



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KARANJA & KOOME, J.J.A)**

**CRIMINAL APPEAL NO. 327 OF 2011**

**BETWEEN**

**IBRAHIM ANAKEYA.....1<sup>ST</sup> APPELLANT**

**DOUGLAS NYANGWARA MAOBE.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(Khaminwa & Warsame, JJ.) dated 19<sup>th</sup> May, 2011

*in H.C. CRA No. 618 & 620 of 2007.)*

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**JUDGMENT OF THE COURT**

1. On the evening of 15<sup>th</sup> August, 2006, Moses Mulinge Muthebwa (PW3) was on duty guarding the Prime Tech Industries premises situated along Nanyuki Road in Industrial Area. At around 8:30 p.m. he was ambushed by three men who had jumped over the front gate. They threatened to harm him if he raised any alarm and he cooperated. The robbers asked him for keys to the factory but he did not have them because the proprietor, Onaly Alira Narji (PW1) as was the custom, had locked the factory and taken the keys with him. He was then tied up and locked up in the toilet by the 2<sup>nd</sup> appellant who he identified using the security lights in the compound.

2. Bent on not leaving empty handed, the intruders vandalized a car make Mazda registration number KAB 545P which was parked in the compound. Apparently, that evening at around 5:00 p.m. Humphrey Branco (PW5), the company's driver, had picked up assorted office stationery which had been purchased by Onaly from a bookshop. However, by the time he came back to the premises the offices were closed, hence he decided to leave the stationery inside the car in question. The intruders stole the stationery, the car radio as well as all the tyres of the vehicle.

3. It seems that the intruders had come up with a scheme of how to move the stolen items from Prime Tech Industries. According to Harrison Thuo Mugo (PW4) who operated his vehicle registration number KAA 121Q as a 'taxi', one Jairo who was known to him, called him and requested him to pick him up from Nakumatt Supermarket situated in Industrial area. Upon arrival he noticed that Jairo was in the company of the 1<sup>st</sup> appellant who was then not known to him. Jairo directed him to take the 1<sup>st</sup> appellant to pick some items along Nanyuki Road.

4. As per the 1<sup>st</sup> appellant's directions, they drove to Prime Tech Industries and the gate was opened by the 2<sup>nd</sup> appellant who was also at the time not known to him. Oblivious of the fact that a robbery had taken place Harrison opened his boot and an array of items including vehicle tyres were loaded therein. He then drove the 1<sup>st</sup> appellant to Huduma Bora Clinic where he left him with the aforementioned merchandise after being paid for his services.

5. Unknown to them, CPL Lawrence Mwangela (PW2) who was on patrol along Lunga Lunga/ Nanyuki road received a tip from an informer that there were suspicious persons driving along Nanyuki Road. Without wasting time CPL Lawrence and his colleagues lay in wait at the junction to the airport. This is where they saw Harrison's taxi get into the Prime Tech premises and drive out after a short while. They decided to follow the vehicle and intercepted it while Harrison was on his way back from dropping the 1<sup>st</sup> appellant.

6. After interrogation Harrison informed the police what he had gone to do at Prime Tech Industries. He did not stop there but also took the police to where he had dropped off the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant was apprehended while still in possession of the stolen items which were later identified by Onaly and Humphrey. They then drove to Prime Tech Industries and upon knocking on the gate the 2<sup>nd</sup> appellant opened the same. The police noticed the vandalized vehicle and then carried out a search around the premises and found Moses who had been tied up. The 2<sup>nd</sup> appellant was not able to give a reasonable explanation as to what he was doing in the premises.

7. As a result, the appellants were arraigned in court and charged with one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In their defence, they both gave unsworn statements denying the charge against them. In particular, the 2<sup>nd</sup> appellant stated that on the material day he was working in the night shift at Mombasa Maize Millers when he received an emergency call from his relative asking him to go home. It was while he was making his way home that he was arrested and later charged with the fabricated offence.

8. The trial court weighed the evidence and found that the prosecution had proved its case against both appellants. The appellants were convicted and sentenced to death. Aggrieved with their convictions and sentences the appellants lodged an appeal in the High court which was dismissed by a judgment dated 19<sup>th</sup> May, 2011. Unrelenting, the appellants filed a second appeal in this Court predicated on different grounds.

9. With respect to the 1<sup>st</sup> appellant his appeal is anchored on the legality of the sentence meted out to him. On the other hand, the 2<sup>nd</sup> appellant complains that the learned Judges (**Khaminwa & Warsame, JJ.**) erred in law by:

**i. Failing to find that the trial was a nullity for the reason that the trial court neither recorded the language he was familiar with nor the language in which the trial was conducted.**

**ii. Failing to appreciate that the charge sheet was defective that is, that the particulars therein were at variance with the evidence adduced.**

**iii. Failing to interrogate the appellant's defence of alibi.**

**iv. Failing to properly re-evaluate the evidence on record.**

10. Mr. Ratemo, learned counsel for the 1<sup>st</sup> appellant, took issue with the sentence issued against his client because the two courts below had not taken into account mitigating factors before imposing the sentence. He urged us to remit the matter back to the High Court for re-sentencing as per the guidelines in the Supreme Court holding in **Francis Karioko Muruatetu & another vs. R [2017] eKLR (Muruatetu case)**.

11. As for the 2<sup>nd</sup> appellant who appeared in person, he chose to rely on the written submissions which were filed on his behalf. It was the 2<sup>nd</sup> appellant's contention that his right to have the trial conducted in a language he understood was flouted. This is because the record does not indicate which language he was familiar with or at the very least whether there was an interpreter since some witnesses testified in Kiswahili and others in English. In his view, the omission to state the language vitiated the trial. In that regard, we were referred to this Court's decisions in **Patrick Kubale Wesonga vs. R [2007] eKLR** and **Gabriel Owang Otila & another vs. R [2009] eKLR**.

12. Citing the provisions of **Article 50(4)** of the **Constitution** the appellant asserted that Moses' evidence had been irregularly obtained because he was present in court while CPL Lawrence testified. Therefore, his evidence should not have been admitted.

13. On the issue of the defective charge sheet, the appellant contended that the offensive weapons used by the alleged robbers on the material day were never produced in court as exhibits. What is more, the essential elements of the offence of robbery with violence were not established.

14. The appellant added that the two courts below disregarded his *alibi* defence without any legal basis. Furthermore, despite CPL Lawrence giving evidence that he acted on a tip from an informer that there were people who seemed suspicious along Nanyuki Road the said informer was never called as a witness. He asked us to draw a negative inference from the failure by the prosecution to call the informer, who he believed was a crucial witness, to testify. In conclusion, he argued that looking at the evidence as a whole it was evident that the High court failed in its duty to reappraise the evidence as the first appellate court.

15. On her part, Mrs. Murungi, Senior Assistant Director of Public Prosecution opposed the appeal. She submitted that there was overwhelming evidence against the 2<sup>nd</sup> appellant. He was not only found at the scene of the crime but he was also identified by Moses and Harrison as one of the assailants.

16. We have considered the record, submissions made on behalf of the parties and the law. We are also alive to the scope of our jurisdiction as a second appellate Court as delineated under **Section 361(1)** of the **Criminal Procedure Law**. It is limited to consideration of points of law only.

17. To begin with, appreciation by an accused person of the nature of the offence he is charged with is paramount to a fair trial as envisaged under **Article 50** of the **Constitution**. This is because without such comprehension the accused person will not be able to prepare a good defence to the case against him/her. One of the requirements of making sure that an accused person grasps the implication of the charge (s) against him is to ensure that he/she understands the language used during the plea taking and the trial. This is why the law provides for interpretation of proceedings to an accused person who does not understand the language used in court. See **Article 50(2)(m)** of the **Constitution** and **Section 198(1)** of the **Criminal Procedure Code**.

18. It is equally important for the trial court to indicate before an accused person's plea is taken what language he understands as well as the language in which the evidence is taken, the proceedings are conducted and/or the language used in interpretation, if any. This not only ensures that an accused person understands the proceedings but also helps an appellate court when dealing with any challenge with respect to the language used at the trial court.

19. Having perused the record, we cannot help but note that contrary to the appellant's contention, the trial court did indicate before the appellants' plea was taken that the charge and the particulars therein were explained in English and then translated to Kiswahili. It is also clear that apart from Onaly all the other witnesses testified in Kiswahili. Besides, we are convinced that the 2<sup>nd</sup> appellant understood what was going on at the trial as evidenced by the line of questioning he applied in cross examining the prosecution witnesses. See this Court's decision in George Mbugua Thiongo vs. R [2013] eKLR. Therefore, we find that this ground lacks merit.

20. Article 50(4) of the *Constitution* reads:

**“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”**

As far as the appellant is concerned, Moses' evidence fell under this category for the reason that he was present in court while CPL Lawrence testified. He maintains that the trial court should not have admitted his evidence. It is common ground that the trial court had the opportunity to deal with this objection and rendered itself as follows:

**“Court:**

**Note: PW3 answers from within court. Witness was in court.**

**Prosecution:**

**He is the complainant. I had told all to go out but he didn't. I pray he is allowed to testify.**

**Accused 1:**

**Oppose court doesn't allow him to testify as he has heard.**

**Accused 2:**

**Opposed as he has heard what was said.**

**Ruling 2pm**

**The matter is for ruling on the application by prosecution to permit PW3 to give evidence notwithstanding he was seated in court as PW2 testified. PW2 is the arresting officer. His evidence basically touched on the manner of arrest of both accused persons. At this juncture I do not imagine how his evidence can be duplicated by any other witness to the accused persons prejudice/detriment. I shall exercise my discretion and permit PW3 to give his evidence ...”**

In our view, the trial court properly addressed its mind on the issue and exercised its discretion judiciously. More so, in light of the fact that Moses did not testify on the mode of the appellants arrest rather his evidence was with regard to what transpired at the scene of the crime. Accordingly, we see no reason to interfere with the same.

21. We are clear in our minds that the totality of the evidence on record placed the 2<sup>nd</sup> appellant at the scene of the crime and linked him to the offence of robbery with violence. As such, we concur with the following sentiments of the High court:

**“From sequence of events and circumstances, the appellants did not offer any explanation why they were found with stolen items and in (sic) premises where the items were stolen from.**

**The law is that a person found in possession of recently stolen items, is presumed in the absence of any plausible explanation, to be either the thief or the handler of the stolen items, therefore the doctrine of recent possession is applicable in the circumstances of this case against the 1<sup>st</sup> appellant. There is also no doubt that both PW3 and PW4 identified the appellants at a very close range, that the light and other conditions for proper identification were present. We appreciate that no identification was carried out but nevertheless PW4 is the one who led police to the arrest of both appellants. In our view the time lag between the time of the robbery and the recovery and arrest was so proximate and sufficient to found a conclusion that the appellants participated in the subject robbery. The 1<sup>st</sup> appellant was found in possession of items stolen from Prime Tech Industries while the 2<sup>nd</sup> appellant was arrested from inside the premises of the said company in a suspicious and unexplained manner. We therefore think the trial court proceeded in accordance with the law and rightly convicted both appellants.”**

Further, we find that the prosecution's evidence which placed the 2<sup>nd</sup> appellant at the scene of crime displaced his *alibi* defence that he was

working at Mombasa Maize Millers.

22. By virtue of **Section 143** of the **Evidence Act**, the prosecution is under no obligation to call any number of witnesses to prove a fact. It is only where the prosecution calls evidence that is barely adequate or marginal that a court may be entitled to draw an adverse inference that if the relevant evidence was tendered then such evidence would have been adverse to the prosecution's case. See this Court's decision in **Safari Charo Koyo vs. R [2017] eKLR**.

23. In the circumstances of this case, we cannot discern such an impropriety by the prosecution for failing to call the informer as a witness. Our position is fortified by that case **John Otieno Juma vs. R [2011] eKLR** where this Court expressed:

**“Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired!**

...

**Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution's other evidence served the purpose.”**

24. Moving to the allegations of a defective charge sheet, the appellant claims that the evidence tendered was at variance with the particulars in the charge sheet. In his view, the elements of the offence of robbery with violence as set out in the particulars were not established by the evidence because the alleged offensive weapons were not produced in court.

25. It is trite that it is not mandatory for all the elements of the offence of robbery with violence as set out under **Section 296(2)** of the **Penal Code** to be present before the offence can be established. **Section 296(2)** stipulates that:

**“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”** [Emphasis added]

It is sufficient to establish even one of the aforementioned elements of the offence, as the list under the said provision is disjunctive, not conjunctive. See this Court decision in **Simon Ndungu Kinuthia vs. R [2016] eKLR**.

26. In this case the charge sheet indicated that the appellants were in the company of other persons not before the court during the commission of the offence and the evidence tendered by the prosecution confirmed as much. That by itself established the offence of robbery with violence.

27. Last but not least, the principle behind the **Muruatetu case** is that a sentencing court should take into account mitigating factors and apply its judicial discretion in issuing an appropriate sentence even in capital offences where there is a prescribed mandatory death sentence. It is not in dispute that both the trial court and the High court did not take into account any mitigating factors but simply issued the death sentence to both appellants. This is understandable owing to the fact that the trial of this matter and the appeal were done long before the Muruatetu case. Consequently, we accede to the 1<sup>st</sup> appellant's request to remit the matter back to the High Court for the appellants' re-sentencing as per the Supreme Court guidelines in the **Muruatetu case**.

28. In the end, save for the issue of the sentence of death, which we hereby set aside, we find that the appeal lacks merit and is hereby dismissed.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of February, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**