IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, GITHINJI & NYAMU, JJ.A.

CRIMINAL APPEAL NO. 70 OF 2007

BETWEEN

JACKSON KYALO MUNGE ……..……..…….. APPELLANT

AND

REPUBLIC …….....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos (Ojwang' & Sitati, JJ.) dated 18th May, 2007

in

H.C.CR.A. NO. 110 OF 2002)

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JUDGMENT OF THE COURT

Following his conviction and sentence upon trial by the Senior Resident Magistrate, Machakos, for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, **Jackson Kyalo Munge**, the appellant, preferred an appeal against the conviction and sentence to the High Court of Kenya at Machakos (Ojwang' & Sitati, JJ.) and after that court heard his appeal, it dismissed it on 18th May 2007 on the basis; first that, the appellant had been positively identified by witnesses as among the persons who were driving away some head of cattle which had been stolen from Joseph Nzioka Kaumbu, the deceased, who was killed during the robbery; and secondly, that the appellant had made a Statement – under - Inquiry which was admitted by the trial court and in which the appellant admitted having planned and executed the theft of the animals. The appellant was aggrieved and hence this second and final appeal.

Several grounds of appeal have been preferred, but, when the appeal came up for hearing before us, the appellant's learned counsel Mr. Oyalo, confined his submissions to these:-

(1) The first appellate court erred in affirming the decision of the trial magistrate notwithstanding that the evidence of the two eye-witnesses – i.e. PW1 and PW2 – regarding visual identification of the people who were driving the cattle was so riddled with contradictions that it was impossible to separate truth from untruth.

(2) The Statement – under – Inquiry ought not to have been admitted in evidence since the prosecution did not prove that the same was voluntarily made.

The appellant had been charged jointly with two other accused persons on one count of robbery with violence whose particulars were as follows:-

"Jackson Kyalo Munge, Mulandi Wambua and Kamonzi Mwania: on 14th May, 2000, at Matutu Village, Nguu Location in Machakos District jointly being armed with offensive weapons namely hammers and clubs, robbed Joseph Nzioka – Kaumbu of 8 head of cattle valued at Kshs.72,000/- and, at, or immediately before, or immediately after the time of such robbery, killed the said Joseph Nzioka Kaumbu."

The offence charged is contrary to **section 296 (2)** of the Penal Code which provides for a mandatory death sentence.

The prosecution presented the following facts to the trial court. The deceased was employed by Mamuu Munge (PW3) as a herdsman. On the material day, at about 5.30 p.m., Alice Maundu (PW1) who is a neighbor to the said Mamuu Munge at Matutu Village, Nguu Location in Machakos District, was at her home when she saw several people driving away some head of cattle. PW1 at that time identified the appellant as one of those driving away the cattle. PW1 knew the appellant because he had at one time lived in the neighbourhood, at the home of Mamuu Munge. PW1 saw that her own bull was among the head of cattle which were being driven away. She separated this bull from the herd, and took it away; but the several people driving away the cattle continued with their trek. At this moment Alice Mumo Matheka (PW2) happened to be at the home of PW1. PW2, too, saw the appellant among those who were driving away the cattle. It was later found that Mamuu Munge's eight head of cattle were missing, and their current herdsman, the deceased, had been killed.

After a search, four out of the missing eight head of cattle were recovered; but the rest were never to be found. Investigations led to the arrest of three accused persons, among them the appellant.

In the course of investigations by the police the appellant made a Statement-under-Inquiry, which was admitted by the trial court after a trial-within-a trial. The content of this statement tallies very well with the quite-consistent testimonies of PW1 and PW2. In the statement, the appellant admitted to having planned and executed the theft of the animals, and indicated where he and his co-accused had hidden them. He stated that while he and others were driving away the cattle, they passed by a home where a woman who knew him inquired where the animals were being taken; and he personally ducked, by hiding in a bush, leaving his colleague to communicate with that woman in a rehearsed manner; and the woman in question then separated a bull from the herd and drove it back, claiming it to be hers.

The appellant in his defence before the trial court denied the offence charged but the trial court held that the appellant had been identified reliably and properly for both PW1 and PW2 had known him before the material day. PW2 had testified that she had seen the appellant on the material day from a distance of about 100 metres, while PW1 had seen him from a distance of about 20 metres. The two courts below held, and we think, quite correctly so, that there were no doubts at all as to the proper identification of the appellant, as both PW1 and PW2 who had lived in the same village as the appellant, and who knew him very well, had visually recognized him from relatively short distances. On this basis the appellant was convicted and his co-accused acquitted.

On our part, after analyzing the evidence on identification we are satisfied that the evidence of PW1 and PW2 as to their having recognized the appellant driving away the stolen head of cattle can safely be relied upon as valid evidence of identification.

The conviction of the appellant was based on the evidence of recognition. The appellant was positively identified by two witnesses who knew him well having seen him at about 5.30 p.m. in broad daylight in possession of the stolen cattle.

We now come to the issue of the Statement-Under-Inquiry. This, in our view, was properly admitted. This Statement was detailed enough in its content and was well corroborated by the consistent testimonies of PW1 and PW2.

Taking the evidence of recognition into account and the Statement-Under-Inquiry, we find that the appellant was convicted on very sound evidence. We may add that appellant's conviction was, indeed, inevitable as the evidence against him was watertight. He together with others jointly executed a plan to rob the deceased of cattle. They did so and in the process killed him.

For the foregoing reasons we find no merit in this appeal and we order that the same be and is hereby dismissed.

Dated and delivered at NAIROBI this 4th day of June, 2010.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR