REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL 12 OF 2004

TEDIUM ROGER LENENI MZUNGU ……...….. 1ST APPELLANT

PETER MWANGI KANGETHE …...………… 2ND APPELLANT

AND

REPUBLIC ……………………..……………… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya

Nairobi (Mbogholi & Mutitu, JJ) dated 21st August, 2003

In

H.C. Cr. A. No. 1187 & 1188 of 2001)

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JUDGMENT OF THE COURT

The two Appellants, Tedium (or Terium) Roger Leneni Mzungu, the 1st Appellant, and Peter Mwangi Kangethe, the 2nd Appellant, were tried and convicted on a charge of robbery with violence contrary to *section 296 (2)* of the Penal Code by a Senior Resident Magistrate at Kiambu (G.M. Njuguna, Esq.,) and as the only sentence provided by law for that offence is death, the learned trial Magistrate duly sentenced each one of them to suffer that penalty. Each of them then appealed to the High Court against their conviction and sentence but by its judgment dated and delivered on 21st August, 2003, the High Court (Msagha-Mbogholi and Mutitu, JJ) dismissed their appeals against the conviction and confirmed the sentences imposed by the Magistrate. The Appellants have now come to this Court by way of second appeals and that being so, only matters of law can be considered by the Court – see ***section 361 (1)*** of the Criminal Procedure Code.

The particulars of the offence of which the Appellants were convicted stated that on 4th day of July, 2000, at Kiambu township of Kiambu District, Central Province, while armed with crude weapons, to wit, knives and machetes, the two appellants jointly robbed Mburu Wang'endo of his TV set, Panasonic by make and valued at Kshs.27,000/- and one blanket valued at Kshs.500/- and that immediately before or immediately after the robbery, they used or threatened to use actual violence to the said Mburu Wang'endo, Mburu Wang'endo testified as PW1. He lived opposite the Kiambu Law Courts and according to him the house in which he lived with his wife had, on two previous occasions, on 8th June, 2000 and on 12th June, 2000, been broken into and their property stolen. On each occasion a duplicate key had been used to open the door as there was no visible breakage to the door. So on 4th July, 2000, Mburu was locked in his house by his wife to see if he could catch the thieves. He was in the bedroom.

At around 9.00 a.m. he heard commotion in the sitting-room; he went there and according to him he found two men who had opened the door and were in the sitting room removing the TV set which had been tied in a blanket and put inside a Manilla bag. It is clear from the evidence of the witnesses that the TV set thus tied was removed from the room and abandoned at the entrance to the house. It was so abandoned because Mburu raised an alarm. He claimed the two men he found in his sitting-room were these two Appellants; the 1st Appellant was tall and brown while the 2nd Appellant was short and black. The 2nd Appellant had a Somali sword and when Mburu raised an alarm, the 2nd Appellant attacked him with the sword and inflicted a deep and long cut-wound on his head. Mburu, however, shouted the two men out of his house and started to chase them and at the same time shouting "thief, thief." He, however, could not continue with the chase because he was bleeding profusely.

Joseph Francis Kuria, (PW2) was a shoe-shiner at Kiambu and his place of business was next or near to Mburu's house. He heard and saw Mburu shouting at his gate and he also saw two men running from there . He put the time at 10.00 a.m. He took over the chase from Mburu. One of the two men, the short one ran into a maize plantation and disappeared. The other one ran along the road and Kuria and others chased him and caught him. The person thus caught was the 1st Appellant. The 1st Appellant was thereafter handed over to Inspector Charles Kiiru (PW3) who had been performing his duties at Kiambu Law Courts and who had witnessed the chase from a kiosk where he had gone to take tea. Meanwhile, Mburu had been put in a vehicle and taken to hospital for treatment. The 1st Appellant was taken to Kiambu police station and it is clear from the recorded evidence that it was Inspector Kiiru who first went to the hospital and informed Mburu that the tall brown man had been arrested. Kiiru said Mburu described to him the persons who had attacked him in his house.

The police witnesses said the 2nd Appellant was later on arrested in Mathare in Nairobi and it is clear the 2nd Appellant was arrested with the assistance of the 1st Appellant. On 10th July, 2000, Inspector Fanwell Wamai (PW7) conducted an identification parade at Kiambu police station and at that parade Mburu identified the 1st Appellant as one of his attackers,. Again on 14th July, 2000 Wamai conducted another identification parade at which Mburu identified the 2nd Appellant. Thereafter, the Appellants were charged with the offence and the Magistrate having heard the prosecution evidence set out above, ruled that each Appellant had a case to answer.

The 1st Appellant gave sworn evidence. He told the Magistrate that he (1st Appellant) was a seller of second-hand clothes in Mathare in Nairobi and that apart from selling second-hand clothes he was also a footballer and was a member of the Mathare United Football Club. He knew the 2nd Appellant and it was the 2nd Appellant who asked him that they go together to Kiambu from where the 2nd Appellant was to collect certain articles of his. They went to Kiambu in a matatu and there, the 2nd Appellant left him at the matatu stage and went away to collect whatever it was that the 2nd Appellant had gone to collect. Thereafter he (1st Appellant) saw some people running towards him and they arrested him saying he was the one. The prosecutor cross-examined the 1st Appellant on this evidence but the trial Magistrate did not ask the 2nd Appellant to cross-examine the 1st Appellant. This was the main point of law taken before us by Mr. Wachira who argued the 2nd Appellant's appeal before us.

The 2nd Appellant himself made an unsworn statement in his defence. He was a resident of Mathare 4A where he lived with his parents. He was a matatu conductor. On 11th July, 2000 he was on duty and at around 3.00 p.m., three people, one woman and two men approached him and asked him if he was Mwangi. He agreed and he was arrested. They asked him where he had been and he told them he had been working as a conductor from 5.00 a.m. They took him to Muthaiga police station where the lady told him she would ensure that he suffered. The following day he was taken to Kiambu Police Station, put in the cells and an identification parade held the following day. He was thereafter brought to court. It is to be noted the 2nd Appellant said nothing at all about the date on which Mburu was robbed, namely 4th July, 2000. Mr. Wachira argued that the 2nd Appellant raised the defence of an alibi and that the two courts below said nothing about that defence. We would dispose of that issue by saying that the 2nd

Appellant having said nothing about 4th July, 2000, when Mburu was robbed it is unreasonable to say that his silence about that date was to be construed to mean he was saying he was not at Mburu's house on 4th July, 2000 when Mburu was robbed. The 2nd Appellant raised no defence of an alibi and there was no reason for the two courts below to specifically deal with and reject what had not been raised before them in the first place. Silence cannot be construed to mean the defence of an alibi has been raised.

On the evidence set out herein, the two courts below were in no doubt that the charge of robbery laid against the two Appellants had been proved beyond any reasonable doubt and in this Court, we can only deal with matters of law as we have already pointed out.

The other issue of law raised on behalf of the 2nd Appellant by Mr. Wachira is the failure of the Magistrate to give the 2nd Appellant an opportunity to cross-examine the 1st Appellant who in his sworn evidence appeared to have been laying blame upon the 2nd Appellant. We agree with Mr. Wachira that the right to cross-examination is a fundamental one, and we would repeat what His Majesty's Court of Appeal for Eastern Africa said in **EDWARD S/o MSENGA VS. REGINAM, (1942) EA CA 553** which was one of the cases relied on by Mr. Wachira. There, the Court held that:-

"***The failure to give the appellant an opportunity to cross-examine the second accused was the denial of a fundamental right which was fatal to the conviction on the first count."***

What happened in that case was that a co-accused gave evidence on oath and implicated **MSENGA** on count one of the charge. The prosecutor cross-examined the co-accused but:-

"***the first accused (MSENGA) was refused permission to do so."***

We do not know if the 2nd Appellant had been "refused permission" to cross-examine the 1st Appellant but before coming to the conclusion which we have already set out herein, the Court in **MSENGA's** case examined the nature of the evidence which the co-accused had given against **MSENGA**.

The Judges there said at page 554:-

"***We find it impossible to say that the refusal by the learned trial Magistrate to allow the appellant to cross-examine the second accused did not prejudice the appellant in his defence and did not result in a miscarriage of justice. The evidence given by the second accused undoubtedly tended to incriminate the appellant, particularly his evidence that the appellant did not hand over the money to him for, if the appellant did not hand over the money, the only reasonable inference which could be drawn was that the appellant had stolen the money himself. But if doubt were thrown on the truth of the second accused's testimony, a reasonable doubt might well have been raised as to the guilt of the appellant. It was, therefore, clearly in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the 2nd accused. Although it is true that the prosecutor cross-examined the second accused on most of the points on which the appellant says he wished to cross-examine, we are unable to agree with the conclusion of the learned appellate Judge that 'had the appellant been allowed to cross-examine, there is no reason whatsoever to believe that the 2nd accused would have answered differently.' It cannot be assumed that the second accused would not have answered differently if he had been cross-examined by the appellant. The appellant might well have material which was unknown to the prosecutor and which would have enabled him to cross-examine more effectively than the prosecutor. We think that the failure to give the appellant the opportunity to cross-examine the 2nd accused was a denial of a fundamental right which was fatal to the conviction on the first count."***

We have found it necessary to set out ***in extenso*** the reasoning of the Court in the **MSENGA** case because the Court actually went into detail with regard to the nature of the evidence which **MSENGA's** co-accused had given against him and upon which he had not been allowed to cross-examine. What was the nature of the evidence which the 1st Appellant had given against the 2nd Appellant and on which the 2nd Appellant was not given an opportunity to cross-examine? We think it is necessary for us to set out

that evidence in full. In his evidence-in-chief the 1st Appellant had said:-

"***My name is Tedium Rogers Mzungu. I reside in Mathare 4A. I sell second-hand clothes. I also play football. I am a Wundanyi citizen, and a footballer Mathare Member Club. I live with my parents. If it was [not] for the 2nd accused I would not have to (sic) Kiambu. When we arrived at Kiambu, the second accused asked me to wait at the matatu stage. He entered in plot known to him. All of a sudden I saw people running towards where I was. I started following the main road. The 2nd accused diverted to a maize plantation. I was arrested. I had no malice. I had no knowledge whether we were coming to steal. He had asked me to accompany him to assist him carry the items. That is all."***

What we understand from this evidence is that the 1st Appellant had no business at all in Kiambu but that the 2nd Appellant asked him to go with him (2nd Appellant) to help the 2nd Appellant carry certain items from there. He (1st Appellant) was left at the "matatu" stage while the 2nd Appellant went into some plot from which he came out running. The 2nd Appellant, as we have seen said nothing about 4th July, 2000 and the evidence of the 1st Appellant was directly placing him at Kiambu and in a plot from which he came out being chased. Clearly, the 2nd Appellant was entitled to cross-examine the 1st Appellant on this evidence. The 2nd Appellant might well have suggested to the 1st Appellant that he (2nd Appellant) was not at and did not go to Kiambu with the 1st Appellant and that the 1st Appellant was lying in his evidence. The failure by the trial Magistrate to give the 2nd Appellant the opportunity to cross-examine the 1st Appellant was a denial of a fundamental right. In 1942 when **MSENGA's** case was decided, Kenya did not have a written Constitution or any Constitution at all. We were a colony. Now we have a written Constitution and ***section 77 (2) (e)*** thereof specifically enshrines in it the right to cross-examine witnesses giving evidence adverse to an accused person. The 1st Appellant was denied that right as regards the adverse evidence given against him by the 1st Appellant. The 2nd Appellant will have the benefit of that holding.

As regards the 1st Appellant, his learned counsel Mr. Wamwayi, raised, first the alleged failure on the part of the trial Magistrate to comply with ***section 77 (2) (b)*** of the Constitution and ***section 198(1)*** of the Criminal Procedure Code. Both sections deal with the language being used during the trial and that such language must be understood by an accused person and if it is not understood by him, must be interpreted to him in the language which he understands. With respect to Mr. Wamwayi, there is no substance in his contention that the 1st Appellant did not understand the language used by the court or the witnesses. On the very first day when the pleas of the two Appellants were recorded, the Magistrate's record clearly shows that the proceedings were being interpreted to the two Appellants from English to Kiswahili and Kikuyu. The 1st Appellant specifically pleaded not guilty in Kiswahili. The 2nd Appellant also pleaded not guilty in Kiswahili. It is to be remembered both of them lived in Mathare in Nairobi. The trial started on 13th February, 2001 and before evidence could be led, the Magistrate once again read out the charge to them and it was being interpreted to them from English to Swahili by a court clerk whose name is shown as J.F. Njau. In those circumstances, we do not understand the basis of the complaint that the Appellants did not understand the language of the court. True, the learned trial Magistrate did not record the language in which the witnesses testified; it is equally true that the Magistrate did not record the language in which each Appellant gave his evidence. The Magistrate should have done so, but irrespective of the language in which the witnesses gave their evidence it is clear that their evidence was interpreted to the Appellants into Kiswahili and Kikuyu. There is no merit in this complaint and in our view it amounts to no more than nit-picking. We reject it.

The other grounds which appear to be common to both Appellants, grounds like the High Court erring in affirming the convictions whereas there was evidence touching on recovery of exhibits having been tampered with and destroyed; that the person who took the photographs of the exhibits did not say what his qualifications were and, therefore, the courts below were in error in accepting his evidence; that the High Court did not subject the evidence to a fresh and exhaustive re-evaluation; and that the judgment of the High Court was not delivered in open court, do not, with great respect to Mr. Wamwayi, seem to us

to carry the matter any further.

With regard to the issue of evidence being tampered with and destroyed, the position is that items belonging to the complainant (i.e. Mburu) – a TV set and a blanket – were removed from his house and abandoned outside, obviously because of the alarm raised by Mburu. The items were later on photographed by P.c. Albert Kiari (PW6) who testified that the items were shown to him at Kiambu Police Station on 3rd August, 2001 and he took photographs of them. The items were shown to that witness by Inspector Kiiru and the witness took photographs which he said he processed himself and produced in court before the Magistrate. Mburu's items were released to him after they were photographed. Mr. Wamwayi's point was that the items themselves and not their photographs ought to have been produced. It would have been better or preferable if the items themselves had been produced, but the issue of Mburu's property being stolen from his house and being abandoned outside the house was testified to by Mburu himself, Joseph Francis Macharia and Inspector Kiiru who specifically said he collected the items and had them photographed before releasing them to Mburu. That evidence was accepted by the two courts below and we see no possible prejudice which could have been caused to any of the Appellants by the release of the items. As regards the qualifications of P.c. Kiari (PW6), we do not know the exact qualifications required by a police officer to take photographs, but Kiari said he was attached to the CID Headquarters, and we assume as a photographer because in this case, he played no other role apart from taking the photographs. No one challenged his role in the affair or that he was unqualified to take photographs. We reject the two contentions that the evidence was tampered with and destroyed and that Kiari's failure to state his qualifications as a photographer prejudiced the Appellants or any of them. Mr. Wamwayi did not point out to us any such prejudice.

On the question of the High Court having failed to re-evaluate the evidence afresh, that court could have done better, but they actually set out the factors they took into account when making their decision. They noted that the incident took place in broad day-light and that the witnesses could not have failed to identify the Appellants in those circumstances. We say the High Court could have done better, but we do not agree that they failed to re-evaluate the evidence and to come to their own conclusions on that evidence. It is true that the High Court failed to notice that the 2nd Appellant was not given an opportunity to cross-examine the 1st Appellant as we have already pointed out but that issue was never raised before the High Court and their failure to deal with it is thus understandable. There is no material before us from which we could conclude that the learned Judges of the High Court did not read their judgment in open court.

Nor did Mr. Wamwayi explain to us what law required that the Appellants be present before the Judges when judgment was being delivered. There was no order that the Appellants be brought to court at state expense when their appeals were admitted to hearing. Once again these two contentions were an example of nit-picking by Mr. Wamwayi. We reject them.

We think that going merely by the recorded evidence, there was abundant evidence upon which the Appellants could have been, and were in fact, convicted. The 2nd Appellant is lucky to escape due to the serious mistake made by the trial Magistrate in not affording the 2nd Appellant the right to cross-examine the 1st Appellant. We accordingly find no merit in the appeal by the 1st Appellant and order that his appeal be and is hereby dismissed. The 2nd Appellant is, we repeat, lucky to have the benefit of the trial Magistrate's failure to allow him cross-examine the 1st Appellant, and we accordingly allow his appeal, quash his conviction, set aside the sentence of death and order that he be released from prison forthwith unless he is held for some other lawful cause. Those shall be our orders in the two appeals.

Dated and delivered at Nairobi this 8th day of June, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.