REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 115 of 2002
FRANKLINE MURIKI ……..…….. APPELLANT
VERSUS
REPUBLIC ……..…….. RESPONDENT
(An Appeal from a judgment of N. Ithiga SPM, Meru, delivered on 14th June 2002)
JUDGEMENT

The appellant, Frankline Muriuki, together with two others, who were acquitted by the trial court, were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code.

In the first count the particulars were that on 8th day of September, 2001 at Kooje estate in Ntima location jointly with others not before court armed with offensive weapons namely axes, pangas and rungus robbed Elias Thige Mutitu of Kshs. 6000/= and at or immediately before or immediately after the time of such robbery wounded the said James Thige Mutitu.

In count two they were charged that on the same night, 8th day of September 2001 at Mwiteria Village in Ntima Location of Meru Central District within Eastern Province, jointly with others not before court armed with offensive weapons namely axes, pangas and rungus robbed Mercy Njoki Ndiangoro Kshs. 3,000/= cash, 5 packets of Embassy, 5 packets of sportsman, 5 packets of Safari and 5 packets of Supper March cigarettes all valued at Kshs. 1,170/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Mercy Njoki.

The appellant and his co-accused persons were tried by the trial court which found the appellant guilty of the charge and sentenced to death, the only lawful sentence under the law for the offence charged. His co-accused persons were, however, acquitted.

The appellant was aggrieved by the conviction and sentence and hence preferred this appeal citing, initially, five (5) grounds. An additional ground was raised in the appellant's written submissions. These grounds may be paraphrased and summarized as follows:-

(i) That there was no evidence of identification

(ii) That the prosecution evidence was contradictory

(iii) That the identification parade was irregularly conducted

(iv) That the case against the appellant was not proved beyond reasonable doubt

(v) That the provisions of sections 197 and 198 of the Criminal Procedure Code were not complied with with regard to the language used.

Counsel for the respondent supported both the conviction and sentence. He submitted that the appellant was identified both at the scene of robbery and in the identification parade. He was shot and arrested at

the scene of the robbery.

Apart from the foregoing, counsel further submitted that the appellant was found to be in possession of cigarettes which had shortly before the shooting and arrest been stolen from the 2nd complainant, Mercy Njoki.

We have considered these submissions and are aware of our duty as the first appellate court to re-evaluate the evidence on record and to come to an independent conclusion, bearing in mind that we lack the advantage of the trial court where that evidence was received and witnesses seen.

The facts of this case are straight forward. On 8th September 2001 a gang of robbers numbering between six and eight went into a robbery orgy terrorizing residents of Kooje estate and the neighbouring Mwiteria village, in Ntima Location.

There were three victims to this orgy, PW1, James Thige Mutitu (the 1st complainant), PW4, Mercy Njoki (the 2nd complainant) and PW6 Lenny Mutuma (Lenny) who was only a witness although he was also robbed. It was the evidence of the 1st complainant that on the night of 8th September 2001 at about 1.30am while with his wife, PW5, Fridah Kanorio (Fridah), sleeping in their house at Kooje Estate a gang of about seven people broke into their house armed with an axe, panga and rungu demanding money. The robbers were given Kshs. 60,000/= and left.

According to the 1st complainant and Fridah, the incident took between 10 to 25 minutes. The 1st complainant and Fridah were able to identify the appellant only from torches the robbers had. The 1st complainant who was injured during the robbery was treated by PW2 Wilson Namu, a medical officer who assessed the degree of his injuries as "harm". That very night at Mwiteria village a gang of about 8 robbers forced their way into the 2nd complainant's shop where she was sleeping at 2am armed and demanding money. They were given Kshs. 2,000/= and helped themselves with Kshs. 2,200/= and cigarettes from the shop.

The 2nd complainant was able to identify three of robbers including the appellant. In the same plot lived Lenny who was also robbed of Kshs. 300/= by a group of three men. Lenny was able to identify the appellant as well as his two colleagues.

As all this was happening, PW3, P.C. Oliver Silali (P.C. Silali) received a telephone call reporting a robbery in Gakoromone area. In the company of PW8, PC Geseke (P.C. Geseke) and IP Wangombe (not a witness) P.C. Silali rushed to the scene where they confronted six robbers. They challenged them to stop but the robbers responded by throwing stones at the officers while running away. P.C. Silali shot the appellant on the buttocks as the robbers were scaling the wall and arrested him.

On 10th September 2001 PW7, I.P. Philip Nganatha (I.P. Nganatha) conducted an identification parade where the 1st complainant, the 2nd complainant, Fridah and Lenny pick out the appellant. The appellant and his accomplices were subsequently charged.

In his defence the appellant maintained that he was a victim of circumstances; that he was in the wrong place at the wrong time. He explained that while in his house on the night in question DW6, Jacob Kaimenyi Miriti (Kaimenyi) alerted him of the presence of thieves in the neighbourhood. On going towards the gate to confirm what was happening he was shot in the leg and arrested by the police claiming that he had been involved in the robbery. He further stated that he was not shot at the scene of the robbery but at his residence. Kaimenyi reiterated that when they were going to enquire why people were screaming, they heard gun shots and dispersed in different directions. Later he learnt that the appellant had been shot.

From the evidence on record, it is clear to us that there were three robberies on the night of 8th September 2001 which took place at Kooje estate and Mwiteria village within 30 minutes interval (only two are

charged). There is also evidence that the robberies took place between 1.30am and 2.00am. The robbery, we further find, was perpetrated by a gang of between six and eight persons who were armed with crude weapons; that in the course of the robbery the 1st complainant was injured, money and shop goods stolen. The 2nd complainant was not attacked by the robbers.

The only question that falls for our determination is whether the appellant was part of the gang that committed the robbery. It is a question of identification. The 1st complainant said of the appellant;

"***I managed to identify accused 1 on the dock. I had seen him earlier in the evening……. He is the one who cut me on the back with a panga."***

In cross-examination he continued:-

"***I usually see the accused at Gakoromone area."*** (The appellant was accused 1 at the trial)

Fridah was also able to identify the appellant. Although both the 1st complainant and Fridah confirmed that the room in which they were was dark they maintained that with the light from the torches which the appellant and his accomplices had they were able to see the appellant well. The light from the torch were bright enough, they added.

According to the 1st complainant the appellant with his colleagues took some 25 minutes while Fridah estimated that they took 10 minutes with them. Either case, we are of the view that the 1st complainant and Fridah had sufficient opportunity to identify the appellant, particular because of the active role he played, (cutting the 1st complainant with a panga and being the first person to enter the room) and also because of his dressing. Besides he was known to the 1st complainant before. Above all, both the 1st complainant and Fridah easily picked out the appellant in the parade.

Regarding the second count, the 2nd complainant confirmed that as the robbers stormed her house there was electric light both inside her room and outside from 100 watts bulb. She was able, with the aid of this light, to identify the appellant and two others. She estimated that the robbers spent about 20 minutes at her shop. She was also able to identify the appellant at a parade. Her testimony is, however evidence of a single eye witness and must be subjected to the strictures, set out in ***Abdala bin Wendo and another V. R.*** (1953) 20 EACA and followed in a long time of recent authorities, for instance ***Tipapek Kimiti alias Ole Lemuninka V. R.*** Criminal Appeal No. (Mks) 2 of 2006 in which these strictures were stated as follows:-

"***It is now trite law that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the court needs to see if there is other evidence to lend assurance as to guilt of the suspect before it, before it can enter conviction."***

Although the offence took place at 2am, we are satisfied that, given the time the appellant spent with the 2nd complainant and the fact that there was bright electric light, she was able to positively identify the appellant. She had no difficulty picking him out in the parade. Her evidence was adequately corroborated by that of Lenny who heard the robbers demanding money from the 2nd complainant in the shop next door. The 2nd complainant's evidence is further reinforced by the evidence that cigarettes very shortly stolen from her shop were recovered from the appellant. But of significance is the fact that the appellant was shot and immobilized within the vicinity of the robbery. His defence that he was shot while at his residence for no apparent reason is not persuasive. The same was displaced by the above overwhelming prosecution evidence.

We find no material contradiction or at all in the prosecution case. Similarly, we find no flaw in the

manner the identification parade was conducted. The identification parade form (police form 156) in respect of the appellant is clear that he did not ask for an advocate or a friend to be present. As a matter of fact, the appellant never raised this question in the trial court. I.P. Nganatha testified, in terms of police form 156, that there were eight members of the parade. Again this matter was never raised in cross-examination.

Standing Order 6(iv) of the Police Force Standing Order provides that:-

"***(d) The accused/suspected person will be placed among atleast eight persons as far as possible similar in age, height, general appearance and class of life as himself…….***"

This requirement, we are satisfied, was complied with. The appellant has attacked the proceeding before the trial court for failing to indicate the language used. There are enough recent decisions underscoring the need to indicate on record the language of the proceedings, in keeping with both the constitutional (section 77(2) (b) and the statutory (sections 197 & 198 of CPC) requirements.

We reiterate that it is the duty of the courts to enforce these provisions in order to uphold the rights of suspects.

In the landmark case of ***Albanus Mwasia Mutua V. R.*** Cr. Appeal No. 243 of 2005 it was held, among other things, that:-

"***The jurisprudence which emerges from the authorities we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.***"

This reasoning was followed in the case of ***Francis Macharia Gichangi and 3 others V. R.*** Criminal Appeal No. 11 of 2004 in which the Court of Appeal reiterated that while the court has a duty to enforce constitutional provisions, there is reciprocal duty on an accused person to indicate to the trial court, for instance, that he is not able to understand the language of the proceedings. The court delivered itself thus:-

"***These place an implied duty on the accused to inform the court whether or not he is able to follow the proceedings. In an appropriate case where there is no complaint at the trial this court may well infer that there was interpretation where the proceedings show the accused understood the nature of the charge against him and the evidence presented in support thereof notwithstanding absence of a note regarding interpretation.***"

In the appeal before us the applicant pleaded not guilty to the charge. It is not indicated in what language the charge was read over and explained to the appellant. The reading of the charge and explanation of the substance thereof is represented a standard rubber stamp impression. But what is important is that the appellant who was unrepresented pleaded not guilty.

The trial took some nine months during which period eight prosecution witnesses testified. The appellant cross-examination of those witness does not give us the impression that he did not understand what was happening. Indeed, he called a witness, after he gave a clear defence, to buttress his case. The appellant has failed to convince us that he did not understand the language of the trial.

The final point raised by the appellant is that section 211 of the Criminal Procedure Code requiring the court to explain the substance of the charge to the suspect before requiring him to make a defence was not complied with. This ground has no merit as the record clearly states that:-

"***COURT: Section 211(1) CPC complied with. All the 3 elect to make sworn statement in defence and calling one witness each.***"

Before we conclude, one matter in the trial magistrate's sentence must be pointed out. The trial

magistrate sentenced the appellant to suffer death on both counts. That was a grave error of law. The law is settled that where a suspect is convicted on more than one corporal charge, as was the case here, the correct approach is to sentence him to death on only one of the counts and leave the other(s) in abeyance.

In the result, we uphold the sentence in count 1 and suspend that in court 2. Save for this, the appeal is dismissed in its entirety.

Dated and delivered at Meru this 8th day of February 2008.

I. LENAOLA

JUDGE

W. OUKO

JUDGE