



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Criminal Appeal 192 of 2005**

**JOSPHAT MUGAMBI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the judgment of Mr. A. N. Kimani, (PM) in Chuka criminal case  
no.1048/2004 dated 7.10.2005)**

**JUDGMENT**

Josphat Mugambi, the appellant has brought this appeal challenging the finding of the trial magistrate, A.N.Kimani, SRM in Chuka SRM Court, where he was tried, convicted and sentenced to death for robbery with violence contrary to Section 296(2) of the Penal Code.

In support of those charges the prosecution relied on the particulars of the offence on the charge sheet and the evidence of four witnesses. It is alleged that on 1<sup>st</sup> day of July, 2004 at Ciakanyiga Market in Meru South District jointly with others not before the court, being armed with dangerous and offensive weapons, namely pangas, rungus and metal bars, he robbed Godfrey Riungu Baini of two pangas, 12 packets of wheat flour, 1 kg of beans, 3 torches, 1 kg of rice, 4 tins of chips fat, 8 pairs of Eveready batteries and one bar soap all valued at Kshs.1500/= and at or immediately before or immediately after the time of such robbery wounded the said Godfrey Baini.

Evidence was led to the effect that on the night in question, PW1, James Muriuki (Muriuki), whose shop was broken into in the robbery in this matter, was informed of the robbery at about 11.30 pm and went to the scene where he confirmed items of assorted nature missing from his shop. At the scene was a metal bar and a panga. His watchman PW2, Godfrey Riungu (Riungu) who was on duty told the court that he saw 2 people he identified as the appellant and one Karani break the shop. He raised an alarm. On his way from seeking assistance, he met the appellant at a butchery. That the appellant told him that he had

seen some people run away. Riungu then asked the appellant to identify himself. The latter instead removed a panga and cut him on the forehead.

The following day, Riungu and Muriuki made a report to the police. In the company of the police they went to the shop. On their way Riungu pointed out the appellant as the person who attacked him and the police arrested him. Upon searching the appellant, 8 pairs of batteries and one torch were recovered from him by PW4, PC Jamlick Kithinji and his colleagues.

In his unsworn statement, the appellant told the court that on 1<sup>st</sup> July, 2004, the day of the alleged robbery, he came from Nairobi, parked the matatu he was working in and went to sleep. The following day he went to work and was arrested while at the matatu stage. He denied involvement in the robbery.

We have duly considered the evidence adduced before the trial court. The appellant has challenged the decision of the trial court on six grounds originally but subsequently filed what is headed “*Home-made supplementary Grounds of Appeal*”-based on 4 other grounds all of which we have summarized as follows;

- (i) That the prosecution evidence was contradictory
- (ii) That the evidence of identification was flawed
- (iii) That no reasons were given for rejecting the defence
- (iv) That the charge was not proved
- (v) That the record of the trial court did not indicate the coram
- (vi) That the alleged injuries on Riungu were not supported by medical evidence
- (vii) That the prosecutor on the day the appellant’s plea was taken was not qualified.
- (viii) That the vital witnesses were not called by the prosecution.

In addition to these grounds filed with the Petition of Appeal, the appellant in his brief address before us raised another ground, namely, that he did not understand the language used during his trial.

This ground is not part of the appellant’s written submissions. Learned counsel for the respondent supported both the conviction and sentence. Regarding the issue of language used he urged us to disregard the claim by the appellant that he did not understand the language used at the trial since the appellant was able to cross-examine witnesses at length.

On the issue of identification, counsel submitted that Riungu was able to identify the appellant using a torch. That Riungu knew the appellant before, and before he was attacked by the appellant, they had a conversation lasting about 5 minutes. Further, that the appellant was implicated in the crime by reason of 8 pairs of batteries recovered from him the following morning constituting possession of recent stolen goods.

On the production of a medical examination report (P3) it was contended that the appellant did not object to its production by the police. That, even in the absence of the medical report, the offence was nonetheless disclosed as the appellant was in the company of another.

We have duly considered these submissions as well as the authorities cited by both the appellant and counsel for the respondent. Being the first appellate court we are duty-bound to re-evaluate the evidence before the lower court and to draw our own independent conclusions always bearing in mind our disadvantaged position of not receiving that evidence directly from the witnesses. See James Otengo Nyarombo and Two Others V R, Criminal Appeal NO.184 of 2002.

We consider that the seventh ground is capable of disposing of this appeal hence we intend to deal only with that ground.

The appellant argued that the day his plea was taken the case was prosecuted by an unqualified officer. We find merit in that submission. The appellant appeared before the trial magistrate on 5<sup>th</sup> July, 2004 when the charge was read over and elements of the offence explained to him.

He pleaded not guilty. According to the record of that court, the court prosecutor is reflected as one Sgt.Musila. Section 85(2) of the Criminal Procedure Code provides;-

“(2) The Attorney General by writing under his hand, may appoint any advocate of the High Court or person employed in the Public Service, not being a police officer below the rank of Assistant Inspector of police, to be a Public Prosecutor for the purposes of any case”

The effect of this provision is that to be appointed a Public Prosecutor, one must either be an advocate of the High Court or a person employed in the public service. In the latter case, that person if a police officer must be of the rank not below that of an Assistant Inspector.

A Sergeant, it follows, is not qualified to conduct a prosecution. We hold that although the rest of the prosecution was conducted by a qualified prosecutor, Inspector Kunga, the part conducted by Sgt.Musila must be declared a nullity. Since this was one trial the part conducted by Sgt.Musila cannot be delinked from the rest. The inevitable is that the entire trial was a nullity.

Both the Court of Appeal and the High Court have considered in a number of cases the issue of who is a person qualified to conduct a criminal trial, starting with the oft-cited case of Elirema and Another V R(2003) KLR 537.

The result of a nullity trial is that the conviction recorded must be quashed and sentence meted out set aside. The only question left for our consideration is whether or not to order a retrial.

As was stated in Muiruri V R(2003) KLR 552, generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case.

The court in that case stated;

“It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to be considered would include, but are not limited to, illegalities or defects in the original trial (see Zedekia Ojuando Manyala V R (Criminal Appeal No.57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution’s making or the court’s”.

The other consideration is whether, on proper assessment of the evidence on record, a conviction may result. The robbery took place at night (11pm). It was dark and the only source of light was Riungu’s torch. That was the only evidence of identification. Riungu stated that prior to his attack he had known the appellant since “July”. This is not helpful without the year since the incident itself took place on 1<sup>st</sup> July, 2004.

It is trite law that when the evidence before the court is mainly that of a single witness on identification, the court has to be extra cautious before entering a conviction based on such evidence. That need for extra caution is in way less necessary when the evidence is that of recognition for there may be cases of mistaken identity of even close relatives and friends.

In either case, the court must see if there is other evidence to lend assurance as to guilt of the suspect before it can enter a conviction. Riungu’s evidence, in this appeal, in our considered view, cannot form a basis for a conviction. In the circumstances it would be prejudicial to the appellant if a retrial was ordered.

We allow this appeal, quash the conviction and set aside the sentence imposed by the lower court. We order the release of the appellant forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MERU THIS 12<sup>TH</sup> DAY OF JULY 2007

ISAAC LENAOLA

JUDGE

WILLIAM. OUKO

JUDGE