



**REPUBLIC OF KENYA**

**CRIMINAL DIVISION**

**(Coram: Ojwang & Dulu, JJ.)**

**CRIMINAL APPEAL NO.33 OF 2005**

**BETWEEN**

**WELLINGTON ADENYA.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

**(An appeal from the Judgment of Senior Resident Magistrate Ms. Muchira dated 12th January, 2005 in Criminal Case No. 1073 of 2004 at Kibera Law Courts)**

**JUDGMENT OF THE COURT**

The appellant was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that on 25<sup>th</sup> January, 2004 at Kawangware bus stage in Nairobi, the appellant who was armed with a dangerous or offensive weapon, namely a machete, robbed **Samuel Devava Ashuluki** of 40 radios of different makes and sizes valued at Kshs.12,950/=, and at, or immediately before, or immediately after the time of such robbery, used or threatened to use actual violence against the said **Samuel Devava Ashuluki**.

PW1, **Victor Limtanza**, testified that he is a radio seller at Kawangware. The appellant herein, who comes from his rural village, is well known to him. PW1 was at the shop on 25<sup>th</sup> January, 2004, at 3.00 p.m. when the appellant came along to buy a cigarette. After he lit the cigarette, he grabbed one radio, Model XBX valued at Kshs.500/=, which he slipped into his jacket pocket, and took off. The appellant soon returned, and grabbed another radio worth Kshs.700/=; and this time PW1 held the appellant by the hand, and sought to know why the radios were being taken without buying them. The appellant at this stage issued a threat, "it will be a murder case"; and PW1 Let go. The appellant left the radio, and went away. But PW1 called a friend of his, **Samuel Davava Ashuluki** to take care of the shop as he went to make a security-breach report. The chairman of the local security committee asked PW1 to report the matter at Muthangari Police Station. Now as PW1 was making his way towards the Police station, he met **Samuel Davava Ashuluki** who he had left at the shop to keep watch. This gentleman, **Samuel Davava Ashuluki**, had a further security-breach account; the appellant had just returned to the shop armed with a machete, and grabbed 40 radios, bearing a value of Kshs.12,950/=.

PW1 pointed out the appellant herein to Police officers on 26<sup>th</sup> January, 2004 and the appellant was arrested. The radio business belongs to

PW1's brother, **Boniface Onzai Olandi**. None of the stolen radios was recovered.

PW2, **Samuel Devava Ashuluki** testified that he is a casual worker and labourer, and has known the appellant herein since childhood. On 25<sup>th</sup> January, 2004 PW2 passed through the shop where PW1 sells radios. PW1 asked him to take care of the shop, as he went out to make a report. As PW2 cared for the shop, the appellant herein came along and grabbed one radio. When PW2 sought to know what the appellant was up to, he grabbed more radios; and PW2 saw that the appellant was armed with a machete which he, the appellant, was brandishing menacingly at him; PW2 dodged, and exited through the rear of the shop; the appellant chased, but PW2 ran away, meeting PW1 as he (PW2) scampered for safety. When PW1 and PW2 got to the shop, they found that as many as 40 radios had been taken away. PW1 reported the matter to the Police station, and PW2 recorded a statement on the incident.

PW3, **Boniface Onzai Olandi** testified that he was a radio and electronics seller at Kawangware, and he knew the appellant, as the two had been to the same Primary School. PW3 had learned from PW2, on 25<sup>th</sup> January, 2004 at 3.30 p.m., that the appellant had stolen radios from PW3's shop, and that the appellant had been armed with a machete. PW3 went to the shop, and found 40 radios valued at Kshs.12,950/= missing. When PW3 got to the shop, he did not find his brother (PW1) who had been taking care of the shop, and he learned that PW2 had gone to the village elder to report a security-breach at the shop. PW3 found PW2 at the kiosk, but PW1 had gone to Muthangari Police Station to make a further report. The appellant herein was arrested on the following day, 26<sup>th</sup> January, 2004.

PW4, Police Force No. 61846, **P.C. Jackson Mwendango** of Muthangari Police Station testified that he was in office at 10.00 a.m. on 26<sup>th</sup> November, 2004 when the officer-in-charge of Crime asked him to conduct investigations into the instant matter. He found out that PW3 had, on 25<sup>th</sup> January, 2004 given his brother (PW1) a stall to sell radios from, and the appellant went there and grabbed 40 radios worth Kshs.12,950/=; and the appellant was, at the time, armed with a machete and he had threatened the person in the shop. No item stolen from the shop was recovered.

The appellant when put to his defence, chose to make an unsworn statement in which he said he was a mason doing casual work. He made no reference to the incident of 25<sup>th</sup> January, 2004, but said that on 26<sup>th</sup> January, 2004 he had been arrested in connection with a theft said to have taken place the previous day. He said he knew nothing about the theft incident.

In coming to her decision in this case, the learned Senior Resident Magistrate proceeded as follows:

**“The issue for determination herein [is] whether ...the accused person, while armed with a dangerous *panga*, did rob PW2 and threaten him with actual violence.**

**“PW1, PW2, PW3 all said they knew [the] accused very well, ...having grown up with him...up-country.**

**“[The] accused in his defence did not deny this fact. On 25<sup>th</sup> January, 2004 at 3.00 p.m. ..., PW1 and PW2 must have recognized the accused person whom they well knew. PW1, in fact, said when [the] accused picked [up] the first radio, [the] accused spoke back and told him ‘it would be a murder case.’ Whatever he meant by that, I smell threat and danger. PW1's evidence is corroborated by PW2 whom PW1 left at the stall to report the accused's blatant, broad-daylight theft of the radio. No sooner was he gone, than [the] accused was back [at] the stall, this time armed with a *panga*. I believe PW1 who said that [the] accused collected... his radios. PW2 left the scene while [the] accused started taking the radios. PW3 testified [that] the radios were his, sold by his brother, PW1. I [find] no doubts in these three prosecution witnesses' evidence. No grudge was shown [to exist] between the accused and the three, so that he could be framed-up. In his defence the accused steered clear of any issues raised by the prosecution, merely saying he did not know about this offence.**

**“I do not believe the three prosecution witnesses are mistaken. I believe their evidence makes sense and is unrebutted. I find it true, that the accused person robbed PW2 while armed with a *panga*...I find [the] accused guilty as charged, and convict him.”**

The learned Magistrate sentenced the appellant to death as required by law.

In his appeal, the appellant challenged the reliability of the identification of him as suspect, on the basis that no first report had been made describing him, so that a comparative match of appearances could be made. It was contended too, that those who arrested the appellant should have been called as witnesses. It was contended that the trial Court had rejected defence statement without any justification.

Learned State Counsel, **Mrs. Kagiri** urged that reliable testimony from PW1 and PW2 showed the ingredients of the offence of robbery with violence to have been satisfied: the appellant grabbed the goods while armed with a machete, issuing threats to PW2. In **Mrs. Kagiri's** words: "The evidence of PW1 and PW2 was direct evidence, and it is clear, consistent, and well corroborated by the evidence of PW3 and PW4." This evidence, learned counsel urged, speaks for itself: the relevant ingredients of the offence of robbery with violence were fully proved.

To the appellant's contention that the terms of s.77(2)(b) and (f) of the Constitution were not complied with during trial, because the record has not shown the language used in Court, **Mrs. Kagiri** focussed the Court's attention on the content of the trial Court record. Although during the second plea-taking, on 22<sup>nd</sup> March, 2004 the language was not recorded, the language spoken by each witness was clearly shown on the record. Moreover, the appellant's plea had been one of "Not guilty"; hence there could not have been any prejudice occasioned to him through non-recording of language at plea-taking; and all the witnesses gave evidence in a language that he, the appellant, understood.

On the appellant's invocation of the status of the Court record, in relation to the second plea-taking, we have found learned counsel's position meritorious, and we hereby uphold it. It is for this Court to give practical meaning to the expressions used in the relevant provision of the Constitution, and that meaning is shaped by the prevailing circumstances, and by this Court's first duty of ensuring that justice is done to both parties.

**Mrs. Kagiri**, while urging that the law and the evidence would call for a confirmation of the trial Court's decision, offered a certain perspective, in her personal solicitude as an officer of the Court. She noted that the commission of the offence charged was attended with a special circumstance: the appellant, PW1, PW2 and PW3 were all well known to one another, before the incident; and the appellant committed the offence well knowing of this fact of *recognition* as the category of identification at play. This scenario led learned counsel to ask: "Are the facts so extraordinary that it would have been necessary for the Magistrate to make a finding as to the mental status of the appellant? Could the Magistrate have made an error in not requiring mental examination?"

In our opinion, the trial process was well conducted in substance, in accordance with the law; and we entertain no doubts that conviction was made on the basis of the reliable evidence of the prosecution witnesses. There is no record anywhere showing questionable demeanour on the part of any of the witnesses, and the totality of the prosecution case constitutes a firm impeachment which the appellant herein did not succeed in displacing.

It only remains for us to consider the last point made by learned counsel: was there any judicial duty resting on the learned Magistrate to require that the appellant herein be subjected to psychiatric examination? We doubt that this would be so. The Court's position, in a criminal trial, must be founded on the principle stated in s.11 of the Penal Code (Cap.63, Laws of Kenya). That section stipulates:

***"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."***

It is a rebuttable presumption of law that every person is sane; and insanity is a defence only where the accused shows that he was suffering from a disease of the mind at the material time and that, as a result of such a disease, he or she was incapable of understanding the nature of the act in question, or the accused had then lost control and judgement in relation to right and wrong (see *J.J.R. Collingwood*, Criminal Law in East and Central Africa (London: Sweet & Maxwell, 1967), pp. 30-35).

Such a scenario did not arise in the instant case, and, indeed, the learned Senior Resident Magistrate, so far as we can see, even by exercising the most humane solicitude, had no basis for perceiving that the appellant was anything but normal.

It is not clear to us if learned counsel was suggesting this Court should advert to any peculiarities of age, locality or familiarity which made some bond among the appellant, PW1, PW2 and PW3. If that was her concern, we are inclined not to agree, for the reason that the criminal law sets up a standard yardstick addressing all Kenyan people in exactly the same way.

Accordingly, we dismiss the appellant's appeal, uphold conviction, and confirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 6<sup>th</sup> day of March, 2008.

**J.B. OJWANG**

**G.A. DULU**

**JUDGE**

**JUDGE**

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Mrs. Kagiri

Appellant in person