



IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO.209 & 210 OF 2004

BETWEEN

MWENDWA KILONZO.....1<sup>ST</sup> APPELLANT

JACKSON WAMBUA KILONZO.....2<sup>ND</sup> APPELLANT

AND

REPUBLIC..... RESPONDENT

*(APPEAL FROM A JUDGMENT OF THE HIGH COURT OF KENYA AT MACHAKOS  
(OCHIENG, J.) DATED 28<sup>TH</sup> SEPTEMBER, 2004*

IN

*HC.CR.A. NOS.18, 19 & 20 OF 2002)*

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JUDGMENT OF THE COURT

The two appeals herein were consolidated and heard together. **Mwendwa Kilonzo** and **Jackson Wambua Kilonzo** were jointly charged with **Dominic Muthoka** with two offences of robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged in count 1 that on the night of 28<sup>th</sup> /29<sup>th</sup> April, 2001 at Nzukini Village, Kitui while armed with offensive weapons, namely simis and iron bars, they robbed **Mwendwa Munyoki** of Sh.2,300/= and they used personal violence on the said **Munyoki** during the incident.

Count 2 stated that on the same day and place while armed as aforesaid, the three robbed **Margaret Mwendwa** of Sh.2000/= and used personal violence on the said **Margaret Mwendwa** during the incident. Evidence was tendered before the Kitui Principal Magistrate. After assessing, evaluating and analyzing the evidence tendered, the appellants were found guilty, convicted and sentenced to suffer death as by law mandated. Being dissatisfied with that conviction and sentences, they appealed to the High Court at Machakos vide Criminal Appeal Numbers 19 and 20 of 2002, where their appeals were dismissed (Wndoh, Ochieng, JJ). During the pendency of the appeals, **Dominic Mutinda Muthoka** died. His appeal abated. Further aggrieved by the decision of the High Court, the present two appellants have come before us.

To convict the appellants, the learned trial magistrate found that even as the robbery took place at night, the robbers were positively identified at the scene and on identification parades by the complainants; that on their arrest the following morning, the appellants were found with the torches they used at the time of the robbery; that the complainants had identified these torches as well as the jacket the first appellant was wearing during the robbery.

On its part, the High Court, after due re-evaluation, re-assessment and re-analysing of the evidence heard by the trial court, concluded that the appellants were positively identified at the scene of crime; that this coupled with circumstantial evidence, led the learned trial magistrate to convict the appellants and on that note the learned judges confirmed both the conviction and sentences handed down.

Mrs. Nyamongo, learned counsel for both appellants, based her arguments on her own 5-ground supplementary memorandum of appeal. She also argued some of the grounds from the further supplementary memorandum of appeal filed on behalf of the appellants by Mr. Timothy Bryant, Advocate.

Mrs. Nyamongo submitted that her clients were not accorded a fair trial in terms of Section 77(1)(2)(b) of the repealed Constitution, that also Section 198(1) of the Criminal Procedure Code was not complied with; that the appellants were arrested on 4<sup>th</sup> May, 2010 but their trial did not begin until 22<sup>nd</sup> October, 2001 – a period of about 5 months. Which was not a case of a trial within a reasonable time.

Mrs. Nyamongo also argued that as the language used was not noted on the record by the learned trial magistrate, should be presumed that the language used was not understood by the appellants. Thus her unrepresented clients were prejudiced, and the case of ***Bashir Abdi vs Republic Cr.57/08*** was cited in this regard.

Turning to identification, counsel maintained that the circumstances were not conducive for positive identification as the complainants (***Mwendwa Munyoki*** PW2 and ***Margaret Mwendwa*** PW3) had been asleep when the robbers attacked their one-roomed residence and robbed them; that it was dark and the claim that these two witnesses were able to identify the robbers, using the light from the torches of those robbers was not satisfactory; that PW2 even hid under the bed during the incident and thus was not able to see the robbers. The conduct of the identification parades was faulted on account of the numbers of members on the parades.

In her other ground, Mrs. Nyamongo claimed that the learned judges of the High Court failed to reevaluate the particulars of the weapons as per the charge sheet, namely simis and iron bars, against the evidence that only a knife and torches were recovered at the time the appellants were arrested, and only a stone and a stick were produced as exhibits. She added that the first appellant, ***Mwendwa Kilonzo***, ended up being called “***Nzau Kasee***” without explanation or alias. He was convicted under this unexplained name and that was prejudicial to him.

Still on the the issue of identification, Mrs. Nyamongo said that the evidence of PW2 was that he recognized the voice of the 1<sup>st</sup> appellant at the scene, but no ground was laid as to how long PW2 had been at school with ***Mwendwa Kilonzo*** so as to be sufficiently acquainted with his voice.

Mrs. Nyamongo also urged us to note that the total sum of money allegedly stolen from the 2 complainants was not the same as that recovered from the appellant at time of their arrest. She contended that it was not possible to track the robbers at night using shoe prints, allegedly left behind by the shoes of one of the robbers.

Moving to the grounds in Mr. Bryant’s memorandum of appeal Mrs. Nyamongo cited Article 6(2) of the International Convection on Civil and Political Rights which, to her, it prohibited death sentences. The other point was that the learned High Court judges had the option to review the death sentence which they failed to exercise.

Mr. V. S. Monda, Senior Principal Prosecution in reply, submitted that Article 26(3) of the

Constitution 2010 and, Section 296(2) of the Penal Code provide for such sentence. It is thus not be unconstitutional.

As for a fair trial, we heard that it was concluded within a reasonable time because on some occasions the learned trial magistrate noted that the case could not be reached. There was no unnecessary delay and the appellants were not prejudiced.

Regarding the language used at the trial, Mr. Monda conceded that it was not noted on record, but the appellants, did cross-examine the prosecution witnesses; that they did not raise the issue of language as a barrier in either of the two lower courts; that they even had counsel, Mr. Kibanga in the High Court who did not raise that point. Accordingly, it should be taken that the appellants followed the proceedings well and so raising the complaint at this point was an afterthought.

On identification, counsel told us that there was ample light coming from the torches the robbers had and were flashing about in the single room occupied by the complainants and even on themselves; that PW3 and PW4 recognized the 1<sup>st</sup> appellant – a villager and neighbour. PW2 recognized the 1<sup>st</sup> appellant's voice and as such there was no question of mistaken identity and the concurrent findings of the trial and first appellate courts on this need not be disturbed.

Commenting on the aspect of weapons, Mr. Monda told us that the High Court disposed it of as well as the question of the sums of money stolen during the robbery and that that was recovered from the applicants upon them and find the learned judges who had re-evaluated all the evidence on record and ought not be faulted on this.

This is a second appeal. So we approach it in the manner provided for in Section 361(1) of the Criminal Procedure Code and as this Court pronounced in numerous of its decisions. See the case of Njoroge vs Republic [1982] KLR 388, where the court held *inter alia* that:

***“On second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”***

We begin with the question whether or not the appellants were accorded a fair trial in the lower court. It was claimed that from the time of first appearance in court and commencement of the trial, it took some 5 months. While the appellants contend that that period was so long that they were prejudiced, the State does not think so. We are all familiar with Section 77(1)(2)(b) of the now repealed constitution. We need not reproduce it. It requires courts to be always alive to the need for speedy trials. That principle has been captured even in the current Constitution (See Article 49(1)(a)). An accused person ought to be tried in the shortest time possible so that he/she knows the final determination of his/her case. An unnecessarily delayed trial causes anxiety, loss of time and liberty. A trial should commence as soon as it is possible and end quickly. The beginning of a trial takes into account the availability of time to the judicial officer, presence of police file, the prosecutor, defence counsel, witnesses and much more. A trial may start right away or be delayed for a certain period of time for one reason or the other. But the earlier the better and a court should never lose sight of this.

In the present case, it took some 5 months for the trial to open. We have perused the trial court record and noted some of the reasons for not moving the trial herein at a faster pace. The learned trial magistrate remarked on two occasions that the case could not be reached. That meant that he/she had placed it on the table with a view to proceeding with it but was prevented from doing so, quite probably because of pressure of work. That did not amount to a breach of the right to fair trial at all. In our opinion, this case proceeded within reasonable time in the circumstances. This part of the first ground therefore fails.

The other part concerned language. Section 198(1) of the Criminal Procedure Code provides that where evidence is given in a language which the accused does not understand, it shall be interpreted to him in a language that he understands. (See also Section 72(2)(f) of the repealed Constitution). We note

that there was no indication on record of the language used during the trial before the learned trial magistrate. The record however has it that one Muthui, the court clerk was present at plea stage and thereafter a court clerk was present all the time during the trial. We noted that the answers of not guilty were entered on behalf of each accused persons in response to the charge read. Each accused person then addressed the court complaining about the manner of his arrest and that he was assaulted and cash taken from him. All this was recorded in English. It can be assumed that the accused persons spoke in English or a language that was translated into English. Their respective complaints were considered and dismissed. The prosecution called ten (10) witnesses and the record has it that each accused person cross-examined each witness at length upon the accused persons were placed on their defence, each made an unsworn statement. The issue of not following the proceedings due to language barrier was not raised. At the High Court the 2<sup>nd</sup> appellant, **Jackson Wambua**, had Mr. D. Kibanga Advocate representing him. The issue of language was not one of the grounds of appeal.

We appreciate that the aspect of language and ensuring that an accused person is given the facility of interpretation when he requires it is central in ensuring that the accused person is not prejudiced because he could not follow proceedings due to language barrier. In fact such trial will end in an injustice particularly if the accused is found guilty. Courts therefore have a duty to ensure that an accused person is able to follow its proceedings in a language he understands. That is the law and the case of **Bishar Abdi vs Republic Cr.A.57/2008** emphasizes it. In the present appeal however, we have come to the conclusion that the appellants did follow the proceedings before the learned trial magistrate conducted in a language they understood, though that was not noted on the record. As we have stated, they did not complain to that court; they cross-examined witnesses and their statements in defence were taken down. They did not raise the issue of language as a challenge either in the trial court or in the High Court where one of them had a lawyer. And there was always a court clerk on hand, whose role is to provide interpretation if required. Accordingly, we do not find that the appellants herein were prejudiced in this case. This ground therefore fails.

Then there was this ground on identification. This was in two parts – at the scene and on identification parades. The incident took place at night in the single room occupied by the 2 complainants. There was no light. This is what the learned trial magistrate found on this point:

***“First there is the issue of the accuseds identification at the home of the complaints. I have weighed with the greatest possible care this issue of identification.***

***I have considered the demeanour of the witnesses and they testified, the source of light and its intensity any possible reasons that the witnesses might have for lying against the accused as suggested by the defence.***

***I am satisfied that the accused persons were all positively identified by the two complainants. Though it was at night there was adequate light from the bright torches that the accused persons had. This complied with the fact that the robbery occurred in a single room enabled witnesses to identify the accused.”***

This was a finding of fact. After the judges of the High Court re-evaluated that evidence, they were satisfied that the 1<sup>st</sup> appellant plus his confederates were positively identified by the 2 complainants at the scene and so were the co-accused. Of the first appellant the learned judges found:

***“From the foregoing, we are satisfied that Nzau Kasee was one and the same person as Mwendwa Kilonzo. We are satisfied that he was recognized by PW2, at the time of the robbery.”***

And on his arrest in the matatu:

***“Kasee was arrested when he entered the vehicle. It is he who then informed the trackers that his two colleagues were ahead. After some 200 metres, Nzau Kasee pointed out his two colleagues, who were then arrested.”***

The learned judges, on the whole evidence of identification, concluded:

***“In our own assessment of the evidence adduced before the trial court, we hold that the appellants were positively identified at the scene of crime.”***

It was also in evidence that the appellants were identified on the parades conducted. But there was also circumstantial evidence and the judges said of this:

***“We also uphold the conclusion arrived at by the learned trial magistrate that the circumstantial evidence leads to the inescapable decision that the appellants were active participants in the robbery.”***

Thus the two courts below made a concurrent finding on a matter of fact as borne out by the evidence before them. We have no material to overturn that finding and accordingly, this ground is also found to have no merit. It fails.

As to the ground that the High Court failed to re-evaluate the evidence on weapons allegedly used in the incident or the sums of money recovered from the appellants, it would appear that Mrs. Nyamongo did not properly appreciate the High Court judgment (Page 123) where that court disposed of those two aspects. We need not go over them again. We have already remarked that the High Court found that “*Nzau Kasee*” was one and the same person as *Mwendwa Kilonzo*, the first appellant, even though the alias was not noted in the charge sheet. There was no prejudice occasioned by this.

The other main ground came from the supplementary memorandum of appeal filed by Mr. Bryant that the death sentence handed down to each appellant contravened Article 6 of the International Convention on Civil and Political Rights. It reads in the pertinent parts as follows:

***“6. 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.***

***2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Convention and to the Convention on the prevention and punishment of the crime of genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.***

***3..... 6.....”***

This Article should be read with our Article 26(3) of the Constitution:

***“26. (1)... (2)...***

***(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”***

And the written law is Section 296(2) of the Penal Code. So all in all a death sentence is not unconstitutional. Kenya has not abolished the death sentence and so the death sentence meted out here to the appellants is not contrary to the cited Convention. Yes. There is the case of ***Godfrey Ngotho Mutiso Vs R (2010) eKLR*** and what it says about the death sentence not being the mandatory and only sentence provided for under Section 203 of the Penal Code as read with Section 204 of the Penal Code. The same meaning could as well be extended to other provisions of law which stipulate death sentences. But that is not the case before us now. In the similar vein, we are not in a position in the present appeal to consider whether the learned trial magistrate’s discretion to mete out any other sentence or the High Court had the option to review the death sentence in issue. No sufficient material was placed before us to deal with such issue. That ground also fails.

In the result this appeal fails and it is dismissed in its entirety.

*Dated and Delivered at Nairobi this 18<sup>th</sup> day of October, 2013*

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

I certify that this is

A true copy of the original

**DEPUTY REGISTRAR**

*/jkc*