



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 48 OF 2000

ISAACK MULIWA MANZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Appeal from a judgment of the Senior Principal Magistrate's
Court at Embu, G. C. Mutembei, Senior Principal Magistrate,
in Criminal Case No. 489 of 1999)**

JUDGMENT

The Appellant faced two counts, the first one being attempted robbery with violence contrary to Section 297(2) of the Penal Code and the second count alleging escape from lawful custody contrary to Section 123 of the Penal Code.

The attempted robbery is alleged to have taken place on 4th October 1998 at Blue Valley Village in Embu District, the Appellant, with others not before court, being alleged to have been armed with bows and arrows when they attempted to rob Ksh.10,000/- from Ann Wanja Nyamu.

The position as explained by the prosecution is that when the Appellant was arrested he was injured by a police dog necessitating his being admitted to Embu Provincial General Hospital under guard by the police for treatment.

On 28th October, 1998 during a power black out at about 4.30 a.m. the Appellant, who was handcuffed, escaped and disappeared. On 30th August, 1999 the Appellant was arrested by the police in Mwingi District, on a different offence alleged to have been committed at Mwingi on that date.

Later when his particulars were circulated to all police stations within Eastern Province, a signal was received by the C.I.D. Mwingi from the C.I.D. Embu, that the Appellant was wanted at Embu for the offence of attempted robbery with violence and the offence of escape from lawful custody. The Appellant was then escorted from Mwingi to Embu where he was charged with the offences now facing him. The prosecution's evidence against the Appellant therefore was that at around 3.00 a.m. Geoffrey Nyamu Rutere (P.W. 1) and his wife Ann Wanja Nyamu (P.W.2) were asleep in their house at Blue Valley in Embu when they were woken up by the disturbance of people outside the house.

Those people knocked at the window of the room where P.W.1 and P.W.2 were, saying they were mungiki and demanded Ksh.10,000/- which P.W.1 said he did not have as P.W.2 remarked that those people were thieves. They threatened to throw petrol on the house and burn it if they were not given the

money they wanted. P.W.1 switched on security light and P.W.1 and P.W.2 claimed they were able to identify the Appellant through that light before the light was smashed and put off by the robbers who were armed with bows and arrows. Meanwhile P.W.2 was calling the police and screamed.

Those people broke children's bedroom window but before they could do anything else the police on patrol arrived in the compound and as the robbers run away behind the children's bedroom being chased by the police, the police dog got hold of one of the robbers whom P.W.1 and P.W.2 claimed was the one they had identified outside their house. The police dog had caught that person at a swamp near P.W.1's home and the dog had injured that person badly necessitating the person's admission at the Provincial General Hospital after he had been booked at Embu police station. He had been shown to P.W.1 and P.W.2 at their house within minutes of his arrest but he was not a person they had known before.

While under treatment at the hospital, the person who had been arrested escaped. The prosecutor told the court when giving facts of the case on the day the plea on the offence of escape from lawful custody was taken that the escape took place when the police officer guarding the person had gone to answer a call of nature. But P.W.3 police constable Dismas Siria who was one of the arresting officers and was on duty at the hospital guarding when the escape took place, told the court that the escape took place because there was power black out and he was concentrating on guarding the prisoner who was not hand cuffed while the one who was hand cuffed escaped.

That escape created a problem in the prosecution's case as the police officers needed to be careful to maintain the connecting link.

The Appellant before us was arrested on 30th August, 1999 at Mwingi which should be the present Mwingi District far away from Embu although in the same Eastern Province. That was about ten months after the escape of the prisoner P.W.3 was guarding at Embu Provincial General Hospital.

The person who escaped when P.W. 3 was guarding him at the hospital had been seen by P.W.1 and P.W.2 on the 4th October 1998 only. When the Appellant was arrested at Mwingi and brought to Embu, there should have been a police identification parade, for P.W.1 and P.W.2 to identify him to connect the link. That was not done yet the police at Embu were aware of what the Appellant was saying that he was claiming to be a stranger to these offences. To wait for P.W.1 and P.W.2 to identify the Appellant in the dock before the trial magistrate was not useful.

P.W.3 when giving evidence should have told the court how he knew the Appellant was the prisoner who had escaped from him on 28th October, 1998. That prisoner was said to have had a severe dog bite resulting into a fracture of his leg. There is nothing in the evidence of P.W. 3 to show that the Appellant, during the trial had any sign of a fractured leg or a dog bite wound or scar. Medical evidence was available at Embu Provincial General Hospital. It could have been used. Fingerprints and the Appellant's identity card could have been used. In addition, keen investigation could have brought out more evidence.

But all that was left out, P.W. 3 closing his evidence as if the escape of the prisoner he was guarding was of no serious consequence to the prosecution's case. The dog handler police constable Kariuki, did not give evidence. The evidence of P.W. 4, the arresting officer at Mwingi could not alone provide the needed link. Yet the prosecution closed its case without proving who the Appellant was. It was not the Appellant's duty to do that.

In his defence the Appellant said his name was **ISAAC MULEWA MANZI** and not ISAAC MULIWA MANZI. He accepted he was arrested at Mwingi for a different offence. He said he was surprised to be taken to Embu where he was charged in this matter, offences he did not know anything about. He said:

***“I was later escorted to Embu Police Station. I was taken to the C.I.D. office and they asked me to show them my broken legs. I said my legs were not broken. The in-charge then told the officers to call witnesses to identify me.*”**

The officer came and said the person he knew had had both legs broken. He said he could not identify his face. I was then taken back to the cells. I was later charged. Even the name in the charge sheet is not mine. It only resembles mine.”

The Appellant has maintained that defence during the hearing of this appeal and in our opinion that defence creates doubt in the prosecution’s case as to whether the Appellant is the same person the police had arrested at the home of P.W.1 on 4th October, 1998 with serious dog bites; taken to Embu Provincial General Hospital where he was admitted for treatment before he escaped from the hospital. We give the Appellant the benefit of doubt and therefore hold that the evidence before the learned trial magistrate was not safe to sustain the Appellant’s conviction.

Accordingly, we do hereby allow the appeal of the Appellant. Quash his conviction on each count and set aside the sentence thereon.

The Appellant be released forthwith unless lawfully detained in some other cause.

Dated this 19th day of November, 2003.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE