IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ONYANGO OTIENO, AGANYANYA & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 109 OF 2006

BETWEEN

MULATYA MUSAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Onyancha & Lesiit, JJ.) dated 5th April, 2006

in
H.C.Cr.A. No. 181 of 2004)
****

JUDGMENT OF THE COURT

This second and probably the last appeal arises from the decision of the Principal Magistrate's Court at Kitui *(E.K. Makori, SRM)* delivered on 4th November, 2004 wherein ***Mulatya Musau***, the appellant, was tried and found guilty of the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code and was sentenced to death. His appeal to the High Court was dismissed and this gave rise to the present appeal.

The particulars of the charge were that on the evening of 28th January, 2004 at about 7.30 p.m., ***Dorcas Kamene Mureithi*** (PW1) was at her house when a group of three people entered therein, armed with a panga and bows and arrows and attacked her demanding money from her. There was a hurricane lamp lighting the house. Through use of that light PW1 saw and identified the appellant as one of the three people because at one time she and her husband, ***Dominic Mureithi Mwaniki*** (PW4) had hired him to fence their land. So she knew him. During the attack PW1 suffered cut injuries on various parts of her body, caused by the panga which the appellant had.

Apart from the evidence of PW1, there was also the evidence of ***Musonya Peter*** (PW2), the complainant's servant who at the time of the incident was with the house-help, ***Kyule Muthui*** (PW3) in the kitchen – a short distance from the house of PW1. He (PW2) testified that while in the kitchen at the material time someone came in holding a panga and ordered him and PW3 to lie down. When PW2 raised his hands as a sign of surrender, the person left the kitchen and locked them inside. However by the time the person left the kitchen. PW2 had not identified him but when this witness looked through the kitchen window to see where the attacker had gone, he saw and identified the appellant who entered the main house; pushed PW1 outside and cut her over the head, then she was forced into the kitchen by the

appellant who opened its door from outside. He locked PW1, PW2 and PW3 in the kitchen.

PW3 did not identify anybody because when the assailant came in and ordered everybody in the kitchen to lie down, he obeyed the order and placed his head under the chair. The evidence of PW4 was that PW1 informed him when he came home that night that the son of Musau was one of the people who attacked her. PW4 took her to Jordan Hospital where she was admitted for six (6) days. He is also the one who reported the matter to Kitui Police Station.

There was also the evidence of ***Stephen Kitili*** (PW5) who examined PW1 to assess the degree of injuries she sustained during the attack. All these injuries were specified on the P3form wherein PW5 classified them as ***"Maim".***

Cosmas Katindi (PW6) was the arresting officer who first arrested the appellant's brother Simon on 28th January, 2004 – the same night of the incident and when the appellant was informed about the arrest and went to Kitui Police Station to find out what was happening, he was arrested on 29th January, 2004. It would appear the confusion in arresting the appellant's brother *Simon Musau* instead of the appellant came about because when PW1 was attacked she became unconscious but when she regained consciousness she informed PW2, PW4 and the police that her attacker was the son of Musau. At that time she did not give the name of the son of Musau involved. However, when she was informed that Simon had been arrested she informed police that her attacker was the appellant, and not Simon and this is why Simon was released from custody and the appellant arrested instead. He was then charged as aforesaid.

When placed on his defence the appellant said nothing about 28th January, 2004 but concentrated on the events of 29th January, 2004 when he was arrested and taken to the police station where he found his brother Simon Musau, under arrest. While admitting that the complainant knew him, he, however, stated that she, the said complainant, could have been mistaken on the identity of her attacker which ended in his arrest.

In the Judgment delivered by the learned Magistrate on 4th November, 2004 he rendered himself thus:-

"She actually knew him and recognized him as *Mulatya Musau.* ***She did not identify other persons who were with him. Before or when she was in hospital she talked of having been attacked by Musau's son. That is when*** *Simon Musau* ***was arrested. When she gained (consciousness) she said it was not Simon but the present accused. Whether Simon was at the scene or not and having been found with a bloodstained shirt I cannot say since he is not on trial."***

Then the learned Magistrate went on:-

"I have considered the circumstances under which the accused was identified, albeit difficult. I have also considered the defence he put across. Weighing the two to me even if I am left with the evidence of the complainant, to me the accused was sufficiently identified and I will add actually he was recognized and known by the complainant having worked for her. He was not masked and camouflaged. He was the attacker with others at large I have no doubt in my mind having guided myself carefully and taking into account that this is a robbery case. Actually because the circumstances were such that the accused was known to the complainant – an identification parade could have been superflous."

The appeal before this Court was based on the grounds specified in the supplementary memorandum of appeal filed in the Court's registry at Nairobi on 14th October, 2011. It has two (2) grounds of appeal, namely:-

"(1) That the Superior Court Judges erred in law by failing to resolve that the appellant's rights under section 77(1), (2(b) and (f) of the constitution as read together with section 198(1) of the Criminal Procedure Code (Cap. 75) Laws of Kenya were violated to the prejudice of the appellant.

(2) The Superior Court Judges erred in law and in fact by failing in reevaluating the entire evidence with much accuracy and note that the prosecution evidence was full of discrepancies and serious contradictions which render the whole evidence scanty and unworthy to sustain conviction and sentence against the appellant."

The High Court, after re-evaluating and re-assessing the evidence adduced in the trial court considered the adequacy of light used by PW1 to identify the appellant which the learned Judges (*Onyancha & Lesiit, JJ*) found inadequate. However they considered that PW1 knew the appellant and his brother Simon, and she specifically pointed out the appellant as the culprit; giving details of what role he played in the course of the attack on her. Thirdly the Judges considered that despite the attack on her which caused her moments of unconsciousness she was still able to point out the appellant as the person who was in the group of three robbers who attacked her on the night in question and to distinguish him from Simon who had earlier been arrested in connection with the offence. These considerations culminated in the dismissal of the appellant's appeal to the High Court as herein before stated.

When the appeal was heard by this Court on 11th October, 2011 ***Mrs. Nyamongo***, learned counsel for the appellant complained about the failure by the trial court to find out in what language the appellant wished the case to be conducted and that no such language was indicated throughout the trial. On the second ground, counsel complained that, it was not clear which Musau's son or Musau was involved in the robbery because it ended in the initial arrest of the wrong person.

Ms. Murungi, Deputy Prosecution Counsel opposed the appeal and submitted that in spite of the failure to mention the language in which the case was conducted in the Principal Magistrate's Court, the record shows the appellant fully participated in the proceedings and cross-examined all the witnesses. Furthermore during the appeal in the High Court the appellant was represented by counsel of his choice who did not raise the issue of language and that raising it at this stage was an afterthought. According to her submissions, this was a case of recognition since the appellant had been a labourer of PW1 for two months and that during the robbery the two were in close proximity as they struggled, and further, the hurricane lamp in the house helped PW1 to identify the appellant.

Being a second appeal this Court is enjoined to consider only points of law – see ***section 361(1)*** of the Criminal Procedure Code. The first issue raised by the appellant's counsel is the violation of the appellant's rights under ***Article 77(1), 2(b)*** *and* ***(f)*** of the Constitution and ***section 198(1)*** of the Criminal Procedure Code. This issue has been before this Court before, and numerous decisions have been made on it. It is true that throughout the entire hearing of the case in the Senior Resident Magistrate's Court at Kitui there is no indication of the language in which the proceedings were conducted but that the whole evidence was recorded in the English language. To that extent we would think the provision of the law as stated above were indeed violated.

However perusing through the entire record, we find that the appellant fully participated in the proceedings, cross-examined all the witnesses and even he himself testified on oath and answered all the questions put to him by the prosecution during the said cross-examination. And on each of the days the case was mentioned or heard there was a clerk called Muthui and/or one Mwiwa who acted as the court interpreters. Moreover for sometime before the case was heard there was one Mr. Kalili who acted as an advocate for the appellant but at no time did he raise an issue over the interpretation of proceedings to the appellant.

When the appellant appealed against his conviction and sentence to the High Court the services of the firm of *M/s Matata & Company Advocates* were hired. This is the firm which drafted the petition of appeal and also conducted that appeal in that court. Neither in the petition of appeal nor in the submissions by a ***Mr. Osoro***, learned counsel for the appellant in the High Court, was the issue of language raised. In view of all these we would agree with learned Deputy Litigation Counsel that raising this issue on this second appeal is indeed an afterthought. We are of the view that the appellant followed the proceedings in the trial Magistrate's Court and this is why the issue of language did not feature in that court at all, neither was it raised in the High Court. This ground of appeal must fail.

As regards the identification of the appellant during the robbery incident, it is our view that PW1 was certain that it was the son of Musau – the appellant amongst the three (3) thugs who attacked her on the night in question. The promptness with which she named the son of Musau as one of her attackers and exonerated Simon from blame when he was arrested by police because he wore bloodstained clothes, to identify the appellant as the real culprit depicted her truthfulness in her evidence. PW1 knew the appellant before as she had hired him earlier to fence her land. The evidence of PW2 corroborated her evidence on the identity of the appellant as he too had seen him during the night of the incident.

There were thus two concurrent findings by the two courts below on the issue of identification of the appellant and this Court would find it difficult to interfere with the appellant's conviction. That ground fails too. The sentence was lawful and we are informed from the bar that it has been commuted by His Excellency the President to life imprisonment. The appeal has no merit and it is hereby dismissed.

Dated and delivered at Nairobi this 9th day of December, 2011

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

D. K. S. AGANYANYA
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR