IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, KEIWUA & VISRAM, JJA)

CRIMINAL APPEAL NO 220 OF 2008

BETWEEN

EMANUEL MUTINDA KISILA……..……APPELLANT

AND

REPUBLIC……..…….……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Omondi JJ) dated 7th November 2008

in

H.C.CR.A. NO 344 of 2006)

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JUDGMENT OF THE COURT

The appellant, Emmanuel Mutinda Kisila, was charged with robbery with violence contrary to **section 296 (2)** of the Penal Code. The appellant was also charged together with two other persons. The particulars of the charge were that on 16th day of October 2004, along Siaya Road in Kileleshwa Nairobi, within Nairobi Area, jointly and while armed with dangerous weapons namely pistols, robbed one Fakar Alam of Kshs 200,000/= cash and assorted jewelry, two mobile phones Nokia 6610 all valued at Kshs 250,000/= and at, or immediately before or immediately after the time of such robbery used personal violence to the said Fakar Alam.

The appellant was arraigned before the Chief Magistrate's Court at Kibera which convicted him of the charge of robbery with violence and sentenced to death as the law requires. One of the three accused persons was acquitted by the Chief Magistrate for lack of evidence to connect him with the commission of the offence. The appellant appealed against the said conviction and sentence to the superior court. The gist of his complaints to that court is that the trial Magistrate erred in basing the appellant's conviction on a single identifying witness and that though arrested on the spot and at the scene of crime, there was nothing incriminating found on him to connect him with the commission of the crime. This is how the Chief Magistrate at Kibera dealt with the case of this appellant:-

"Against the second accused there is evidence that he was shot by the complainant's son who was a licensed gun holder and fell inside the compound; that is where the police found him. This was in the odd hours of the night. He was in the complainant's compound. He was not a resident or an invited guest. He was shot near where a hole had been dug.

The second accused was a robber and was caught in the act. His defence that he was a victim of another robbery is not tenable. Though he was under no obligation to prove anything, the same does not explain how he came to be in the complainant's compound. The truth is that he was shot after he had robbed the complainant."

The appeal by the appellant to the superior court was opposed by the prosecution submitting that the policeman who visited the scene of the crime confirmed in evidence that a robbery had taken place and he found a person who had been shot and confirmed that he was the appellant herein. According to this policeman he found a bolt cutter near the appellant and on searching him he found a card which bore the names of Emmanuel Mutinda. The prosecution pointed out the fact that the appellant herein was neither a guest nor a resident in the complainant compound and the only conclusion to be drawn about him being found in that compound at night is because of his involvement in the commission of the offence and such evidence was strong to support the conviction.

The superior court reviewed the evidence which was tendered before the Chief Magistrate's court as follows:-

"With regard to the 2nd appellant, the evidence of PW1 is that he was able to see him because his bedroom lights were on; having been switched on by his wife who just went to the bedroom. He had opportunity to see the three men who walked into his bedroom and demanded for money, as they never concealed their identities- he was calm enough to tell his wife to give them what they asked for. Then they took him out after telling him that what they had was not a toy and recalled that it was PW2 (sic), the 2nd appellant who had a metal cutter. If this had been all the evidence that the learned trial magistrate was relying on then we would be in agreement with the 2nd appellant that that it was not safe to rely on such evidence to convict him. But as it is, that was not the only evidence linking him to the incident,- he was found within PW1's compound, lying with an injury, just next to the very fence, of course as to whether the gunshot wound had not been proved yet the evidence by PW2 who arrived at the scene, and the police officer both confirm finding 2nd appellant within PW1's compound in unexplained circumstances."

The superior court found that the learned trial magistrate considered the defence tendered by this appellant before that court and in those circumstances properly rejected it and that did not amount to shifting the burden of proof because according to the superior court, the prosecution had already proved that 2nd appellant was found inside the compound where the robbery was committed.

It is from this determination that the appellant appeals to this Court. His main ground is that the superior court failed to analyze and reevaluate the evidence on record exhaustively.

The prosecution opposed the appeal and urged us to uphold the conviction because the appellant had been found in the locus in quo, it was also submitted, that that fact alone obviated the need for further identification to be undertaken. The prosecution also observed that the defence assertion that the appellant was a victim of a robbery was an afterthought.

On our part, we have no hesitation in observing at the outset that we accept that, because the appellant was found with a gun wound at a place where a robbery had just taken place; he must have been part of the gang which robbed and injured the complainant. This is more of the position when it is remembered that PW2 properly linked the appellant with the commission of the offence in that, the big bolt cutter used to cut the complainant's house grill was found next to him at the same compound where he was lying with a gun inflicted injury.

We also think that in the circumstances, in which the appellant was found and arrested, there was no further purpose to be served by the holding of any other identification. We agree, that the appellant's defence that he was asked by police officers to accompany him to the scene of crime, is an afterthought and was rightly disbelieved and rejected by the two courts bellow.

The prosecution also objected to the fact that the alleged breach of the appellant's constitutional right under **section 77 (1)** of the repealed Constitution, of denial of an opportunity to cross examine his co-accused, ought to have been raised earlier because this is being raised before this Court for the first time. We have perused the record of proceedings before the trial court and have not been able to see any application to that court that the appellant desired to cross examine any of the other co-accused.

We have also perused the record of proceedings before the superior court and have not found any complaint lodged by the appellant that his right to a fair trial under **section 77 (1)** of the repealed Constitution was violated in that the trial court denied him the opportunity to cross examine his co-accused. That being the position, we cannot help thinking that, for such a right under **section 77 (1)** of the said Constitution to crystallize, an accused person must let his intention be known at the earliest possible opportunity. That to our minds is the only available means of testing if a breach of such a right was committed or not. Having not complied with the condition precedent, we do not see any merit whatsoever in this complaint.

We accordingly dismiss the appeal as it lacks merit.

Dated and delivered at Nairobi this 12th day of November 2010.

P. K. TUNOI

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

ALNASHIR VISRAM

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR