



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 373 of 2006

JAMES MBATIA NJERIAPPELLANT

- AND -

REPUBLICRESPONDENT

**(An appeal from the Judgment of Senior Principal Magistrate Mrs. *Mwangi* dated 13th
July, 2006 in Criminal Case No. 2839 of 2004 at Kibera Law Courts)**

JUDGEMENT OF THE COURT

The accused was charged with robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63 Laws), in six substantive counts, with two counts in the alternative, of handling stolen property contrary to s. 322 (1) of the Penal Code.

It was the evidence of *Everline Owuor Odongo* (PW1) that she had walked out of her house at 9.15 p.m. on 10th April, 2004 to feed her dogs; and when she returned to the house, she heard orders being shouted at the gate that she should open up; and when she sought to know who was at the gate, she got the answer that it was policemen. The intruders broke in and hit PW1 with a metal bar, and demanded money with menaces. These intruders were two men and a woman; they were armed; the electric lights were at the time switched on. The intruders directed PW1 to call her father, and to tell him there were guests in the house; but she did not do as demanded. A neighbour alerted the Police, while at this moment, the intruders left. After a short while a guard came to the house with the appellant herein, who had been arrested. This man, the appellant, had stolen two cellphones from the house, a DVD and video player, beverages, and an umbrella; and PW1 said he recognized the appellant. The stolen items were recovered, and PW1 identified them in Court. In cross-examination, PW1 was able to describe in specific terms the three persons who had attacked their house on the material night: a tall man; a young lady who was PW1's size; and the appellant firstly by his clothing, and secondly by his physical appearance. The witness said she would also be able to identify the two other intruders if she saw them.

PW2, *Carrest Ochieng*, was the elder sister of PW1. PW2 was in the house with her brother and two younger sisters on the material night, at 9.15 pm when PW1 who had gone out to feed the dogs called out to say some people were chasing her and had forced her to sit down. When PW2 shut the door, one of the intruders pointed a gun at her and demanded she open the door; following which the intruders entered; and one of them slapped her and demanded money – and all this time the electric lights were on. The intruders took PW2's Kshs.300/=. PW2 called her father who was at a neighbour's house after Police officers had already arrived. The Police had already arrested one of the robbers, the appellant herein, who

they brought back to the house, together with recovered items.

PW2 said she was with the night-intruders for some 15 - 20 minutes, and that she had seen the three in good lighting; she remembered that one of the robbers was tall and brown.

PW3, **John Kamau Kanja**, was having his dinner on the material night at 9.00 pm, and watching television news, when he saw three people enter his house through the rear door, one brandishing a pistol. The intruders forced PW3 and his son to lie down and they rummaged in his pockets, taking his cellphones worth Kshs.80,000/=. When PW3 raised alarm, the attackers hit him on the neck with a stool; and these intruders then ran away. Neighbours came and, as they were taking injured PW3 to hospital, Police were at the compound, with the appellant herein under arrest. PW3 at the time identified the appellant herein as the robber who had hit him with a stool and had subjected him (PW3) to kicks. It was PW3's testimony that at the material time, the appellant had a metal rod which he used to crush the illuminating light-bulb as the intruders were fleeing. Only at that last stage in the incident, did the attackers disrupt the condition of electric lighting. PW3 had informed the Police officers of his stolen cellphones; and one of the cellphones recovered belonged to him: PW3 gave his cellphone number to the Police, who called the same and it betrayed the appellant dramatically by ringing immediately, right inside the appellant's pocket. PW3 was able to identify the said cellphone in Court.

PW4, **Patrick Mbugua Kariuki**, had just locked his shop, on the material night, and was going out, while his wife (PW7) remained in the shop; and he met two people who said they wanted to buy flour from the shop. As soon as PW7 opened the door, these intruders whipped out a pistol; they stole from the pockets of PW4's jacket; they stole from his wife Kshs.300/=; and they took PW4's car keys. Later the Police recovered the jacket, and PW4 saw it at the Police station; he identified it in Court and even showed its matching trousers which he had not worn on the night of the theft; and the thieves had taken the jacket. PW4 had not been able to identify the robbers, since he and his wife had been forced to lie down and he was not able to see well.

Gabriel Paul Mugo (PW5), a son to PW3, was driving in motor vehicle Reg. No. KUR 692 to his father's home after work, on the material night and at the material time. He stopped at the gate, and went to open it, as it was shut; but he came up against a robber, a "tall brown man", who grabbed his cellphone, as well as his money, Kshs.2,500/=. The robber demanded PW5 should take him to PW5's father in the house; at this stage there was just this one robber; but when they got into the house, two more robbers emerged, who forced both PW3 and PW5 to lie down; and they took PW3's cellphones and battered him; these intruders were particularly enraged by PW4 because he had screamed and raised alarm.

It was PW5's testimony that the electric lights were on, at the time of the intruders' assault on his father's house. The Police, upon being alerted, promptly came up to PW3's house; and at that time, PW5 "saw the accused inside the Police car"; and PW5 was able to identify him. It was clear to PW5 that the appellant herein had been to their house, and it was the appellant who took PW3's mobile phone and hit PW3 with a stool; he still had on, when he (appellant) was returned to the house in the Police motor vehicle, the very jacket PW5 had earlier seen him in. It was PW5's testimony that upon PW3 giving his cellphone number to the Police officers and upon the officers calling that number, it rang out right inside the appellant's pocket; and PW5 identified the said cellphone as the one belonging to his father (PW3). PW5 was present when the said cellphone was retrieved from the appellant herein. PW5 identified the jacket which the appellant was wearing on the material night; this was the very jacket PW4 had identified as his, and as the one which was taken from him by robbers.

PW5 testified that the said robbery had lasted some 10 - 15 minutes, in well-illuminated conditions; and that he felt compelled to look up, and in the process saw the appellant, for the reason that the appellant kept stepping on him as he lay down.

Albert Wandiga Wandago (PW6) testified that he arrived at his house at 10.00 pm, after being alerted by his son that his house had been invaded by robbers. When PW6 arrived, he found that the Police had come to his house ahead of him; and the Police officers had the appellant herein inside their car. The Police officers had also come with items which had earlier been stolen from PW6's home: and he

identified the electrical items among these, and produced his purchase-receipts.

Dorcias Wanjira (PW7) was at her shop on the material night, when two men forced their way in and dragged her husband (PW4) into the shop. The shop-lights were switched on at the time, and one of the intruders, a tall man wielding a gun, demanded money with menaces. The intruders extracted Kshs.4,900/= from PW7; he took PW7's Nokia 3310 cellphone; he took from PW4 a jacket and Kshs.400/= and he took from the guard Kshs.100/=. After some 10 minutes, the robbers left the shop; PW7 and her husband rose to their feet, and made a report to Police officers who came along.

PW7 did not have an opportunity to look at the night robbers; but on 12th April, 2004 she and her husband went to the Police station and found PW4's jacket among the recovered items.

PW8, Inspector of Police **Moses Mwangi** (P.F. No. 2304), had been on patrol with other officers at 7.00 pm on 10th April, 2004. When these officers returned to the Police station at 9.30pm, they were informed that a robbery had taken place at a backyard supermarket. PW8 and two other officers, thereupon, went to an area known as 6th Avenue, and found several people standing with night-guards; and these Police officers learned that there had just been a robbery attack in the area. One guard who said he could identify the robbers, went with the Police team on a search; and they went up to the back of the shopping centre where shops close late. When the Police vehicle lights lit up a certain dark area, PW8 and his colleagues saw four people carrying two plastic bags. These people, when ordered to stop, started running, and they even dropped the plastic bags they were carrying. PW8 and his colleagues managed to arrest only the appellant herein; and the appellant had dropped a plastic bag that contained a video player and a remote-control device. PW8 and his team also recovered the second plastic bag, which had been dropped by a fleeing suspect – and found it to contain a DVD player, a DSTV, four bottles of whisky, an umbrella, three caps, a pillow-case. The appellant was wearing a jacket (exhibited in Court) with pockets containing a cellphone, NEC by make.

PW8 took the appellant herein back to the scene of the robbery on 6th Avenue – and the victims were able to identify him, and also to identify the items which had been robbed from them. When the owner of the stolen cellphone gave its number, the Police officers called it, and it rang in the appellant's pocket. On 12th April, 2004, the owner of the backyard supermarket (PW4) went to the Police station, and identified his jacket which had been stolen on the material night; and he brought along a matching pair of trousers which belonged with the said jacket as one suit.

PW9, **Dr. Zephaniah Kamau**, the Police Surgeon, examined PW3 some 10 months after the material robbery incident; and he found that PW3 had ruptured the left shoulder. PW9 concluded that the injury may have been caused by a blunt object; and he assessed the degree of injury as grievous harm.

The appellant in his sworn defence, pleaded alibi, and said he had been arrested by mistake and had nothing to do with the robbery in question.

This state of the evidence led the trial Court to proceed as follows:

“This is a very clear case The lights were on during the robbery, and the accused and his colleagues were armed with a pistol. The accused was caught so soon after the robbery and all the items stolen were recovered upon the accused being arrested ... [PW1 and PW2] said they could identify the accused because the lights were on during the robbery.

“PW5 said the accused in the company of others got inside his house while the lights were on. PW3 and PW4 who are father and son, were able to identify the accused upon being arrested. In fact, the accused was found in possession of PW3's mobile phone in his pocket when the same was rung by the arresting officer.

“PW4 said he was robbed of his jacket and Kshs.300/= while PW7, his wife, was robbed of money and a mobile phone. The accused upon being arrested was found wearing PW4's jacket which had

been robbed off him”

The trial Court found it impossible to believe the appellant’s story. The Court stated:

“During the execution of the robberies, all witnesses saw the accused [who] was in a group that was armed with a pistol. In fact, in the course of the robbery, actual bodily harm was occasioned to PW3 and the same was proved by PW9”

The trial Court found that the charge, in counts 1, 2, 3, 4 and 6 was proved beyond any reasonable doubt; though this was not the case in respect of count 5, for which no evidence was called. The appellant was convicted on counts 1, 2, 3, 4 and 6, and was sentenced to death as provided by law.

The appellant’s original grounds of appeal filed by himself in person, may be thus summarized: that he had not been positively identified as a suspect; that there were doubts and contradictions in the prosecution evidence; that inadequate investigations had been conducted before the charge was laid; that the trial Court had erroneously rejected his defence.

The appellant later instructed counsel, **Mr. Ondieki**, who thereafter filed a supplementary petition of appeal; and in this, the main contentions are as follows: that the appellant’s trial rights set out in the Constitution had been infringed; that the trial Court had erroneously applied the doctrine of recent possession, against the appellant; that the appellant had been convicted on the basis of a defective charged sheet; that the identification of the appellant as a suspect, fell short of the operative standards; that the Court had relied on circumstantial evidence that fell short of the applicable standard; that the trial Court failed to resolve material contradictions in the evidence; that the prosecution case was not proved beyond reasonable doubt; that the trial Court “misapprehended the facts and applied wrong legal principles and drew erroneous conclusion to the prejudice of the appellant”; that the trial Court “failed to analyse and consider plausible [defences] given by the appellant”.

Learned counsel **Mr. Ondieki** said he was relying on five constitutional grounds, one of these being the mode in which the language used in the trial had been recorded. He noted that the language used in Court was not shown in the proceedings, on several occasions: p.1 of the proceedings; p. 10 line 8; p. 16 line 6; p. 17 line 29; p. 18 line 19. Counsel urged that the trial would have been afflicted by a language problem, leading to lack of cross-examination for the most part, by the appellant herein. Counsel submitted that the language used in Court was also not stated on pp. 23, 24, 26, 29 and 31 of the proceedings, and that this would explain the absence of cross-examination in respect of the testimony of PW6.

On this question, counsel impugned the conduct of trial, especially taking into account the terms of ss. 77 (2) (b) and (f) of the Constitution, and of s. 198 (1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya) which provided for language as it was to apply and be recorded, during criminal trial.

The omission, counsel urged, was highly prejudicial, and “rendered the proceedings a nullity”.

Counsel next based his client’s case on the terms of s. 72 (3) (b) of the Constitution, and the issue of expeditious arraignment of a suspect in Court following arrest and detention. He urged that the appellant had been brought before the Court after the expiry of 14 days, and so on this account, the appellant should be acquitted.

Mr. Ondieki contended that the charge-sheet was defective, as it had not been signed and dated. We have checked this point in the original record; and it shows that the charge sheet was duly signed and dated.

We find no need to delve into the merits of proof, before the trial Court, as learned respondent’s counsel, **Mr. Makura** conceded to the appeal on a technicality. He noted that, in respect of all the witnesses called by the prosecution, there was no record of the language they had spoken in Court; and it was also not shown in what language the defence had been given. In these circumstances, **Mr. Makura** urged that the trial be declared a mistrial, but that a hearing *de novo* be ordered.

In that regard, counsel urged that the *strength of the evidence* on record be considered. Counsel was not in agreement with appellant's counsel, on the relevance of trial-rights under s. 72 (3) (b), in this case, as the appellant had been detained for less than 14 days before being indicted in Court.

We have examined in detail the *evidence* which the prosecution had against the appellant in this case; and we have no doubts at all it was extensive and cogent evidence. Such evidence has the probability of leading to a conviction, in a properly-conducted trial.

We, however, take seriously the point raised by **Mr. Ondieki**, regarding a language problem during the trial, which may have led to ineffective cross-examination, thus prejudicing the possible impact of the appellant's defence. It is now an established principle of law that the Court is to be convinced the accused person was able to follow and to understand the proceedings against him, and that he was in a position to put up a proper defence; and failing this, the trial may be declared a nullity: ***Swahibu Simbauni Simiyu & Another v. Republic, Crim. Appeal No. 243 of 2005.***

While not drawing any conclusions from the evidence on record, we are convinced it is such evidence as would *probably* return a verdict of guilty. Therefore, there is a *prima facie* basis for the prosecution to be inclined to prosecute the case to conclusion; and in such a case, it is the obligation of this Court to give an opportunity for the exercise of the prosecutorial role as defined by s. 26 of the Constitution. This Court must be moved by the *public policy* to ensure due discharge of standing constitutional obligations, and, in this particular case, by the fundamental goal of the *public interest*, of controlling crime and ensuring safety and security for members of the public.

Being guided by these principles, we will now make specific orders as follows:

- (a) The trial proceedings in Criminal Case No. 2839 of 2004 are hereby declared a nullity.**
- (b) A re-trial of the case shall take place, and shall be conducted on the basis of a priority schedule to be set out by the trial Court.**
- (c) Re-trial shall take place before a Magistrate other than the one who conducted the earlier proceedings.**
- (d) This matter shall be listed for mention before the Presiding Magistrate at Kibera Law Courts on 10th February, 2009.**
- (e) Production order to issue in respect of the appellants herein, and in relation to Order no. (d) herein.**

Orders accordingly.

DATED and DELIVERED at Nairobi this 27th day of January 2009.

J. B. OJWANG M. WARSAME

JUDGE JUDGE

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Appellant: Mr. Ondieki

For the Respondent: Mr. Makura