



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL 24 OF 2004**  
**BOSCO MIRITI NGAINE.....APPELLANT**  
**AND**  
**REPUBLIC.....RESPONDENT**  
**JUDGMENT OF THE COURT**

Bosco Miriti Ngaine, the appellant herein was tried and convicted of one count of robbery contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the night of 15th August 2001, at Kimichia Village, Chogoria sub-Location in Meru South District, jointly with others not before court he robbed Julius Nyerere of cash Kshs. 6,000/= and a torch valued at Kshs. 200/= and at or immediately before or immediately after the time of such robbery wounded Julius Nyerere.

Briefly the facts of this case can be given. On 15.8.2001 at about 7.30pm, the complainant Julius Nyerere (PWI) and his wife, Purity Kagure (PW2) got home in their motor vehicle. The couple had just left Chogoria Market where they operated some business. Just before the couple got out of the vehicle Reg. No. KNS 325, landrover, the appellant and two other people, two of whom were armed with guns confronted them and while pointing guns at them ordered them not to leave the vehicle. The appellant was well known to the complainant. The complainant was able to identify the appellant with the help of the motor vehicle lights.

The attackers then forced the complainant and PW2 out of the vehicle and ordered them to open the door to the house. Inside the house, the attackers ransacked the house. They stole Kshs. 4,500/= from the complainant and Kshs. 1,500/= from PW2. After ransacking the house, the attackers forced the complainant back into the car and ordered him to drive to the home of one Mbae. The complainant talked with the appellant and when the complainant asked the appellant what it is they had come to do at his home, the complainant was hit on the head with the butt of the gun. During the drive to Mbae's home, the appellant sat in the front of the car with the complainant.

At Mbae's house, the attackers took Mbae's coat and also searched the house. The complainant stated that there were electric lights at Mbae's house so that the complainant was able to further identify the appellant. After the robbery at Mbae's house, the attackers forced the complainant back into the vehicle together with Mbae's wife and ordered him to drive them as far as the river. At the river, the attackers abandoned the complainant and Mbae's wife in the vehicle. The complainant then drove Mbae's wife back home, after which he went and reported the matter to the police who issued him with a P3 form. The appellant was later arrested and charged.

During an identification parade conducted by Chief Inspector of police Peter Kamonde who gave

evidence as PW5, the appellant was identified by the complainant. The appellant informed PW5 at the end of the identification parade that he was not satisfied with the parade because the complainant knew him before. The appellant gave an unsworn statement in his defence.

The appellant testified that on 30.11.2001 he left Timau in the morning for Nkubu Market to sell potatoes. After the day's business, he entered a bar where he stayed until about 9.00pm. As the appellant left the bar at 9.00pm, he met some three people who stopped him and demanded from him the proceeds from the sale of the 7 bags of potatoes he had sold. One of the three men got hold of the appellant by the neck while another removed money from the appellant's pocket. The third man stabbed the appellant with a knife and the leg. The appellant got up and went to the hospital where he was operated on. In the same breath, the appellant said he only realized he was in hospital after the operation and that he stayed in the hospital for 21 days. He was later arrested and charged. After the hearing of the case, the learned trial magistrate, was satisfied that the prosecution had proved its case beyond any reasonable doubt on count one and accordingly convicted him of the same, and sentenced him to the mandatory death sentence. The appellant was acquitted of the second count of robbery. In the opinion of the learned trial magistrate, the appellant had been positively identified by the complainant both at complainant's own house with the use of the vehicle's dashboard lights and also while at Mbae's house where the electric lights were on.

The learned trial magistrate also found that the complainant also sat with the appellant in the front of the vehicle as the complainant drove from his house to Mbae's house and also from Mbae's house to the river. The learned trial magistrate further found that the complainant conversed with the appellant during that drive. The learned trial magistrate also considered the appellant's unsworn testimony which he termed a feeble account of events whose aim was to divert attention from the appellant's involvement in the crime.

It is against that conviction and the sentence that the appellant has appealed. In his petition of appeal, the appellant set out six grounds of appeal. The appellant complained that the complainant's recognition of the appellant was not accompanied by an initial report to the police. That the prosecution's case was based on contradictory evidence; that the prosecution's case was not proved beyond any reasonable doubt particularly when the prosecution did not adduce evidence by the investigation and arresting officers. That the learned trial magistrate failed to consider the appellant's defence and finally that the learned trial magistrate misdirected himself on the burden of proof.

During the hearing of the appeal, the appellant put in his written submissions and in addition brought out four complaints which he urged this honourable court to find dictated against the learned trial magistrate's conviction. The appellant complained that (a) the complainant who was well known to the appellant did not give the appellant's name to the police as one of the complainant's attackers on the night of the robbery (b) that the arresting officer, who is a brother in law to the appellant was not called to testify, (c) that the complainant did not tell any of the other prosecution witnesses for example PW2, PW3 – Royford Mbae – and PW4 – Charity Njeri – that the appellant was one of his attackers and (d) that the appellant was arrested while coming out of Nkubu court on another case the day before he was identified at the police station. Mr. Oluoch, who appeared for the state did not oppose the appeal. He also informed us that he did not wish to ask for an order of retrial. The main reason for conceding the appeal he said was that the trial of the appellant in the lower court was partly conducted by one Police Constable Mbogori, contrary to the provisions of section 85 of the Criminal procedure Code. Mr. Olouch submitted that the evidence of the most critical witness, PW1 was led by PC Mbogori. The learned state counsel cited to us the case of Alfred Mumo Kioko V. R – Criminal Appeal No. 154 of 2002.

In not asking for retrial, Mr. Oluoch submitted that if indeed the complainant knew the appellant as alleged in his testimony, then the complainant should have taken the earliest opportunity to give the appellant's name to the police and not to wait for identification at the identification parade. It was the view of the learned state counsel that infact the identification parade was prejudicial to the appellant in view of the fact that the complainant admitted both in evidence in chief and while under cross-examination that he knew the appellant before the alleged offence was committed.

Secondly, Mr. Oluoch submitted that the evidence by PW1 was not corroborated by that of PW2, Purity

Kagure wife to PWI who testified that though she was present all the while during the robbery she did not see the appellant and she did not understand why the appellant was in court. Mr. Oluoch also submitted that PW3, Royford Mbae, who alleged to have been present during the robbery at his home testified that he did not know the appellant and that he never recognized the appellant as one of the robbers. Finally, it was the view of the learned state counsel that the evidence on record was not sufficient to sustain a conviction even if the prosecution had been conducted by a qualified prosecutor.

It was for that reason Mr. Olouch argued that the prosecution had tried in the middle of the hearing to withdraw the case against the appellant. We have ourselves reconsidered and re-evaluated the evidence on record as we are required to do and we are in agreement with the learned state counsel that it would be unsafe to let the conviction against the appellant to stand. First and foremost, the only evidence connecting the appellant to the robbery is that of PWI. That evidence is not corroborated by the evidence of PW2 who was also present when PWI was being robbed and who was also herself allegedly robbed. PW2 said she knew the appellant before.

Secondly, we have found a serious flaw in PWI's evidence in that though he alleged that he knew the appellant before the material day, he did not find it necessary to mention the appellant's name to either PW2 or PW3 at the earliest opportunity. Nor did he do so to PW4, all of whom the complainant had the opportunity of talking to after the robbery. PWI testified that he was afraid to say the appellant's name to anybody for fear of being killed, yet there is no evidence adduced by PWI to show that PW2 (his wife), PW3 or PW4 would pass such information to the appellant so as to make PWI afraid of revealing the appellant's name.

It is now trite law that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought to be given first of all by the person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. This is the law as stated in *R. V. Kabago s/o Wagungu* 23 (1) KLR 50 and applied in the case of *David Masinde Simiyu and another v. R – Criminal Appeal Nos. 33 and 34 of 2004 (consolidated) – unreported*.

We have no doubt in our minds that the evidence of the first report after the attack is a good test by which truth and accuracy of subsequent statements may be gauged. Such evidence also provides a safe guard against any deliberate attempts by a witness to later on "create" evidence. During such first report, the memory of a witness would still be fresh and without the possibility of collusion with other witnesses.

In the case before us we find that though PWI alleged that he saw the appellant on the night of the attack, there is no evidence that PWI gave the name of the appellant, whom PWI alleged he knew well and with whom they used to carry on timber business to PW2, PW3 or PW4. PWI admitted that he did not give the appellant's name to any of these witnesses and explains that away by alleging that he did not do so for fear of his life. We have already concluded that there was no basis for the complainant's alleged fear in giving the appellant's name and especially the police.

We have also found from the record that neither the investigating nor the arresting officer was called as a witness, thus leaving a huge gap in the prosecution's case regarding the identity of the appellant as one of PWI's attackers on the material night. The inference we have drawn regarding the prosecutions failure to call either or both of the said officers is that their evidence would not support its case.

The second issue for our determination is whether the learned state counsel was right in conceding to the appeal on the ground that the prosecution's case in the lower court was partially conducted by a police constable. In light of the decision in the case of *Alfred Mumo Kiogo V. R – Criminal Appeal No. 154 of 2002 (above)* and also the case of *Elirema and 4 others V. R. – Criminal Appeal No. 67 of 2002*, we are satisfied that the decision made by learned state counsel was validly made.

In the *Elirema* case (above) the learned Court of Appeal judges were emphatic that a competent public prosecutor is either an advocate of the High Court or a police officer not below the rank of an Assistant

Inspector of police. It was further held in the same ELIREMA case that even where the prosecution is only partially conducted by an incompetent prosecutor, the whole prosecution case is rendered a nullity as such prosecution occasioned a miscarriage of justice to the appellant.

Finally, we now deal with the issue as to whether or not the Learned State Counsel was right in not asking us to make an order of retrial. The principles to be applied by the court in deciding whether or not to make an order for retrial can be paraphrased as:-(a) whether the evidence as it stands would lead to a conviction on retrial;(b) whether the order of retrial would cause prejudice to the appellant and(c) whether making an order for retrial would result in giving the prosecution a second chance by allowing it to fill in gaps in its earlier case. Our own evaluation of the record reveals that apart from the evidence given by PW1, there is no other evidence linking the appellant to the offence.

PW2 who said she was together with PW1 during the robbery testified that she neither saw nor identified the appellant on the night of the attack. PW3, at whose home PW1 said he was able to identify the appellant further when PW1 and the appellant entered the house testified that he was unable to identify any of the two attackers who were with PW1. PW3 also testified when under cross-examination that he did not know the appellant. Even PW4 who drove in the same vehicle with the appellant for some distance testified that PW1 told her nothing about the identity of the appellant. The totality of the prosecution's case is that there was no evidence to link the appellant to the offence.

It would therefore, in our view, serve no useful purpose to order a retrial unless in so doing we would also be asking the prosecution to adduce fresh evidence to create the nexus between the appellant and the offence of which he was convicted. To do so would, in our further considered view, be prejudicial to the appellant. An order for retrial would therefore not be appropriate in this case. Having reached the conclusions that we have so far reached, we do not find it necessary to go into any appreciable detail on the other grounds of appeal, except perhaps to make a few comments on ground number 5 (five) which is to the effect that the learned trial magistrate failed to consider the appellant's defence. Just before the learned trial magistrate concluded his judgment he had the following to say:-

"I have considered defence too. The defence in my view is a feeble vague account of events which aimed at evading the consequences of accused's acts and it leaves prosecution's case intact in regard to count 1 herein." Though belatedly, it is not true that the learned trial magistrate did not consider the appellant's defence. One can say that by the time the learned trial magistrate reached a point of considering the appellant's defence, he had already made up his mind about the guilt of the appellant and in our view, whether or not he considered that defence would not have made a difference to his decision. We have ourselves considered that unsworn testimony by the appellant.

The defence consists of allegations that were not supported by medical evidence or some other evidence to prove that indeed the appellant was arrested for no good reason. In any event, during the hearing of the appeal, the appellant gave a totally different story from that which he had given during the trial. Before us, the appellant alleged that he was arrested while coming out of the Nkubu Court on another case.

Though the appellant did not state the time of his arrest, we take judicial notice of the fact that courts in Kenya do not sit during the night. In his unsworn statement, the appellant had testified that he was arrested 9.00pm when coming out of the bar. What we are saying here is that if the evidence against the appellant had been watertight, we would not as much as have taken a second look at that defence. In fact to our mind, a reading of that evidence by the appellant seems to portray the scenario on the night the appellant was attacked, but given in reverse order for the appellant's own benefit.

In the result, the appellant's appeal must succeed and we so order. The conviction is quashed. The sentence of death imposed upon the appellant by the learned Senior Resident Magistrate on 27.1.04 is set aside. We therefore order the release of the appellant from prison forthwith unless he is otherwise lawfully held. It is so ordered.

Dated and delivered at Meru this 29th day of June 2005.

**D.A. ONYANCHA**

**JUDGE**

**29.6.2005**

**RUTH N. SITATI**

**JUDGE**

**29.6.2005**