



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWERA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO.290 OF 2007

BETWEEN

NICHOLAS KITHEKA.....1ST APPELLANT

ZACHARIA OLE MESIEK.....2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ)
dated 27th September, 2005*

in

HC.CR.A. NO.921 OF 2001)

JUDGMENT OF THE COURT

The appellants herein, *Nicholas Kitheka* and *Zacharia Ole Mesiek*, brought this appeal after their consolidated appeals HCCR.A.921 and 922 both of 2001 were dismissed in the High Court (Lesiit, Ochieng JJ) on 27th September, 2005.

The appellants were arraigned in Kibera CM Cr.C.No.7408/2010 with 4 charges of robbery with violence contrary to section 296(2) of the Penal Code. The charges were that on 1st September, 2000 along Limuru Road Nairobi they committed acts of robbery while armed with dangerous weapons as follows: They robbed *Michael Ndichu* of a minibus valued at Sh.1m plus cash Sh.100/=; they robbed *Hannah Nyambura* of Sh.4800/= and *Stephen Karudi* of Sh.7500/= as well as *Robert Kamau* of a licence worth Sh.1,125/=. They used or threatened to use actual violence against their victims during the incidents. In the 2 petitions before the High Court the appellants more or less raised similar grounds of identification, disregarding their defences and inadequate or inconsistent evidence. Here the appellants through learned counsel *Mr. A. Kariu* put forth four grounds which were condensed into two.

The first ground was that the appellants, especially the 2nd appellant, *Zacharia Ole Musiek*, did not understand the English language in which the trial proceeded in the lower court and was thus prejudiced. He claimed that only on the day of plea, 8th September, 2000, were proceedings conducted in English being interpreted in Kiswahili but not in subsequent days until the end of the trial. The 2nd appellant

presented written submissions in Kiswahili. He did not say anything in mitigation and he gave an unsworn statement in defence in Kiswahili.

On the question of evidence we were told that it did not support the charges against the two appellants. Particularly **Mr. Kariu**, emphasized that even with witnesses testifying that they were robbed of money, none was recovered from the appellants. It was stated that the 1st appellant **Nicholas Kitheka** was the one to whom all the valuables robbed were passed. Accordingly the offence of robbery with violence could not be preferred, perhaps attempted robbery. The mates of the appellants fled the minibus matatu where all this occurred, when the police stopped it.

Mr. Ondari, learned Senior Assistant Director of Public Prosecutions, opposed the appeal on the following lines: That the issue of language was being raised for the first time in this appeal. The entire proceedings were conducted in Kiswahili. The appellants cross-examined the witnesses and made lengthy defences. Accordingly, this ground had no merit.

On evidence he submitted that the charges were robbery with violence. There were more than 5 robbers involved. They were armed. They stole money and other items from passengers and took control of the motor vehicle. Some three passengers escaped police arrest by fleeing from the motor vehicle. Recovery of money was not central to the charges. The appellants were identified. Hence all ingredients of robbery with violence were established and proved and the appellants. Conviction was based on sound evidence and the sentence was lawful.

This being a second appeal and by dint of the case of ***M'riungi V Republic [1983] 455*** and many other authorities, plus the provision of ***S.361(2) of the Criminal Procedure Code***, the court will only address a point or points of law, and nor disturb the findings of fact as made by the two courts below unless such findings were not made on available evidence.

Mr. Kariu argued this appeal on two grounds only – language and evidence. Beginning with the language, which ground was only raised on this appeal, we perused the lower court record and noted that on the day of plea, that is on 8th September, 2000, with an interpreter present (**Obonyo**), the language used was English and Kiswahili. **Mr. Obonyo** or other court clerks or interpreters were present on all the other days.

On 6th October, 2000 the 2nd appellant (**Ole Mesiek** – A1) is recorded to have told the learned trial magistrate:

“Accused 1: I am very sick. I have stomachache and also diarrhoea.”

It was ordered that he be escorted to hospital for treatment. On 23rd October, 2000 the record bears 2nd appellant informing the court, and it was recorded in English, that he had been treated and he was fine. On 9th February, 2001 a new charge sheet was presented to court with court clerk (**Muia**) on hand. The charges were read out and explained to the appellants who pleaded not guilty. Hearing commenced with **Michael Ndichu** (PW1) speaking in Kiswahili. The record was kept in English. It needs no reminding that the languages of the subordinate courts are both English and Kiswahili. After that testimony, and that of the rest of the witnesses, both appellants did cross-examination. The answers recorded were relevant to the charges and the evidence. Particularly the 2nd appellant (A1, **Mesiek**) conducted longer cross-examination than his co-appellant (A2, **Kitheka**). **Mr. Kariu's** point of focus on this ground of language was as regards **Mesiek**.

After hearing the prosecution case the learned trial magistrate found that the appellants had a case to answer (**Muia**, court clerk/interpreter present). The 2nd appellant remarked:

“Accused 1: I will make an unsworn statement. I have no witness to call.”

The unsworn statement given in Kiswahili covered one and half pages. The record does not show whether the appellants made submissions in the lower court. We take it that there was none made there.

But both filed written submissions in the High Court, with **Ole Mesiek** doing so in Kiswahili.

From all the foregoing we are satisfied that with the trial having started with an interpreter present, from English to Kiswahili and *vice versa*, and the facility of an interpreter was accorded all through the proceedings no doubt the proceedings were conducted in the proper languages. The appellants followed them well, they reacted as was necessary and so they were not prejudiced in any way. That is why this issue was not raised before the lower court or the High Court. It must be an afterthought. This ground lacks merit and it is dismissed.

Mr. Kariu learned counsel for the appellants exhorted us to find that the evidence on record fitted charges of attempted and not fully-fledged robbery with violence contrary to **S.296(2) of the Penal Code**. We have gone over the evidence tendered by the prosecution witnesses before the lower court and reevaluated by the High Court. We are satisfied that motor vehicle KAG 786 H (matatu) of which **Michael Ndichu** (PW1) was in charge as a driver, was wrestled from him when on the way along Limuru Road. Some of the passengers turned out to be robbers. They ordered him saying, “**Driver that motor vehicle is now ours.**” Someone holding a pistol gave the orders and directed **Ndichu** to take a turn and drive to a place called Gachie. He obeyed. And later one thug took control of the motor vehicle as **Ndichu** was pushed to the back. That was a complete act of robbery with violence. **Ndichu** saw four (4) men involved in the act, one armed with a pistol. They stole his motor vehicle when they took control of it. No more need be said. This was robbery with violence contrary to Section 296(2).

Regarding other acts of robbery **Hannah Nyambura** (PW2) was robbed of her Sh.4800/= in the same matatu by the same gang. So was **Stephen Karudi** (PW3) and **Robert Kamau** (PW4). They were robbed of money or other valuables. When the police stopped the matatu some of the robbers jumped out and fled. The two appellants were left behind. The passengers including the witnesses identified them to the police. They were arrested and later charged. No stolen property needed to be recovered to complete the ingredients of robbery with violence. Evidence is a relevant material to prove a fact. We have not been shown that the two lower courts or on our own the evidence adduced did not prove the facts as to make the concurrent findings of those two courts untenable. With that, we dismiss this ground.

In the result this appeal is dismissed in its entirety.

Dated and Delivered at Nairobi this 20th day of September, 2013

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

S. GATEMBU-KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc