



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 86 of 2003

MUSYOKA KITUU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 620 of 2000 of the Senior Principal Magistrate's Court at Machakos by S.M.S. Soita – Senior Resident Magistrate)

JUDGMENT

This appeal came up for hearing on 14th July 2009. By that date the appellant, **MUSYOKA KITUU MUTUA**, had not yet had sight of the record of the proceedings before the trial court. Having given that information to us, we informed him that he was entitled to a copy of the judgment and also a copy of the proceedings, before proceeding with his appeal.

However, the appellant insisted that he would prosecute his appeal immediately, because he felt that he had already been in custody for too long.

When arguing the appeal, the appellant said that he did not understand the language in which the trial court conducted his proceedings. He also said that his co-accused had threatened him. Notwithstanding the fact that the appellant had complained to the trial court about the threats issued by his co-accused, the trial court is faulted for having relied on the evidence of the said co-accused, to convict the appellant.

It was also the submission of the appellant that the confession which he had allegedly made was indeed not a confession, because he only signed the same so as to avoid being killed by the police officers at the police station.

He pointed out that, initially, he was one of the complainants, who had been attacked by the robbers. He said that that is why nothing incriminating was found in his possession when he was arrested.

Furthermore, as there was no medical evidence adduced by the prosecution, the appellant believes that the offence of robbery with violence was not proved at all.

Finally, he submitted that the case was not proved beyond any reasonable doubt. He reiterated that he was not involved in the robbery and asked this court to set him free.

In answer to the appeal, the learned state counsel, Mr. Wang'ondy submitted that it had no merits, as the appellant was not only identified at the scene of crime, but also because the appellant was arrested

immediately after the said incident.

The state also submitted that it was not necessary to lead any medical evidence as the offence of robbery with violence had already been proved without such evidence.

It was also pointed out that there was an interpreter during the trial.

And, as regards the confession by the appellant, the state pointed out that the same was admitted after a trial within a trial.

In our capacity as the first appellate court, we are obliged to re-evaluate all the evidence on record, and to draw therefrom our own conclusions. Of course, we will bear in mind the fact that we did not have the benefit of observing the witnesses as they testified.

JUDY MUMBUA TITUS (PW 1) was the complainant. She was at her house, watching television on the night of 23rd February 2001. After watching the news, whilst also having her supper, **PW 1** sent her house-help **Nzilani (PW 2)** to lock-up the doors.

Soon thereafter, **PW 2** came back to the table-room, hurriedly. Behind **PW 2** were about six persons, who were armed with pangas and swords. As the electricity lights were on, **PW 1** was able to see the six robbers; and she was able to identify all of them, save for one who was masked.

The robbers ordered **PW 1** and **PW 2** to lie down. They then demanded money. **PW 1** gave them KShs.3,600/-.

Thereafter, the robbers took with them 3 radios and the T.V. which **PW 1** had been watching.

After the robbers left, **PW 1** screamed, and many neighbours responded to the screams by coming over to her house. The neighbours, who included the chief of the area, pursued the robbers. In the process, some stolen items, including the T.V. and 2 radios were recovered.

It was **PW1's** evidence that the appellant had a small sword at the time he was at her house.

However, **PW 1** also conceded that by the time the appellant was arrested, he was not in possession of any of the things which were stolen from **PW 1**.

During cross-examination by the appellant, **PW 1** said that they did not torture the appellant. She also pointed out that it was the appellant who mentioned the first accused after he was arrested. Finally, **PW 1** said that the appellant was arrested about 1.5kilometres from her home.

PW2, BENEDETA NZILANI, was 14 years old, as at the time she testified. She said that she was employed by **PW 1**, as a maid.

After supper, **PW 2** went to lock-up the doors, but was confronted by a gang of men who were armed with pangas and swords. When **PW 2** saw the six members of the gang, she ran back to the sitting room. **PW 2** and **PW 1** were then ordered to lie down.

The robbers then demanded money. After receiving money from **PW 1**, the robbers also went away with the T.V. and 3 radios.

According to **PW 2**, she did see the robbers clearly, and was able to identify them. In particular, she said;

“The person I saw clearly is the second accused.”

Curiously, notwithstanding that damning piece of evidence, the appellant, (who was the second

accused, at the trial), did not cross-examine the witness at all.

PW 3, PHILIP MAINGI NZIOKA, was the Assistant Chief of Itheani. On the material night he rushed to the scene of crime after he had heard screams from there. He found a crowd at the home of **PW 1**.

Upon learning that **PW 1** had been robbed, **PW 3** went in pursuit of the robbers. **PW 3** was accompanied by some "Youth Wingers". They recovered one television and one radio cassette, which they took back to **PW 1's** house. The complainant positively identified the said items as hers.

Although the search party in which **PW 3** was did not arrest any of the robbers, it was the testimony of **PW 3** that **PW 4's** search party arrested the appellant and brought him back to **PW 1's** house. **PW 3** told the trial court that **PW 1** did identify the appellant as having been one of the robbers.

P.W.4, TITUS MWANIA VURA, was the chief of Kaewa Location. He told the trial court that he heard screams on the material night. He responded by going to the source of the said screams, where he found **PW 1**, who told him that she had been robbed. **PW 4** also said that **PW 1** informed him that she identified 3 of the robbers.

PW 4 organized four search parties, but he remained at the office or the Assistant Chief. Whilst there, **PW 4** received the appellant from the search party of **PW 5**. Thereafter, **PW 4** organised for the appellant to be taken to **PW 1's** house, where the complainant identified him positively.

PW 5, NZIOKI MULI, was a 'youth winger' within the Itheani Sub-location.

On the material night, he responded to screams from **PW 1's** house, by going to her home. After **PW 1** told the neighbours that she had been robbed of money, a television and radios, **PW 5** joined one of the four search parties, who pursued the robbers.

When the group reached about a kilometre from the complainant's home, they heard somebody running. They subdued the person and arrested him. The said person was the appellant herein.

As **PW 1** had told the neighbours that she could identify the robbers, **PW 5** took the appellant back to **PW 1's** home, where **PW 1** identified him.

During cross-examination, **PW 5** denied that the appellant only admitted being a robber because he was beaten by the complainant's neighbours.

PW 6, PC SIMON KITHEKA, was attached to the C.I.D., Machakos. On 24th February 2000, he re-arrested the appellant and the first accused, when they were brought to his office by **PW 3**. At the time the appellant and the co-accused were brought to **PW 6**, the complainant was present.

PW 7, SHADRACK JUMA, was attached to the C.I.D. Machakos. He recorded the first accused's statement under inquiry.

PW 8, POLICE INSPECTOR ROY ODIPO, was attached to the C.I.D. Machakos. He recorded the appellant's charge and caution statement on 5th March 2001.

It was his evidence that the statement was made in Kiswahili, and that the appellant signed it without making any corrections thereto.

The appellant objected to the production of the said statement in evidence, because he said that he had been beaten up. The trial court then conducted a trial within a trial.

Although the appellant had earlier indicated that he had been forced to sign the statement because of beatings, he never indicated, during the trial within a trial, who had beaten him. Instead, he said that he

did not record any statement at all. He said that he was only asked for his name.

It is little wonder that the trial court held that the charge and cautionary statement had been obtained voluntarily.

PW 9, POLICE INSPECTOR LAWRENCE RIUNGU, recorded the statement under inquiry for the 3rd accused. After he testified the prosecution closed its case.

Although there were six accused persons, the trial court found that four of them had no case to answer. The court held that only the first accused and the appellant (who was the second accused) had a case to answer.

In his defence, the appellant said that on 23rd March 2000, he was arrested when he was coming from his place of work. He said that he was a mason.

According to the appellant, he knew nothing about the incident.

Having re-analysed the evidence on record, we find that the fate of the appellant is determinable only on the basis of identification. We say so because he was not arrested in possession of any of the items which had been stolen from **PW 1**. In those circumstances, it is vital that the court be wholly satisfied that there was no possibility of the error in the identification.

In this case, there was electricity light. Indeed, **PW 1** was watching news on television, whilst also having her supper. Therefore the available lighting was sufficient for purposes of enabling both **PW 1** and **PW 2** to see what was going on around them.

The robbers did not wear masks, save for only one of them. Therefore, there was no hindrance to the faces of the said robbers, except for the masked one. The appellant was not the one who was masked.

Both **PW 1** and **PW 2** said that they saw the appellant clearly. **PW 2** even explained that the appellant was one of the two people who stood guard over her, whilst the other robbers were ransacking the house.

At the very first opportunity, **PW 2** did tell her neighbours who had responded to her screams, that she was able to identify the robbers. That was the evidence of **PW 5**; and it explains why the neighbours took the appellant directly back to **PW 1**'s house, immediately after arresting him.

According to **PW 3**, as soon as the appellant was brought to **PW 1**'s house, the complainant identified him promptly.

In the event we find that there is no room whatsoever for any doubt as to the positive identification of the appellant, as being one of the persons who robbed the complainant. Therefore, we hold that the conviction of the appellant was founded on solid evidence.

But it cannot be overlooked that when the plea was taken, the trial court did not indicate the language which the appellant and all the other 5 accused persons understood. We therefore do not know what language was understood by all the six accused persons.

However, as the language of the Magistrate's courts is either English or Kiswahili, we can safely assume that the trial was conducted in one or the other of those two languages.

The record of the proceedings shows that **PW 1, PW 3, PW 3, PW 4** and **PW 5** testified in Kiswahili; whilst **PW 2** testified in Kikamba. **PW 6, PW 7, PW 8** and **PW 9** all testified in English. In effect, the prosecution witnesses testified in English. In effect, the prosecution witnesses testified in three different languages. In those circumstances, unless the appellant had expressly stated that he understood all the said three languages, the learned trial magistrate ought to have made sure that the evidence was interpreted or translated into the language understood by the appellant.

In this case, the appellant did not cross-examine **PW 2, PW 3, PW 4, PW 7** and **PW 8**. It is noteworthy that **PW 2** and **PW 4** testified in Kiswahili; and **PW 7** and **PW 8** testified in English.

As the appellant testified in Kikamba, both during the trial within a trial, and when he was giving his defence, it follows that he was conversant with that language. Therefore, we are unable to understand why the appellant did not cross-examine **PW 2**.

Another interesting point is that the appellant did cross-examine **PW 1**, who had testified in Kiswahili. Yet, when **PW 3** and **PW 4** testified (in Kiswahili), the appellant did not cross-examine them. In those circumstances, the court may be inclined to conclude that the decision not to cross-examine **PW 3** and **PW 4** was not solely attributable to the appellant's inability to understand Kiswahili.

Similarly, the appellant did cross-examine **PW 6**, who testified in English. However, he did not cross-examine **PW 7, PW 8** and **PW 9**. It would thus appear that the appellant did understand the English language.

However, notwithstanding the presumptions drawn from our analysis of the record of the proceedings, we are mindful of the provisions of section 77(1) of the Constitution, which stipulates that an accused person has a right to be

“informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged.”

In this case, the record does not show the language in which the plea was taken. It is thus not possible for us to say that the charge was read out in a language which was understood by the appellant.

Secondly, by virtue of the provisions of sections 197 and 198 of the Criminal Procedure Code, the appellant was entitled to have the evidence adduced by the witnesses interpreted to him in a language he understands.

In **KATIKENYA V REPUBLIC [2007] 1 E.A. 133**, the Court of Appeal expressed itself thus;

“A careful reading of sections 197 and 198 Criminal Procedure Code, clearly shows that a failure to show, demonstrably, the language used in criminal proceeds, will, in an appropriate case, this being one, vitiate the trial.”

In this case the trial court failed to demonstrably show the language which the appellant understood, and the fact that the evidence tendered in languages other than that understood by the appellant were interpreted to him. In the event, we have no option but to conclude, as we now hereby do, that the failure to demonstrably show that plea was taken in a language understood by the appellant; and also that the evidence tendered in other languages were translated into the language understood by the appellant, have vitiated the trial.

In the result, the conviction cannot be sustained. It is set aside. We also set aside the sentences.

As the evidence on record appears to have been overwhelming, we would have preferred to order that there be a retrial. However, the learned state counsel did not address us on that issue. Also, the appellant was not asked to address on the question of a retrial. In those circumstances, an order for a retrial may end up being prejudicial to the appellant, as we have no information on the availability or otherwise of the prosecution witnesses. When it is borne in mind that the offence occurred more than nine (9) years ago, we hold the view that it may be difficult to procure the witnesses, and also that the ability of the witnesses to clearly recall the events giving rise to the charges against the appellant, may have been blunted due to the length of time that has lapsed.

We do therefore hereby reluctantly order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Machakos, this 22nd day of September 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE