IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 20 OF 2007

CHARLES MUTUNGA MUSYOKA ..…….….. 1ST APPELLANT

THOMAS MULI WAMBUA ……..…… 2ND APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos

(Onyancha & Makhandia, JJ) dated 15th December, 2006

JUDGMENT OF THE COURT

The appellant herein CHARLES MUTUNGA MUSYOKA, was jointly charged with THOMAS MULI WAMBUA (now deceased) in the Senior Resident Magistrate's Court at Kangundo with robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the offence as per the charge sheet were as follows:-

"1. THOMAS WAMBUA MULI 2. CHARLES MUTUNGA MUSYOKA: On the 24th day of October 2004, at Matakutha village in Matungulu Division in Machakos District within the Eastern Province, jointly with others not before court, while armed with dangerous weapons namely pangas, iron bars and rungu robbed FLORENCE NDINDA NDOLO of cash Kshs.10,000/-, 3 mobile phones, clothes and a pair of shoes all valued at 100,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said FLORENCE NDINDA NDOLO."

As can be noted from the particulars of the offence the appellant was the 2nd accused during the trial.

After a full trial before the Senior Resident Magistrate (D. Mochache, Esq.) the appellant and his co-accused were convicted and sentenced to death. Their appeals to the superior court were dismissed and hence the appellant now comes to this Court by way of second and final appeal. When this appeal came up for hearing before this Court on 17th September, 2009, Mr. J. Kaigai (Principal State Counsel) informed the Court that the appellant's co- appellant (Thomas Muli Wambua) had passed on in June, 2009 and his appeal was marked as abated under ***rule 68*** of this Court's rules.

The facts as accepted by the two courts below were that on the night of 24th October, 2004 Florence Ndinda Ndolo (PW1) was asleep in her house together with her husband Paul Ndolo Ndua (PW2) when thugs struck at about 1.00 a.m. Earlier on Paul Ndolo had gone out to check on the cause of the dogs barking consistently. He talked to his watchman, Philip Wambua Maitha (PW3) and then returned to the house, but before he could get to the sitting room he heard a commotion outside. He opened the door and suddenly eight men entered the house and proceeded to cut him on the head with a panga. He however managed to run out of the house towards the shamba whilst screaming. He unsuccessfully tried to repulse the thugs who were outside the house. In the meantime, the thugs who had entered the house proceeded to assault Florence (PW1) with pangas demanding money. She gave them a total of Kshs.6,000/- but they were not satisfied. They ransacked the house for about 20 minutes and took from there three mobile phones, clothes and two wrist watches. The neighbours responded to the screams and came to rescue the Ndolo family from the night attack.

Before attacking Ndolo, and his wife Florence, the thugs had earlier attacked and seriously injured the watchman, Maitha (PW3). Because of the serious injuries sustained by Ndolo's family and their watchman they were rushed to Kangundo Sub District Hospital and later transferred to Aga Khan Hospital, Nairobi for treatment. PW1 and PW2 were treated and discharged, but PW3 was admitted and later operated upon. On being discharged he (PW3) discovered that he was partially blind and could not hear properly.

According to the three witnesses (PW1, PW2 and PW3) they were able to recognize the appellant among the thugs as he was a neighbour and had been known to them from his childhood. The witnesses were assisted in recognizing the appellant by the solar lights outside and inside the house, the torches that the thugs had as well as the moonlight. Florence gave out the names of the appellant and the deceased (Wambua) to the police and as a result they were arrested on 9th November, 2004 and subsequently arraigned before the trial court.

When put to his defence the appellant gave a sworn statement in which he stated that he ran a small shop at Kalandini and that on the day of his arrest he had returned home from the shop when he heard a knock at the door. When he opened the door he was arrested. He claimed that he knew nothing about the crime.

The learned trial Magistrate considered the evidence placed before the court and convicted the appellant and his co-accused and sentenced them to death as mandatorily provided by the law. In convicting them the learned trial Magistrate in his judgment delivered on 12th April, 2006 said:-

"…… I find on the basis of this evidence that the accused persons have been positively identified. Further they have been properly linked to the alleged offence. PW3 told them during the ordeal that he knew them. This is corroborated by PW2 who also recognized them when he put on the security lights. I find the Prosecution case against the two accused persons proved beyond reasonable doubt and proceed to convict them of the offence of robbery with violence accordingly ……"

As already stated elsewhere in this judgment the appellant's appeal to the superior court was dismissed. In dismissing the appellant's appeal the High Court (Onyancha and Makhandia , JJ) in its judgment delivered on 15th December, 2006 stated inter alia:-

"For all the foregoing reasons, we are satisfied that the Appellants were convicted on very clear and cogent evidence of recognition. We find no merit in this Appeal."

It is the foregoing decision that provoked this appeal which came up for hearing on 18th January, 2010, when Ms Kegode appeared for the appellant, while Mr. J. Kaigai (Principal State Counsel) appeared for the State.

In her submissions, Ms. Kegode argued that the identification of the appellant was not free from the possibility of error in that there was confusion as to whether there was sufficient light. She pointed out that it took about one month before the appellant was arrested. Finally Ms. Kegode submitted that the

appellant was prejudiced during the trial as it was not indicated what language was used by the witnesses.

To counter those submissions, Mr. Kaigai stated that the evidence against the appellant was overwhelming in that this was a case of recognition as all the three witnesses (PW1, PW2 & PW3) knew the appellant well. As regards the period between the date of the offence and when the appellant was arrested, Mr. Kaigai reminded us that it was the appellant who disappeared from his home and hence it took time before he could be traced.

On the issue of language used during the trial, Mr. Kaigai submitted that the language understood by the appellant was recorded during the plea and furthermore the appellant understood the proceedings as he cross-examined the prosecution witnesses and defended himself by making a sworn statement. The complaint was therefore an afterthought. Mr. Kaigai asked us to dismiss this appeal.

Ms. Kegode raised the question of language used during the trial of the appellant and it was her submission that the appellant was prejudiced. We have perused the trial court's record but we fail to decipher any prejudice that the appellant might have suffered. The plea was taken on 19th November, 2004 and there is a clear record that the language understood by the appellant was Kikamba. An English/Kiswahili interpreter was therefore provided. The trial of the appellant commenced on 21st March, 2005 and the record shows the names of the Magistrate, the Prosecutor and the Court Clerk (Musyoki) who continued with interpretation throughout. The witnesses gave evidence either in Kiswahili or English. The appellant cross-examined them and in the end made a sworn statement in his defence. Clearly, we find no merit in this ground . It is accordingly rejected.

In our view the main issue of law for determination in this appeal is identification. This is a case in which Paul Ndolo and his wife Florence were asleep in their otherwise peaceful rural home when they were rudely and viciously attacked by a gang of robbers who subjected then to a reign of terror in which their watchman (Maitha) was not only injured but ended up being rendered partially blind. The three witnesses testified that they had recognized the appellant among the robbers. The appellant was a neighbour and one that the witnesses had known since his childhood. These witnesses testified that there was sufficient light which enabled them to recognize the appellant and his companion. For example, in her evidence in chief, Florence testified, inter alia:-

"The bedroom light was on and each of them had a torch and so I was able to see them because there was so much light."

On being cross-examined Ndolo (PW2) testified inter alia:-

"----- You were not among the three that I gave chase. When you realized that I had recognized you, you hid. My security lights are very powerful plus there was moonlight.----"

In dealing with the issue of identification the learned trial Magistrate in his judgment stated:-

"…… It is clear that the identifying witnesses had the robbers under observation for long enough. PW1 went with them to the bedroom and gave them the money. PW2 struggled with them although (sic) PW3 also had them under observation for long enough and even told them he knew some of them. There was enough security light in the compound. The observation was not impeded by anything as the robbers were not hooded. The witnesses had known the accused persons before. Infact they testified they've known them ever since they were young and this is confirmed by the accused persons. I find on the basis of this evidence that the accused persons have been positively identified ……"

The learned Judges of the superior court considered the issue of identification and in their judgment expressed themselves thus:-

"The Appellants have also complained that because the robbery was brazenly and violently executed, the three witnesses could not have been in a position to identify any of them. However, as we

have already observed, all these witnesses had ample opportunity to see the Appellants as there was sufficient light both outside and inside the house. The Appellants too had torches. Finally there was also moonlight. PW3 even had occasion to speak to the robbers. PW2 moved around with the robbers as they ransacked the house demanding for more money and as they packed some items in the house. The robbers were not at all hooded. PW2 clearly saw the two Appellants as they entered the house before they set upon and cut him on the head. We have no doubt at all that the identification of the Appellants at the scene of crime cannot be faulted in any way."

From the foregoing, it is clear that the appellant's conviction was based on evidence of recognition rather than identification. Although the robbery took place in a rural setting at night the witnesses gave the source of light. Mr. Ndolo testified that his security lights were very powerful. Hence this being a case of recognition there can be no doubt that the appellant was one of the robbers that attacked Ndolo's family on that fateful night. In ANJONONI AND OTHERS V. R [1980] Kenya L.R 59 this Court said:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

Having considered the submissions by Ms Kegode for the appellant, Mr. Kaigai for the State and the findings of the two courts below, we are satisfied that the appellant was convicted on very cogent evidence of recognition. It is, indeed, our view that the appellant's conviction was inevitable and the sentence imposed was the only sentence in the circumstances for the case. We find no merit in this appeal and order that the same be and is hereby dismissed in its entirety.

Dated and delivered at NAIROBI this 19th day of February, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.