IN THE COURT OF APPEAL OF KENYA
AT NYERI
CRIMINAL APPEAL 166 OF 2004
BETWEEN

BONIFACE KAMANDE …… 1ST APPELLANT
TONY MWITI ……..…. 2ND APPELLANT
DICKSON KINYUA …….. 3RD APPELLANT

AND

REPUBLIC …… RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Okwengu, JJ) dated 22nd May, 2004

In

H.C. Cr. A. Nos. 225, 230 & 231 of 2002)
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JUDGMENT OF THE COURT

On 15th January, 2002, a total of nine persons appeared before the then Chief Magistrate of Meru charged on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The first count stated in its particulars that on the 26th day of November, 2001 at Kaaga village in Meru Central District of Eastern Province, the named nine persons, being armed with dangerous or offensive weapons, namely rifles, simis and rungus, robbed Fredrick Kirugi of Kshs.20,000/- cash and during the robbery shot the said Fredrick Kirugi dead. The second count involved the widow of Fredrick Kirugi, Anastasia Kirugi, who was said to have been robbed of Kshs.10,000/- in cash, a bag and two bunches of keys and that during the robbery which took place at the same time and place as stated in the first count, the said robbers used actual violence upon Anastasia Kirugi. When these charges were read out to the appellant in a language which is not shown on the record, they all pleaded not guilty to the charges. The trial eventually opened before a Senior Resident Magistrate (Nyamategandah, Esq.) on the 11th April, 2002 and the record of this Magistrate is also wholly silent on the language of communication with the persons accused.

Among the persons accused, Boniface Kamande, the 1st appellant was accused No.3; Tony Mwiti, the 2nd appellant was accused No. 2 while Dickson Kinyua, the 3rd appellant was accused No. 1. Having heard evidence from a

total of six witnesses called by the prosecution, the trial Magistrate ruled , under ***section 210*** of the Criminal Procedure Code, that the prosecution had not established a prima facie case against the 4th to the 9th accused persons and the Magistrate duly acquitted them. The Magistrate then heard the sworn defence of each of the appellants and at the end of it all found them guilty as charged in the two counts and duly sentenced each one of them to death on each of the two counts. That seems to have been on the 24th October, 2002. Each appellant then appealed to the High Court at Nyeri against his conviction and sentence and by its judgment dated and delivered on the 22nd May, 2004, the High Court (Onyancha and Okwengu, JJ) apart from altering the conviction on count one to one of attempted robbery with violence under ***section 297 (2)*** of the Penal Code, dismissed the appeal of each appellant on the conviction and confirmed the sentences of death imposed on each of them though the court also directed, in effect that the sentence of death in count two would remain suspended. The appellants now appeal to the Court by way of a second and final appeal and Mr. Charles Kariuki, Advocate, who argued the appeal of each appellant before us filed for each one of them a "SUPPLEMENTARY MEMORANDUM OF APPEAL IN ADDITION TO" each appellant's grounds of appeal. But when he argued the appeals before the Court, Mr. Kariuki wholly confined himself to the four grounds contained in his supplementary memoranda of appeals each of which had the same grounds, namely:-

> ***"1. The learned Judge (sic) erred in law in failing to discharge their legal duty of analyzing and evaluating the evidence and arrive at their own conclusion in that if they did so they would have found that:-***
>
> ***(a) They (sic) identification evidence was not watertight to warrant conviction.***
>
> ***(b) They would have found that the appellants were detained for a period of about 40 days before charge contrary to section 72 (3) of the Constitution.***
>
> ***(c) They would have found that the record did not show that there was any interpretation contrary to section 77 (2) of the Constitution and section 198 (1) CPC, Cap 75;***
>
> ***(2) The learned Judge (sic) erred in law in not finding that the charges of the appellant failed were (sic) a nullity for breach (sic) of section 72 (3) of the Constitution.***
>
> ***(3) The learned Judge (sic) further erred in law in not finding that the trial was a nullity for win (sic) compliance with S. 77 (2) of the Constitution and Section 198 (1) of the CPC, Cap 75.***
>
> ***(4) The learned Judge (sic) erred in law in not finding that the trial Magistrate did not give due consideration or evaluate the appellant (sic) defence rather than reciting it."***

Perhaps we can deal with ground 4 before we deal with others. It is not quite correct to say that the superior court failed to find that the Magistrate's judgment was inadequate. The Judges found the judgment wholly inadequate and specifically said so. Listen to them on that point:-

> ***"------. We note that the trial Magistrate did not in detail analyze the evidence of PW2, the watchman and PW3, the casual worker who were present and saw what happened. In our view***

the trial Magistrate should have analyzed the two witnesses' evidence after tabulating it and should have accepted it wholly, partly or should have shown that he rejected it. We have, however, on our part, considered the evidence of PW1 in relation to the 2nd appellant. We have also considered the evidence of PW2 and PW3 in relation to all the three appellants."

That extract deals with the inadequacy of the trial Magistrate's consideration of the evidence of the three vital witnesses for the prosecution but it is clear from the whole tenor of the two Judges' judgment that they found the trial Magistrate consideration of the entire evidence wanting. They again held:-

"----. We are also satisfied that the learned trial Magistrate while he did not go into great length to caution himself, nevertheless, was conscious of the relevant issues to be considered in such circumstances. Each appellant suggested that the police identification was defective because the witnesses may have been introduced to the suspects before the parades were held. We have considered this complaint but are satisfied that there is not much evidence on record to support the complaint.

The appellants also complained that the learned trial Magistrate relied on evidence of a single witness. This complaint cannot be correct as well because all the three witnesses, PW1, PW2 and PW3 identified the appellants not only at the scene of crime but also later at the police identification parades."

The first appellate court went into all these things not only as part of their duty on a first appeal but also because that court was fully cognizant of the fact that the Magistrate's treatment of the entire evidence was not entirely satisfactory. We think the complaint in ground four must fail and we accordingly reject it.

In arguing ground one of the grounds of appeal, Mr. Kariuki went into great details pointing out what he thought the first appellate court had not considered. Were the security lights in the home of Kirugis' on when the couple arrived at home? Were the robbers armed with a pistol or did they have a big gun? Were there torches or were there no torches? Why was PW3, the casual worker in the home of the Kirugis' able to see the robbers while the robbers themselves could not see him?

The brief facts which were accepted by the two courts below were that the deceased, Fredrick Kirugi and his wife Anastasia (PW1) operated a chemist's shop at Meru. Fredrick appears to have been a doctor while Anastasia was a nurse. On the 26th November, 2001, the couple left their shop at about 6.15 p.m. Fredrick was driving their pick-up vehicle and Anastasia was seated next to him. When the couple arrived at their gate, the watchman, Samuel Mutua, opened the gate for them and upon entry into the compound a gang of robbers pounced on Samuel, got hold of him and took him to the place where Fredrick and Anastasia were just parking the vehicle. Samuel was beaten and made to lie down with his head facing one of the rear tyres. One of the robbers had a gun and was identified by Samuel and Anastasia as the 1st appellant. The other one identified as the first accused and now the 3rd appellant went to the side of Anastasia. They were all demanding money from the Kirugis. It was not clear if Kirugi gave any money to them; that was the reason why the first count was reduced to one of attempted robbery with violence. For whatever reason, the 1st appellant shot Fredrick at close range and he died that same evening on the way to hospital. When Anastasia saw her

husband thus shot she opened the door of the vehicle and ran into the house leaving behind her hand-bag in which there was Kshs.10,000/-. There was a casual worker in the compound, Dominic Murera (PW3) and according to that witness, he was hiding somewhere at the gate but within the compound. He saw all these three appellants in the compound. Two of them grabbed Samuel and took him to the vehicle. The 1st appellant had the gun and shot Fredrick. The 3rd appellant harassed Anastasia and after Fredrick had been shot and Anastasia had run into the house, the robbers left, taking with them Anastasia's bag and its contents. These witnesses, i.e. Anastasia, Samuel and Dominic were able to identify various appellants at identification parades held on 4th January, 2002, a period which the superior court computed to be thirty days after the robbery. Anastasia appears to have identified the 1st appellant. Samuel also identified the 1st appellant while Dominic identified all the three of them.

When placed on their defence, each appellant concentrated wholly on the date of his arrest and the reason for the arrest. The 1st appellant was saying he was arrested because he comes from Maragwa District and visitors to Meru, which he was, were coming there to *"spoil"* that place. The 2nd appellant appeared to have been saying that he was arrested because he was a business rival of the brother of one of the people who arrested him while the 3rd appellant contended he was arrested because one of the Administration Police officers who arrested him thought the 3rd appellant was having an affair with that officers' wife.

These were the conflicting versions which the trial Magistrate had before him and though his assessment of the evidence was found to be wanting the Magistrate stated as follows:-

> ***"On analysis, this was a (sic) committed early in the evening. The lighting and the visibility was okay (sic) and the lights from the security (sic) were used to identify the attackers.***
>
> ***I have also taken into consideration the proximity to the persons in the vehicle when the accused were demanding money which the deceased gave them before he was shot. The 2nd complainant observed well the 1st accused as he was demanding money and beating her with a stick on the left shoulder. The 2nd accused was identified well by those who were hiding by the gate and the 2nd complainant. The identification of the accused is not in dispute. The 3rd accused robbed and shot the deceased point blank (sic). The 1st accused also robbed and assaulted the 2nd complainant from the left side door of the vehicle she was in with the deceased driver. The vehicle lights were on and the accused persons, 1st, 2nd and 3rd were fully identified and were later in the identification parade, identified and touched by the witnesses. I have considered the defence by the accused persons who all indicated from their evidence that they were charged out of grudge which they had with officers' uniforms (sic) of their businesses. But I was not able to relate that defence with the charges those people are facing. I have found that the prosecution has in their evidence established beyond any doubts that the accused persons robbed the complainants on the date in question and used actual violence and in fact killed Doctor Kirugi using a gun as seen from the evidence on the postmortem report by the doctor witness."***

The remark by the Magistrate that:-

"***The identification of the three accused is not in dispute***"

is most unfortunate, but in the context of the paragraph in which it is used, we think the Magistrate meant no more than

that he found the identification of each appellant to have been established beyond any reasonable doubt. The Magistrate obviously accepted the evidence of the three eye witnesses, namely Anastasia, Samuel and Dominic, that they saw and identified each appellant at the scene and having found so, the only remaining logical conclusion for the Magistrate was to reject, as he did, the defence of each appellant.

These conclusions were basically accepted by the superior court, which, as we have seen, having found the judgment of the trial Magistrate inadequate, fully went into a reconsideration and re-evaluation of that evidence, and came to their own conclusion that the appellants were each properly identified at the scene. On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the current findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it. None of these conditions apply in these appeals. There was more than sufficient evidence upon which the two courts below came to their conclusions and we have no reason for interfering with those findings based, as they were, on the recorded evidence.

Should we interfere on the basis that the appellants' constitutional and statutory rights were violated? We start with the alleged unlawful detention of the appellants after the arrest. First the charge-sheet which we have before us and which we assume was the one the Magistrate had before him, does not show the date or dates on which each appellant was arrested. Accordingly the Magistrate could not have been in a position to know the date or dates on which each appellant was arrested unless someone had brought that issue to his attention. Nobody did at the initial stage and the date on which each appellant was arrested was only disclosed in the final evidence of each appellant. By then the trial before the Magistrate was virtually completed and even when a Mr. Nyaboga, advocate, appeared for two of the appellants earlier in the proceedings and had various witnesses who had previously testified recalled, the Advocate did not raise the alleged issue of unconstitutionally of the trial so that the trial Magistrate could decide whether or not to refer the issue to the High Court for determination. Again in the superior court during the first appeal, an advocate, Mrs. Ntarangwi appeared for the 1st appellant Boniface. No issue of the unconstitutionality was raised even in that court by Mrs. Ntarangwi. Had she raised it, the Judges would have had to deal with it, not only in respect of the 1st appellant but in respect of all of them. Taking all of these factors into consideration, we must come to the conclusion, as we now do, that on the principle laid down in the case of **JAMES GITHUI WAITHAKA & ANOTHER VS. REPUBLIC**, Cr. Appeal No. 115 of 2007 (unreported) to the effect that where an advocate fails to raise the issue of the unconstitutionality in the superior court in particular, the appellant must be taken to have waived his right to do so. We accordingly reject the complaint based on the alleged violation of the constitutional rights of the appellants.

Lastly, we deal with the issue of language. In the particular circumstances of these appeals, we are satisfied the appellants fully understood the language used in their trial and they fully participated in the trial. The considerations we

have set out in respect of the issue of the constitution must equally apply to this issue, namely, the presence of advocates at various stages of the trial and none pointing out that an appellant did not understand the language being used. Apart from that, in their first appeals to the superior court each appellant gave that court their "*written submissions*" in flowing English and even citing authorities. We have no doubt that each appellant understood the language of the court and fully participated in the trial. That is abundantly clear from their cross-examination of the relevant witnesses and from their own sworn evidence in which each of them defended himself, clearly in respect of the charges of robbery with violence in the home of the Kirugis. We reject this complaint as well. We would nevertheless direct that a copy of this judgment shall be sent directly to the trial Magistrate so as to avoid these unnecessary complaints being raised against his judgments. Accordingly these appeals wholly fail and we order that they be and are hereby dismissed.

Dated and delivered at Nyeri this 25th day of June, 2010

R.S.C. OMOLO
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JUDGE OF APPEAL

P.N. WAKI
……
JUDGE OF APPEAL

D.K.S. AGANYANYA
……..
JUDGE OF APPEAL

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

DEPUTY REGISTRAR.