



REPUBLIC OF KENYA
HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 185 OF 2007
MUEKE MUTEMI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

*(From the original conviction and sentence in Criminal Case No. 391 of 2006 of the
Principal Magistrate's Court at Kitui by E.K. Makori,- Senior Resident Magistrate)*

JUDGMENT

The appellant, **MUEKE MUTEMI**, was convicted on two counts of robbery with violence contrary to section 296 (2) of the Penal Code, and one count of attempted robbery with violence contrary to Section 297 (2) of the Penal Code.

After conviction, the appellant was sentenced to death on each count.

In his appeal to this court, the appellant stated that although he had been convicted, he was innocent.

It was his contention that there was no positive identification. If the witnesses had identified him, they should have stated his name to the police when they made their first reports.

Secondly, as two of the complainants (**PW 2 and PW 3**) had known the appellant prior to the incident, the appellant submitted that the Identification Parades at which they allegedly identified him, were of no value.

He also contended that some essential witnesses were not called to testify at a trial. However, he did not specify those persons whom he deemed as the essential witnesses, who failed to testify, save for the sister to **PW 3**.

When elaborating on the issue of identification, the appellant pointed out that the incident lasted such a short period of time that **PW 3** did not have sufficient time to positively identify the robbers. He also pointed out that **PW 3** did admit that he was shocked.

If, as **PW 3** said, he was not able to remember either the clothing that the appellant wore or the weapons which the appellant carried, the appellant submitted that the said complainant could not have positively identified the robbers. The failure to describe the robbers' clothing or the weapons that the appellant was carrying is said to be indicative of the insufficient lighting at the scene of crime.

In any event, the appellant believes that the offence of attempted robbery with violence was never

proved by the prosecution. His reason for that submission was that the complainant did not testify about any attempt to rob him. If the said complainant was to be believed, he was locked up behind a metal grill, beyond the reach of the robbers. The robbers were in the sitting-room, whilst the complainant was either in his bedroom or in the corridor leading to his bedroom. And the complainant did not give any evidence to show that the robbers attempted to rob him, so submitted the appellant.

Another issue that was raised by the appellant was that the prosecution witnesses gave inconsistent and contradictory evidence. As an example of such inconsistency, **PW 2** is said to have been giving money to the appellant when one other robber accidentally directed his torch-light at the appellant's face, thus enabling the said complainant to recognize the appellant.

But in the same vein, **PW 2** is said to have told the trial court that the robber who directed his torch-light at the appellant's face, did ask the appellant to tell him about the amount of money which **PW 2** had given to him. Apparently, the appellant was counting the money when the torch-light was directed at his face.

In those circumstances, the appellant submits that **PW 2** cannot have been a credible witness, because there was no way that the appellant could have been counting money in darkness; or if he was already counting the money, the appellant believes that **PW 2** could not still be handing over the money to the appellant.

The next issue raised by the appellant was that the trial court erred by accepting the evidence of a single witness. As far as the appellant was concerned, the evidence of **PW 1**, **PW 2** and **PW 3** were from a single source because the three witnesses were all members of one family.

Finally, the appellant faulted the learned trial magistrate for disregarding his defence, without any sound reason. That failure is said to have been compounded by the fact that;

(a) the witness who the appellant wanted to call, was not made available to him; and

(b) the language in which the witnesses testified was not indicated on the record; yet the appellant had indicated that he was fluent in Kikamba.

Having set out the arguments advanced by the appellant, we shall now briefly restate the events that gave rise to the charges against the appellant.

First, it is clear that **PW 1 (SAMUEL MUHOYA KITENGE)** is the husband to **PW 2 (VERONICA MUMBUA KITENGE)**. The two lived together at Majengo Estate, Kitui town.

On 13th March 2006, at about 2.00a.m., they were "visited" by robbers who took KShs.3,500/- and a Motorola C 17 phone from **PW 1**; and KShs.1,200/- and Nokia 3310 phone from **PW 2**.

The robbers were at least four in number, and they had pangas, an axe and "something like a gun"

PW 1 did not identify any of the robbers but **PW 2** said that she recognized the appellant as one of the said robbers. **PW 1's** nephew, Kevin who was 16 years old, is also said to have recognized the appellant. However, Kevin did not give evidence at the trial. He only told **PW 1** that he had recognized one of the robbers.

On her part, **PW 2** recognised the appellant as someone who used to work at the bus-stage at Kitui, over a period of about 10 years. The appellant did confirm that he too had known **PW 2** for about 10 years prior to the robbery.

Whilst the robbers were gaining entry into **PW 1's** house, his wife (**PW 2**) phoned her brother in-law, **JAMES HUNJA KITENGE (P.W.3)**, who lived nearby. She informed him about the intruders.

PW 3 phoned the police and also activated his siren. Undeterred by the siren, the robbers went over to **PW 3's** house. As they approached the house, **PW 3** rushed to his bedroom, where he locked himself.

Although the robbers gained entry into **PW 3's** house, they failed to break-down the grill door leading to the bedroom.

As the robbers tried to gain access to the bedroom, they switched on the lights in the sitting-room, where they were. Meanwhile, **PW 3** remained in darkness, inside his bedroom. It is in those circumstances that **PW 3** says he was able to recognize the appellant as one of the robbers.

According to **PW 3**, he had known the appellant for about 6 months, by then.

After the appellant was arrested, the police organized Identification Parades. When called to the said parades, **PW 1** did not identify the appellant. But both **PW 2** and **PW 3** did identify the appellant in separate parades.

PW 2 said that he had known the appellant by name, whilst **PW 3** only knew him physically. Both complainants testified that they did tell police about the description of the appellant. Also, they both knew where he used to work as a basket-maker, at the bus-stage at Kitui.

PW 4, CHIEF INSPECTOR ANDREW MUTURI, is the officer who conducted the Identification Parades.

And **PC NICHOLAS KIPKOECH LANGAT (PW 5)**, is the officer who investigated the case. He told the trial court that the police team was led to the appellant by an informer.

PW 5 also confirmed that **PW 2** and **PW 3** had given a description of the appellant, and that the appellant matched that description. The police therefore arrested him.

However, a search at the appellant's house yielded nothing incriminating.

As nothing incriminating was recovered from the appellant, it follows that the conviction herein was founded basically on recognition. And whereas recognition generally tends to be much more assuring than identification, we do remind ourselves that even where there has been an alleged recognition, there could be a possibility of mistaken identity. Therefore, where the only incriminating evidence against a suspect is that of the said recognition, it is even more important than ever to be wholly persuaded that there was no possibility that the identifying witnesses were honest but mistaken.

PW 2 testified that she gave money to the robber who demanded for the same, inside her bedroom. She also said that the said robber was counting the money when a second robber entered into the bedroom and shone a torch-light on the face of the first robber. That would imply that the first robber was counting the money which **PW 2** had given him, in the dark.

Whereas that might sound unrealistic, we note that when the second robber arrived in the bedroom, he asked the first robber how much money he had been given. To our minds, that suggests that the robbers must have agreed, in advance, that whoever was given money, had to count it immediately. That would explain why the second robber's first interest was in determining the quantum of money which **PW 2** had given to the first robber.

In effect, we find neither inconsistency nor contradiction in that aspect of **PW 2's** evidence.

Secondly, **PW 2** said that the torch-light was shone directly at the face of the first robber. That would explain why **PW 2** may have been unable to clearly see the clothing of the robber.

As both **PW 2** and **PW 3** had both known the appellant from before the robbery incident, if they did see him on that night, they would have recognized him, as opposed to identifying him.

Identification parades would serve no useful purpose as between a witness who had recognized a suspect and the said suspect. That is because someone who is already known to the witness would easily and naturally have picked him out in a parade.

In comparison, when a suspect was not previously known to a witness prior to the incident giving rise to the case against the suspect, an Identification Parade would enable the police to verify whether or not the witness could pick out the suspect from a group of persons with similar physical attributes. If the witness did pick-out the suspect, that would indicate that he had seen and observed the said suspect so well as to be able to recall him later. Such recollection would imply that the witness had earlier identified the suspect.

In this case, the Identification Parades did not serve any useful purpose, as both **PW 2** and **PW 3** had known the appellant from before, the robbery. It therefore follows that the learned trial magistrate erred by placing a lot of emphasis on the results of the parades.

Meanwhile, we are satisfied that the evidence of **PW 3** was not inconsistent, as regards the room he was in, when the robbers entered his house. He expressly said that he was inside his bedroom. He also made it clear that the door to the bedroom was not closed. Instead, he had only locked the grill door, which was in the corridor leading to his bedroom.

When the robbers entered the house, they switched on the electric lights in the sitting room, in an endeavour to assess whether or not they could bring down the grill.

As the robbers were standing in a room that was lit, whilst **PW 3** remain in darkness, inside his bedroom, that gave him an opportunity to have a clear look at the robbers. It is then that **PW 3** recognized the appellant.

Contrary to what the appellant submitted, **PW 3** did not say that he was in the corridor, at the time that he recognized the appellant.

Furthermore, even though **PW 3** said that he was shocked, he put that statement within context.

He said;

“I was about 1 ½ metres from the grill door and from you. I was shocked but I was ready for anything. There were no lights where I was but there were lights where you were.”

In effect, **PW 3** knew that he was not in immediate danger, as the grill door stood between him and the robbers. Secondly, **PW 3** was able to see the robbers, as they were in the light, whilst he remained in darkness.

In those circumstances, we find nothing that would have made it difficult for **PW 3** to recognize the appellant.

It is also our understanding of the law that it does not require more than one witness to prove any particular fact or thing. Therefore, even assuming that it was only one witness who had given evidence which was sufficient to prove the fact or thing that would be sufficient to found a conviction.

But in this case, the issue of recognition was attested to by two different persons, **PW 2** and **PW 3**. Those two people were living in different houses, and were only related through the fact that **PW 3**'s brother (**PW 1**) was the husband to **PW 2**. In other words, **PW 2** and **PW 3** were not from the same family.

However, even if the two witnesses had been from the same nuclear family, that would not mean that the evidence tendered by them was that of a single witness. The evidence tendered by siblings or by a couple or by a parent and his child, is not of a single person. Each individual is a separate legal entity and

therefore when he/she gives evidence, he cannot be perceived to be doing so as a part of another individual.

On the issue as to the essential witness whom was not called by the prosecution, we note that although Kevin (who is a nephew to **PW 1**) did tell **PW 1** that he had seen one person whom he knew, **PW 1** never used that piece of information to testify that he too knew the said person. Nor did **PW 1** say that the person whom Kevin recognized was or was not the appellant herein.

In the event, we find that the failure to have Kevin testify neither enhanced or diminished the case against the appellant. It cannot, in our view, be argued that if Kevin had testified he would have given evidence which was prejudicial to the prosecution case.

On the question as to whether or not the prosecution proved that the appellant was guilty of attempted robbery with violence on **PW 3**, we have our doubts. We say so because the robbers were already within the premises in which **PW 3** resides.

They tried to break down the grill door, but did not succeed.

The prosecution did not lead evidence to prove that the robbers made any demands for property from **PW 3**. Also, the prosecution did not prove that it was only in **PW 3's** bedroom that there were items which were capable of being stolen.

In those circumstances, we cannot state with certainty that the robbers' only intention was to rob **PW 3**. Whilst they may have had such intentions, it cannot also be ruled out that they did not simply want to express their displeasure at **PW 3**, for his having activated his siren when the robbers were at the house of **PW 1** and **PW 2**. In effect, there is no clear evidence to show that the robbers intended to rob **PW 3**. Therefore, the conviction on count 3 of the charge, is unsafe. It is thus quashed, and the sentence in that respect is set aside.

But had the conviction not have been set aside, we would nonetheless have directed that the sentences on count II and Count III be suspended because, as has often been stated, it is not possible for one person to be executed more than once. Therefore, as soon as the appellant was sentenced to death on Count 1, the sentence on the other two counts ought to have been suspended.

When the appellant had been placed on his defence, he told the trial court that he would give a sworn defence, and that he would also call one witness. The case was then adjourned at that stage.

When the trial resumed, the appellant told the trial court as follows;

“My witness is said to have gone somewhere to look for a job and I am ready to proceed without him.”

He then told the court about matters that had no direct bearing on the incident which the prosecution witnesses had led evidence on. However, during cross-examination, he said that on the material night, at about 2.40a.m., he was asleep in his house. And although he said that he was with his wife at that hour, he said that he was not calling his wife as his witness.

In our considered view, if the court does accept the evidence on identification, that would place the appellant at the scene of crime. And if the appellant was at the scene of crime, where he took money and a mobile phone from **PW 2**, that would imply that he cannot have, simultaneously been at his house, at that very hour.

The learned trial magistrate did accept the evidence of **PW 2** and **PW 3**, about how they recognized the appellant at the scene of crime. In those circumstances, the trial court cannot be accused of having disregarded the defence for no reason.

Before concluding this judgment, we wish to address two issues. First, is our concern about the fact

that whereas **PW 2** had known the appellant's name before the robbery, she did not give his name to the police. Instead, she only described him.

Similarly, **PW 3** only described the robber, whom he later said was the appellant. But on the part of **PW 3**, he had not known the appellant's name, so he cannot have given it to the police.

According to the Investigating Officer (**PW 5**), the description he received was that of a person who was;

“Short and of a light complexion, and the accused fitted the description.”

In our considered opinion such a description is so generalized that it must fit that of many people. Therefore, it cannot have been a reason enough to only go for the appellant.

Perhaps it would have been different if either **PW 2** had given the appellant's name to the police, or if either **PW 2** or **PW 3** had pointed out the appellant to the police. By so doing, the earlier generalized description would have zeroed-in on the appellant. But that did not happen in this case.

That issue has caused us a lot of anxiety, and ultimately we have concluded that there is some measure of doubt as to whether or not the appellant was positively recognized.

The last issue we wish to address is that which is concerned with interpretation.

The appellant herein did tell the court, on the day of plea, that he understood the Kikamba language. Consequently, the record shows that on 29th March 2006, the substance of the charges and every element thereof was stated to the appellant in Kikamba.

Regrettably, however, there was no indication thereafter, that the evidence was either tendered in Kikamba language, or that the evidence was interpreted into that language. The appellant has asserted that that constituted a violation of his rights pursuant to sections 197 and 198 of the Criminal Procedure Code. The question we have to answer is whether or not the failure to show that the evidence was translated into Kikamba was fatal.

In **DESAI V REPUBLIC [1974] E.A. 416**, at page 418, Spry P. expressed the opinion that whenever interpretation was required in any court proceedings, that fact should be recorded and the name of the interpreter together with the language used, should be shown.

In this case, neither the name of the interpreter nor the language used was shown by the trial court. However, it is very noticeable that the appellant carried out lengthy and indepth cross-examination of all the prosecution witnesses. In order to be able to achieve that feat, the appellant would, as a matter of necessity, have had to first understand the witnesses, and secondly he had to be able to communicate effectively with both the witnesses and the court.

When giving consideration to a similar issue, in the case of **MUTUKU Vs REPUBLIC [1982] KLR 312**, Abdullah J. said that the failure by the court to indicate on the record, the language of the court did not necessarily mean that the accused did not understand the language of the court.

The language of the magistrates' courts is either English or Kiswahili. And the appellant herein had said that he understood Kikamba. Therefore, as Kikamba is not one of the languages of court, it can be safely concluded that the trial was not conducted in Kikamba.

As soon as the court went on with the trial in the language that it is permitted, by law, it became necessary for an interpreter to be provided to the appellant.

In **IRUNGU V REPUBLIC [2008] 1 E.A. 126** at Page 134, the Court of Appeal said;

“Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but the courts are further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of the accused person and cannot, in our view, be waived on the belief that the accused understands the language of the court particularly when the accused has stated, like the appellant did in the case before us, he was not good in English or Kiswahili.”

In that case, the court said that it was not sufficient to show that the trial was conducted in Kiswahili, and also that the accused had defended himself in Kiswahili. Quoting from **JACKSON LESKAI VS REPUBLIC CRIMINAL APPEAL NO. 313/2005**, the Court said;

“It is the court’s duty to ensure that the accused’s right to interpretation is safeguarded and to demonstratively show its protection.”

In this case, the trial court did not demonstrably show that the appellant’s right to interpretation was safeguarded. Therefore, on that ground alone, the appeal herein must succeed.

Accordingly, the appeal is allowed. The convictions are quashed and the sentences set aside.

We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Machakos, this 24th day of September, 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE