him and that is when they circulated their photographs in Murang'a and its environs for members of the public to assist in their arrest. It is his further evidence that on 5th July 2006 he received information that the appellant was heading to Baricho to attend his father's burial and that is when an ambush was laid at the Murang'a Sagana bridge and the appellant was arrested. That on 10th July 2006 an identification parade was conducted and **John Kimani** (PW1) and **Dickson Kinyua** (not called as a witness) positively identified the appellant as the person who had been among the robbers.

The appellant in his sworn statement of defence testified that he was from Karatina and worked as a welder in his uncle's workshop in Nairobi since the year 2003. That prior to that he had quarrelled with his wife since she was having an affair with one **John Mwangi Muru**. That on 5th July 2006 he was travelling in a motor vehicle KAD 951V Nissan Saloon which he had hired headed for Karatina to attend his father's burial in the company of his friends. That on the way his aunt **Beatrice Wairimu** called him and informed him that they had forgotten a rope and asked him to buy one at Sagana. That when they got to Sagana bridge they saw a vehicle that had barricaded the road and he thought that they were carjackers. Since he had Kshs.24,000/= which was contributions from his friends for the function he told the driver to stop and he started running towards the nearby homes and only stopped when he heard some gun shots and thought that they would kill him. That the men introduced themselves as police officers and he told them that he was running away since he thought that they were thieves. That the police officers conducted a search and **Corporal Wachira** recovered bhang from the motor vehicle and asked him whose it was and he told him he should ask the owner of the motor vehicle. He further testified that he was escorted to Murang'a police station and he saw his photograph pasted on a notice board indicating that he was a most wanted criminal. That later he was escorted to his home in Kayole Nairobi and the police conducted a search but recovered nothing. It was his evidence that he consented to participate in the identification parade but later refused after he noted that the 1st witness was pointing him out to he 2nd witness and that they had seen his photograph.

In support of his appeal, the appellant tendered written submissions which we have carefully read and considered.

The appeal was opposed. **Ms Ngalyuka**, learned state counsel in opposing the appeal submitted that the conviction of the appellant was safe since he was positively identified by PW1 and PW3 during the robbery. According to PW1 the said robbery took about 20 minutes to be executed. The bar was well lit since there was electricity light. The two witnesses also knew the appellant physically. That PW7 visited the scene the same night and confirmed that there were lights. They too gave a description of the appellant. Counsel went on to submit that the appellant in his defence stated that the police had circulated his photograph and gave that as a reason why he refused to participate in the parade. However the lower court found that the appellant's description was given on the night of the robbery.

In reply, the appellant submitted that both PW1 & PW3 did not identify the type and source of the light so as to be able to identify him. He maintained that the witnesses were shown his photographs before being called upon to identify him.

It is trite law that the duty to reconsider, re-evaluate the evidence and draw independent conclusion lies with this court as a first appellate court. See **Okeno v/s Republic (1972) E.A. 32** which has been applied in numerous decision of this court. Moreover, when we are re-appraising the evidence, we have to appreciate that we did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that. **Soki v/s Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

There is no doubt at all that the conviction of the appellant by the trial court turned on evidence of identification and or recognition. In other words the appellant was not only identified but recognised by the complainants in counts 1 and III respectively. The appellant was a person known to them physically but not by name. He was a person that they had seen frequently pass by the bar and was common feature in Murang'a town. Accordingly the appellant was a person well known to the complainants before the incident. But even though this was a case of recognition, we must remember that the robbery took place at night. There is therefore, need for abundant cautious when evaluating such evidence of identification and or recognition as has been stated repeatedly in many court of appeal decisions, See for instance **Abdalla Bin Wendo & Another v/s Republic (1953) 20 EACA 166** and more importantly **Roria v/s Republic (1967) E.A. 583**.

The evidence led by the prosecution and accepted by the trial court and we have no reasons to disagree with the findings of the learned magistrate on the issue was that during the robbery, the bar was well lit. The appellant did not discount this piece of evidence either in his cross-examination of the prosecution witnesses nor in his defence. There is evidence that on the same night of the robbery, PW7 visited the scene and established that the bar had enough light and one could easily identify the thugs. PW1 testified on the issues as follows: “..... **The robbery took 20 minutes. The bar was well lit. The lights were on. I was able to identify one of the robbers I know him physically. I can identify him from anywhere The man who robbed me was black in complexion and medium in height. He was not overweight**” As for PW3, she testified on the issue as follows: “..... **The lights were on The robbery took 2 hours. I was able to identify one of the robbers since I usually see him in town. I do not know the name but I know him physically. He was the one who was armed with a gun**” From the foregoing testimony there is no denying that the bar was well lit during the robbery. Much as the type of light available does not come through the evidence, i.e. whether it was electricity light, lantern light e.t.c., it is safe to assume that the bar was well lit with the type of light that was available. The evidence that the bar was well lit was after all not challenged at all. Much as it may have been necessary for the prosecution to establish the nature and source of light available as well as the source of light in relation to the appellant, we are nonetheless satisfied on the uncontroverted evidence of PW1, PW3 and PW7 that the bar was well lit and it was not difficult on the part of these two witnesses (PW1 & 3) to observe the appellant sufficiently as to be able to recognise him. After all there was no evidence that the appellant had in any way disguised himself as to make his identification difficult. The light remained on throughout the incident which took over 20 minutes according to PW1 but 2 hours according to PW3. This discrepancy as to the period the robbery took place is immaterial. What is important is that the

robbery was not committed in a split second. The robbers took their time in committing the robbery thereby exposing themselves to easy recognition. More so in a situation such as the one obtaining herein where the two witnesses were familiar with the appellant, their recognition could not have been difficult. The said witnesses were not exposed to harrowing experience as would have interfered with their perception and recognition of the appellant.

This is therefore, not a case of identification perse but recognition as well in which PW1 and PW3 gave details of the circumstances under which they were able to recognise the appellant. They even described what role the appellant was playing in the whole act. Immediately after the commission of the offence, these two witnesses were able to give the description of the appellant to the police. That description fitted well with the appellant who was being looked for by the police as a result of his involvement in a spade of robberies.

In the case of **Anjononi & Others v/s Republic (1980) KLR 59**, the court of appeal said:

“..... The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in cases like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”

We respectfully agree with the foregoing which in our view, applies to the facts in this appeal. We have anxiously considered the issue of identification and or recognition of the appellant and it is our view that the trial court below cannot be faulted in the manner it dealt with the issue. However what has caused us anxiety is the question of the appellant’s photographs as a most wanted criminal being pasted on the notice board within the police station and being circulated within Murang’a town and its environs. It may very well be possible that the identifying witnesses aforesaid may have seen the photographs. However this is neither here or there and does not advance the appellant’s case any further. In fact there was no need for the identification parade to be conducted in respect of the appellant since the two witnesses had recognised him during the robbery. So that the identification parade was really not necessary. Secondly, following their recognition of the appellant they gave his description to the police immediately after the robbery. This was long before the appellant’s photographs were circulated by the police. The witnesses knew the appellant before then. So that whichever way one looks at it, the circulation of the appellant’s photographs did not at all occasion any prejudice to the appellant.

On the question of language, it is the appellant’s contention that there was nothing on record to show in what language the pleas were taken. The complaint is however not without merit. The court clerk, one **Muchoki**, was however present on the day of plea. The record shows that the charges were read over and explained to the appellant though the language is not indicated. He pleaded not guilty to the charges and the case proceeded to hearing nonetheless. Having entered a plea of not guilty and case having proceeded to hearing on that basis, we discern no prejudice that may have been occasioned to the appellant even if the plea may have been taken in a language that he is least comfortable with. If he had pleaded guilty to the charge, different considerations would arise and apply. The appellant also faults the proceedings of 28th February 2007 respectively for also not showing the language in which they were conducted. However the court record does not support the appellant’s contention. On both of these occasions the record is clear that the evidence was taken in English. On both occasions there were court clerks. Nothing is on record to suggest that the appellant did not understand English and or that there was no interpretation from English language to the language that the appellant is comfortable with. In our view, having carefully considered the record and observed that the appellant conducted his case properly and that at the hearing there is no indication that interpretation was done in a language the appellant did not understand, we see no prejudice to the appellant occasioned by the occasional non-recording of the language in which the trial court communicated to the appellant.

The appellant advanced an Alibi defence on the capital robbery counts. However the learned magistrate did not believe him. We agree. We are satisfied that the said defence was displaced by the strong

prosecution evidence. We detect no fault by the trial on that account.

How about the non-capital counts preferred against the appellant? On the count of escape from lawful custody, there is the unchallenged evidence of PW4 and PW6 that having arrested the appellant in an ambush, they drove towards Murang'a. Along the way the appellant jumped from their moving vehicle in a bid to escape. They chased him whilst shooting and managed to re-arrest him. The appellant does not deny having attempted to escape. However it is his contention that he escaped from the motor vehicle he had hired to ferry him to his father's funeral. We do not buy this story. It is noteworthy that in the said motor vehicle he was in the company of three men and two ladies. How come these other people did not run away with him from the motor vehicle if they too feared that the motor vehicle barricading the road belonged to the hijackers. Indeed one would expect that the driver and who was the owner of the hired motor vehicle would have taken evasive steps to avoid being hijacked. He did not and we can only surmise that the story by the appellant that he ran away fearing being hijacked is a made up story. It is incredible. Thus there was sufficient evidence to convict the appellant or that court.

With regard to the cannabis sativa charge, the appellant does not deny the same being found where he was arrested. However he claimed that the bhang was recovered from the motor vehicle and when the police officers asked him whose bhang it was, he told them to ask the owner of the motor vehicle. Once again this story is unbelievable. There were five people in the car, how come out of all these people, the police only asked him upon discovering bhang who was in possession of the same. If indeed the bhang was not found on the appellant but rather in the motor vehicle as claimed by the appellant, the first casualty would have been the owner and or driver of the motor vehicle. That the police did not bother to pursue the owner of the motor vehicle and or other occupants of the motor vehicle could only mean one thing, the bhang was found on the person of the appellant. For all the foregoing reasons, we are satisfied that the appellant was convicted on very sound evidence and for that reason, we detect no error on the part of the trial court. Accordingly we find no merit in this appeal which we order that it be and is hereby dismissed in its entirety.

As we said at the beginning of this judgment, the mode of sentencing was strange because a person convicted and sentenced to death can only be hanged once and not twice over. There need only have been one sentence of death on one count imposed on the appellant whilst the sentences on other counts were left in abeyance. Accordingly we correct that error by ordering that the appellant shall suffer death in respect of count 1 only. The sentence in respect of counts III, V and VI shall otherwise be held in abeyance.

Dated and delivered at Nyeri this 30th day of January 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE