



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

REUBEN OMBIMA ATICHI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 466 of 2004 of the Chief Magistrate’s Court at Makadara by Miss S. Karani – SRM)

J U D G M E N T

REUBEN OMBIMA ATICHI (appellant) was sentenced to death after conviction on two counts of robbery with violence contrary to section 296(2) Penal Code. He was alleged to have jointly with others not before court, while armed with toy pistols robbed Anthony Kairu Mugi and Anthony Githinji Wambui – both incidents having taken place on 29th December, 2003 at Kariobangi South Estate Nairobi.

Anthony Kairo Mugi (PW1) was in the company of his wife Ann Wanjiku, Anthony Githinji and Samuel Mbogo at Kariobangi South where they had gone to visit his brother Samuel Kariuki – this was at about 7.00p.m. There was security light. The four stood outside their car which had just been parked, when another motor vehicle came and parked behind them. Three men appeared, one held what looked like a metal gun and ordered the four to lie down and robbed them of their belongings and in the process PW1 realised that it was not a real gun but a metal object. So PW1 begun throwing stones at them and PW1 pursued them and fought one whom he managed to subdue with the help of members of the public and that is the appellant – nothing was recovered from him. PW1’s colleague’s had gone in the opposite direction and so did not help in fighting appellant. PW2 Samuel Kariuki confirms the incident and the chase PW1 gave the attackers upon realizing that what appeared like a pistol was actually fake. He confirmed that there were security lights and he watched the robbers very well as he was the first one to be dealt with. PW5 Anthony Githinji who was also a victim of the robbery confirmed that it was PW1 who followed the robbers and he had got up before the rest of them and that it is PW1 who arrested appellant about 10 meters away from the scene. He too said there was electricity and that appellant is the one who banged him during the robbery. PW1 testified that he was injured during the incident and Dr. Kamau (PW4) who examined him found he had a stitched wound on the forehead and most likely caused by a blunt object.

On being placed on his defence appellant gave unsworn testimony in which he stated that on 29th December, 2003 he had gone to see his brother in Kariobangi South but failed to find him. As he was heading back to the stage, he met a drunken person who blocked his way. When appellant asked why, he got no verbal response and instead, the person boxed him and he fell. He heard shouts of thief and lost consciousness – when he came to, he was in hospital and later he was charged.

The learned trial magistrate stated as follows:-

“Having evaluated the prosecution and defence evidence on record. I find prosecution evidence was extremely consistent and well corroborated and I am persuaded that indeed on 29th December, 2003 there was a robbery at Kariobangi South where PW1 and PW5 were victims and hence the complaints in count 1 and 2 respectively.

The learned trial magistrate noted the defence evidence and said PW1, PW2 and PW5 testified that appellant was struggling with PW1 when they eventually managed to overpower and arrest him. “I am satisfied that PW1 and PW5 satisfactorily identified the accused in court at the scene of crime as the place was lit by electricity lights.”

The learned trial magistrate also considered that appellant was arrested more or less at the scene of crime so an identification parade was not necessary. She found PW1 to be a credible witness and that between where he was and part of catching up with the appellant, there were no people so the question of mistaken identity as advanced by the appellant was a feeble attempt at defence, which she disregarded entirely. She was of the view that appellant's defence was not corroborated and that the metal bar which was used to inflict injury qualified to be considered an offensive weapon.

In his petition of appeal appellant stated that, the learned trial magistrate:-

- 1. erred in basing his conviction on the identification evidence as attributed against him by PW1, PW2 and PW5 without observing that the circumstances under which the same were made was harsh and inconclusive and the possibility of mistake could not be discounted.***
- 2. erred in being impressed by the mode of arrest yet the same evidence raised contradictions and inconsistencies and raised suspicion and should have been disregarded as the same created enough doubt to secure an acquittal.***

It was also the appellant's contention that the language used in court was not indicated thus contravening section 198 Criminal Procedure Code and Section 77(2) (b) and (f) of the Constitution.

In his submission, the appellant stated that it was highly suspect whether or not the complainant in count 1 and count 2, identified or chased and arrested him and that the charges were not proved. He says given the sequence of events then the identification was not safe and was full of errors. He points out that PW1 in his evidence in chief stated that he was not able to see the person who was giving orders and that all prosecution witnesses mentioned a security light, none of them gave the position of that light in relation to the suspect and no distance was given of the alleged light and the scene of attack nor was any evidence led regarding the nature, quality and intensity of the light. He cited an unreported decision of ***Paul Entole and Reuben Ombima versus Republic Criminal Appeal 24 of 2000*** (which was not annexed nor handed over to court). Anyway it was the appellant's argument that the victims must have been shocked and ambushed so that there were possibilities of error in the identification and no independent witness to support prosecution witnesses' evidence. He also submitted that none of the prosecution witnesses gave the role the appellant played during the incident and that there was no evidence that PW1 never lost sight of appellant during the chase. Appellant also wonders why nothing was ever recovered from him and why no member of the public was called to testify as a witness saying why the expression in case of ***Bukenya and others versus Ugandan in Criminal Appeal No. 68 of 1972*** that:-

“Court has a duty to call all witnesses whose evidence appears essential to the just decision of the case.”

The appeal is opposed and the learned State Counsel Miss Gateru who submitted that as regards identification, the conditions of light existing at the time of attack favoured identification since PW1 and PW5 were categorical that there were electricity lights which helped them to identify the attackers. Appellant has challenged this opportunity for identification on grounds:-

(a) ***that the light intensity and position of the light in relation to him was not disclosed.***

(b) ***that the witness may have become confused as a result of the attack and possibility made a mistake.***

The learned State Counsel also pointed out that the chain of events was not broken during the chase process and that the appellant immediate arrest after the attack leaves no doubt that appellant was among those who robbed PW1 and PW5. Before we can even address the merits of the substance of this appeal, we are mindful that one of the issues appellant has raised is with regard to the language used during the trial and it was his submission that his rights were contravened under section 198 Criminal Procedure Code and 77(2) (b) and f. Miss Gateru's response to this is that no prejudice was occasioned as appellant extensively participated and even cross examined witnesses with questions which were relevant to what was going on in court. We have looked at the trial court's record and it is apparent that when PW1 testified the language he used is not indicated nor was the language of the court recorded – the same applies to PW3. However PW2 and PW4 and PW5 are shown as having given their evidence in Kiswahili language. The record does not show what language appellant used when giving his defence. The provisions of section 77(2) f is thus:-

“Every person who is charged with a Criminal Offence:- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.

Section 198(1) Criminal Procedure Code further probes that:-

“Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.”

Without an indication on record as to the language used by the witnesses PW1 and PW3 and the appellant, then appellants rights were violated and he must benefit from that omission. Of course there is every probability that the witnesses spoke in a language appellant understood but that would be speculative and it is not enough for the learned State Counsel to state that appellant participated extensively in the trial and asked relevant questions – actually the answers given in cross examination cannot be said to be extensive they are very brief and even his defence was most brief.

We must therefore allow this appeal on the basis that appellant was prejudiced during the trial due to lack of indication as to the language used.

Should this then lead to an acquittal? We think not – we have looked at the record and the evidence availed, an acquittal will not serve the ends of justice. We are mindful that appellant has been in custody once 2003 December when he was arrested and that this being a capital offence, he was been in continuous custody for slightly over four years. However we recognize that he had been sentenced to death and the period spent in incarceration cannot compare with the penalty that awaits him, if found guilty and it is only fair that appellant gets a chance to comprehensively participate in the proceedings in a language well understood by him.

To this extent then we will order that this matter be sent back for retrial.

Consequently these are the orders made:-

- 1. The conviction herein is quashed and sentence is set aside.***
- 2. A retrial is hereby ordered, to take place at the Makadara Law Courts, before a magistrate having jurisdiction, but who has not in the past presided at the trial of this case against the appellant herein.***
- 3. This matter shall be mentioned at the Chief Magistrate's Court (Makadara) for trial directions on 5th June, 2008.***

4. *Production order shall issue in respect of the appellant for the purpose of order No. (3) herein.*

Delivered and dated this 30th day of May, 2008 at Nairobi.

J.B. OJWANG

H.A. OMONDI

JUDGE.

JUDGE.