



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO.186 OF 2002**  
**(Being an appeal from original conviction and Sentence in Criminal Case  
No.3515 of 2001of the Chief Magistrate’s Court at Mombasa – L.S.  
Mushelle, SPM)**

**MOSES MBOGO KIMUMA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

Moses Mbogo Kimuma, the Appellant in this appeal was together with two others charged in the subordinate court with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars were that on 13th Day of November 2000 at Kizingo Beer Distributions in Mombasa District within Coast Province jointly with others not before the court while armed with dangerous weapons, namely Baretta Pistol robbed Laban Waigwa Karanja of his cash KSh.900,000 and at or immediately before or immediately after such robbery threatened to use actual bodily harm to the said Laban Waigwa. We think there was a typing error and what the prosecutor meant was that they threatened to “cause” actual bodily harm to the said Laban Waigwa and not to “use” actual bodily harm as appears in the charge sheet. The three pleaded not guilty, Before the trial started, the prosecution withdrew the case against the other two accused persons and they were discharged under Section 87(a) of the Criminal Procedure Act. After full hearing the appellant was found guilty, convicted and was sentenced to death. He filed this appeal and raised six grounds of appeal. In a summary, he contends in his appeal that there was no proper identification and the learned Magistrate should not have convicted him of the offence on the strength of the Prosecution witnesses on identification. He maintained further that the identification parade was not properly conducted; that the inquiry statement should not have been relied upon to convict him and that the learned Magistrate did not consider his defence.

Kizingo Beer Distributors distributes beer FOR Kenya Breweries. On 13th November 2000 at about 6.00 p.m. the lorry which was coming from Ukunda having distributed beer there returned to the station. Driver parked the lorry so that empty crates could be offloaded. The cashier was at that time carrying money in a nylon paper bag. At that time thieves emerged armed with a pistol. They shot in the air and they took money from cashier after some struggle. They then boarded a vehicle KAJ 610U which was a get away vehicle and drove away but immediately thereafter they returned and took away another person thought to have been with them and who had been left behind and was badly beaten by the members of the public. They left a pistol behind that time. Later, a suspect was arrested at Tudor in a private clinic seeking treatment. Police rushed there, saw the suspect who is the appellant. Police arrested him and he was later charged. Before he was charged, PW.7 recorded the Appellant’s inquiry statement and the appellant was allegedly identified at least by two witnesses at an identification parade organised by PW.8. The learned Magistrate accepted Prosecution’s case and upon the prosecution’s witnesses evidence which he accepted, the appellant was convicted. The learned State Counsel did not support conviction and with respect, we do agree with her.

First on the question of identification. PW.1 did not see the appellant at the scene of robbery and stated clearly in his evidence in cross examination that he was not present when the offence took place. PW.2 also did not see the Appellant at the scene and as to identification his evidence was no more than hearsay. PW.4 was the complainant, Laban Wagwa Karanja. All he said about the appellant in his examination in chief is as follows:-

***“The person who was beaten by mob is the present accused. ”***

and in cross examination he stated:

***It was you who was beaten up .....I did not attend the parade.”***

This witness did not describe the appellant and, as has been demonstrated, he only referred to the Appellant as the person who was beaten up by the public and not as the thief. Further and even more important, this witness did not attend the identification parade so that whatever evidence he may have given on identification other than that of recognition, would be dock identification only as we will show later, is not of much help to the court. PW.5 said in evidence that they overpowered one of the attackers, whom he referred to as the Appellant; but the same witness PW.5 also did not attend identification parade and his evidence remained that of dock identification only, which as we have stated is not of much help to the court. Thus the evidence of PW.1, PW.2, PW.4, and PW.5 were not of much use to the court in as far as the question of proper identification was concerned as PW.1 and PW.2 did not really see the Appellant at the scene and evidence of PW.4 and PW.5 as to identification was no more than dock identification. In the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982 -88) 1 KAR PAGE 1134** , it was held as follows:

***“2. A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted identification parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”***

That is the law. In this case PW.4 and PW.5 did not even give a proper description or any description of the appellant at all. All they say as I have stated is that the Appellant was the person who was beaten by mob. Their evidence cannot be of any help to the court and we feel with respect that the learned Magistrate had not considered that aspect when he relied on their evidence to convict the appellant.

That leaves two main aspects of this appeal to be considered. These are the evidence of PW.3 and PW.6 who attended identification parade and allegedly identified the appellant and the evidence of PW.7 on the alleged confession in the Inquiry statement. We now proceed to consider the same. The case of Gabriel Kamau Njoroge vs. Republic (supra) we have referred to hereinabove makes it clear that after the witness has been asked to describe the assailant and after he has done so, a fair identification parade should be arranged. What is “a fair identification parade”? Forces standing order Chapter 46 is clear on this particularly Clause 6 (iv)(d). It states as follows:

*“6(iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed .....*

*(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent.”*

PW.8 IP Samson Iha Thoya conducted the identification parade on 16.11.2000. Three witnesses were to attend the parade for purposes of identifying (if he was there) the suspect. Of the three witnesses, two i.e. Pius Omondi and Henry Murage gave evidence in court as PW.3 and PW.6 respectively. PW.3 Pius Omondi says of the parade in his evidence in cross examination:

*“During the parade it was you only who had a bandage on the head you had been injured on the head. The other members of the parade had no bandages.”*

PW.6 confirms this in his evidence when he said:

*“I attended an identification parade. From the parade I managed to pick you. You had a bandaged head.”*

That evidence is important when one considers that this witness had stated in his evidence in chief that people had beaten one of the thieves and he (witness) also beat him up. In our humble opinion, the incident took place on 13.11.2000. By 16.11.2000 when the parade was held it was already known that one of the thieves was beaten badly and it was no wonder that the identification of the appellant was deliberately made much easier by the police conducting the parade who put only one person with a bandage on the head amongst 8 other members of the parade none of whom had a bandage on his head. One cannot say with any stretch of imagination that the parade had people of the same appearance when one was having a bandage on while others had none. Neither can one say that any action had been taken to conceal the fact that the Appellant had an injury on the head. Indeed the best one can say is that the Appellant was exposed to be identified without any difficulty whatsoever. We cannot accept that it was a fair identification parade as is required by law. We do not attach any importance to the results of the parade.

We now turn to the question of Inquiry Statement taken by PW.7. This inquiry statement was admitted after trial within trial was conducted by the learned Magistrate. We have no quarrel with the way trial within trial was conducted for the learned Magistrate did follow the right procedure in conducting trial within trial. One thing however causes us concern. PW.7 says in his evidence in trial within trial as follows in his evidence in chief:

***“The offence was robbery with violence contrary to Section 296(2) of the Penal Code. I read the file. I cautioned him as required by law. He understood and signed. I countersigned. We were communicating in Kiswahili language. I recorded his statement. I read it over to him ...”***

and in his evidence in cross-examination he said inter alia:-

***You were talking to me in Kiswahili. I was recording in English. My Kiswahili version is not recorded. I recorded it in English language. You signed the English version.”***

This evidence means in effect that the statement made by the Appellant which should have been recorded in Swahili language, in which the appellant gave the statement was not availed. Put another way, it meant that all that the court admitted and acted upon was the witnesses' interpretation of what he felt the appellant said. It is now trite law that in recording a statement from an accused person/or suspect, the police must record the statement in the language in which the statement is given and if translation is required the same would be made later but the statement which the accused/suspect should be asked to sign, (if he gave it voluntarily) is the statement made in the language in which he communicated to the police and not the interpretation of the same. This statement was, in our view clearly inadmissible and the learned Magistrate should have rejected it at the trial within trial.

The above are the reasons why we have stated herein above that we do agree with the learned State Counsel in her conceding the appeal.

Before we allow the appeal as we must do, we feel we need to deplore the conduct of the police – Senior Police Officers PW.7 and PW.8. These are Inspectors of Police and one would like to think they are conversant with the preliminary aspects of their work like taking Inquiry and cautionary statements and conducting identification parades. What happened in this case clearly demonstrates that there is still much to be desired in the training of the police on this line or if already trained then there is urgent need for the particular officers to take their work more seriously when called upon to do so. If what happened here is what is to be expected of the police and what is to continue then it may be very difficult to reduce

crime rate in this country. We would ask the Hon. Attorney General to bring to the notice of the Provincial Police Officer, Coast Province the contents of this judgment, mainly because this is not the first time we are encountering similar situations but rather they seem to be the order of the day.

Appeal allowed, conviction quashed, and sentence set aside. The appellant is set free henceforth unless otherwise lawfully held. Judgment accordingly.

**Dated and delivered this 28th day of March, 2003.**

**J.W. ONYANGO OTINO**

**JUDGE**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**