IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & AGANYANYA JJ.A)

CRIMINAL APPEAL NO. 280 OF 2005

BETWEEN

PETER KIHIA MWANIKI .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.)

dated 18th October

in
H.C.CR.A. NO. 831 OF 2002)
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JUDGMENT OF THE COURT

Peter Kihia Mwaniki, the appellant, has come before us in this second and final appeal, to challenge his conviction and sentence for the main count of robbery with violence contrary to **section 296(2)** of the Penal Code. As no finding was made on the alternative count of handling stolen property contrary **to section 322(2)** of the Penal this appeal does not touch on it.

Four main grounds have been raised in this appeal, and those are:

(1) Part of the appellant's case was prosecuted by an incompetent prosecutor contrary to section 85 of the Criminal Procedure Code (CPC).

(2) The appellant was not presented to the court after his arrest within the time stipulated under section 72(3) (b) of the relevant Constitution as at the date of his arrest.

(3) The appellant's defence was not adequately considered.

(4) An essential exhibit was not tendered in evidence.

On the morning of 24th August 2001, four men raided the residence of **Hansa Bakrania** (*Hansa*) at New Muthaiga, held Hansa, her mother, a guard and houseboy, hostage, after which they ransacked the house and eventually made away with several items, among them, a leather jacket, a motor vehicle Reg.

No. KAH 339 Q, a Toyota Corolla, Jewellery, a Minolta Camera and money in cash. The appellant was then employed in that home as a gardener. Hansa testified, and on that she was supported by **John Irungu Wachira** (*Wachira*), then working there as a houseboy, that the appellant aided the robbers and eventually escaped with them. He later surrendered to the police and was then charged jointly with another person whose appeal is not before us with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and both faced an alternative count each of handling stolen property contrary to **section 322 (2)** of the Penal Code. The appellant's co-accused was acquitted at the court of first instance for lack of sufficient evidence. The appellant's first appeal to the superior court was dismissed and hence the present appeal.

The appellant's defence at his trial which is also his case before us is that he was one of the victims of the robbery. He was kidnapped by the robbers, was forced to wear a leather jacket belonging to his employer, was bundled into Hansa's car, which the robbers used to escape, and was later locked up in a certain room at a place he cannot possibly identify, where he was detained for several days. Later he was released and abandoned by the road side. Thereafter he surrendered to his employer who in turn handed him over to the police, who kept him in police custody for longer than 14 days before he was presented to the court for plea. He has raised this as one of the grounds of appeal, but we will revert to this aspect of the matter later on in this judgment.

The appellant was represented before us by Mrs. B.L. Rashid. The main ground she raised was that the appellant's case was partly prosecuted by a police corporal, one Cpl. Osiemo. When the appellant's trial commenced, the prosecutor was Inspector Oduor. He presented evidence of 3 witnesses before Cpl. Osiemo took over. The latter presented the evidence of only one witness, No. 41778 Cpl. David Makau, one of the officers who investigated the case. Thereafter Inspector Mureithi, took over the conduct of the case for the prosecution. He handled the case up to the end. Mrs. Rashid submitted that Cpl. Osiemo's intervention in the conduct of the case for the prosecution invalidated the entire proceedings. Nothing can be done to save the case she said. In her view the defect is fundamental and rendered the trial a nullity.

Mrs. Murungi, the Deputy Prosecuting Counsel, did not think the defect was such as will render the entire trial a nullity. It was her view that the evidence of the fourth prosecution witness may be expunged from the record without in any way affecting what she considers to be a clear case against the appellant.
Section 85 (2) CPC, as material, provided:
"85(2) The Attorney General, by writing under his hand may appoint any advocate of the High Court or a person employed in the public service, *not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case."(*emphasis ours)

In **Elirema & Another v. Republic** [2003] KLR 537 this Court held that where proceedings in a criminal trial are conducted by a person below the rank of an Assistant Inspector of Police, such proceedings are a nullity. That Section has now been amended from 15th October 2007 by L.N. No. 7 which deleted the itallicised words. In the matter before us Cpl. Osiemo, who by virtue of the aforesaid provision was not qualified to prosecute the appellant's case, did not conduct the whole trial. He only participated in leading the evidence of one prosecution witness. What would be the legal effect of his aforesaid action? The invalidity of what he did may only properly affect the proceedings relating to the time he prosecuted. In our view the invalidity should not extend to what was done according to law. We think that, as submitted by Mrs. Murungi, the evidence of the fourth prosecution witness can be expunged from the record without doing violence to the rest of the proceedings. The question which then follows would be whether once that evidence is expunged, the remaining evidence is sufficient to sustain the appellant's conviction. We posed that question to Mrs. Rashid, but her view was that the illegality committed by Cpl. Osiemo, adulterated the entire proceedings. With due respect to her she has taken a very dim view of the matter and we think that her view is convoluted and against the interests of justice. The interests of justice dictate that we expunge the evidence of the fourth prosecution witness, which we hereby do, and proceed to consider whether the remaining evidence is sufficient to sustain the appellant's conviction.

The main issue is whether the appellant was a participant in the crime or he was merely a victim of it? To answer this question it is important to examine the evidence of eye witnesses closely to appreciate

the role of the appellant in the matter. The key witnesses in that regard are Hansa and Wachira. They were present at the time of the robbery. Hansa testified that the robbers entered her residence accompanied by the guard and the gardener. The guard, the houseboy, and herself were ordered to lie down. Although she was at some point blindfolded, she was able to see the appellant leading 3 of the robbers to various rooms. This is what she said under cross-examination:

"I saw you taking them round. I saw you taking them upstairs. You were the one taking them round. It is not true that you were also told to lie down with us… You were not ordered to lie down…
You were acting together with them and you left with them. It is not true that they ordered you to go with them… The guard informed us that he opened the gate for you because you had said that you want to take out the garbage. This was suspicious because this was a day before the date when he was supposed to take out the garbage."

Wachira was the other eye witness. He was the houseboy. He testified against the appellant, and this is what he said, in pertinent part:
"While I was getting more water from the tap at the verandah, I saw Peter going into the house with an iron bar. It had a round shape. He had it in his hand. Behind him, there were some people… I saw Peter taking the keys to the rooms upstairs which had been kept on the staircase leading upstairs. The staircase is very close to the bathroom where we were being forced to go into. I therefore saw Peter taking the keys clearly. … As the other two tied up our hands, Peter and two others went upstairs… When they were leaving I saw Peter wearing a leather jacket which he was not wearing when they went upstairs. When they came from upstairs, Peter (1st accused) who had changed his clothes used the pair of trousers which he had been wearing before to tie me up."

Later, under cross-examination by the appellant, the witness, as material, stated thus:
"when they left, he took away all his personal belongings and clothes. Mine were left behind. I do not know when he packed his items. He had not told me that he had planned to leave. Peter came to the place where I was working in Industrial Area sometime in September 2001."

Further still the witness said:

"You left with the thugs in the same car. You also left with all your clothes. It is not possible that the thugs were able to pick your clothes from our servant quarters, leaving behind mine. That is why they were able to pick only your items leaving behind mine."

The excerpts of the two witnesses' evidence controvert the story the appellant gave that he was forced to accompany the robbers as they escaped and was later locked up in a room. His surrender must have been motivated by two factors. There were two relatives, a sister and a brother, who were working in the office of Hansa's brother one Vallabh Bakrania, who must have pressurized him to surrender, and secondly, the police had put up an advertisement showing he was a wanted person by the police. The circumstances suggest that the appellant was not kidnapped but he was a participant in the crime. He pretended to take the garbage out of the compound on a day when garbage was not being collected as a ruse to make the guard open the gate. It was when the guard opened the gate that the robbers entered the compound. It is also instructive that dogs which were normally left loose inside the compound were locked up in the kennel, perhaps to obviate them barking at the sight of strangers. Besides the appellant was arrested with a leather jacket which witnesses said he had escaped with at the time of the robbery. His explanation for having the jacket was that the robbers forced him to put it on. We earlier discussed this issue and we came to the conclusion that the appellant was a voluntary participant in the crime. It is true that when he decided to surrender he contacted the police who referred him to Vallabh Bakrania, who had been his employer. Vallabh Bakrania arrested the appellant and handed him over to the police. His counsel submitted before us that the surrender indicated that indeed the appellant had been kidnapped and detained somewhere and at the earliest opportunity he surrendered to the police. The appellant's conduct, we think, was a mere ruse to hoodwink the complainants and the police, but Hansa and Wachira were categorical that he participated in the crime. We believe as did both the courts below that the appellant committed the offence for which he stands convicted. There is no merit in this ground of appeal.

The other ground raised in the appeal concerns the alleged failure by both courts below to consider the appellant's defence adequately. The trial magistrate in rejecting the appellant's defence considered the circumstances under which Hansa and Wachira observed the movements of the appellant during the robbery. She reviewed the evidence and found as a fact that the appellant was seen, among other things, taking the keys of the various rooms upstairs. She considered the evidence given that the appellant changed his clothes and put on clothes he picked from the house. The witnesses saw him leave the house with the robbers, while wearing a stolen leather jacket. The magistrate then concluded that:
"There is overwhelming evidence that he took part in the robbery, and he was identified properly and positively, without the possibility of error. The incident took place during the day and it could not have been difficult for the witnesses to see or identify him. His defence that he was kidnapped is not true and the court is satisfied that he was acting together with the other robbers and he left with the leather jacket which was later recovered from him."

The superior court on first appeal considered the same pieces of evidence as aforesaid and came to the same conclusion as the trial Judge. Clearly the two courts below considered in detail the defence the appellant put forward, and quite properly rejected it. That ground raised regarding the appellant's defence has no merit.

Regarding the alleged failure to produce certain essential exhibits, we say this. The exhibits complained about are Hansa's car which the robbers escaped in and which was recovered abandoned about 4 kilometres away from the *locus in quo*, and the appellant's clothes, which he allegedly left behind after he put on the clothes he allegedly stole from his employer. It would have been proper to avail those exhibits for the court's observation. However, a failure to produce the same was not fatal to the prosecution case. There were other exhibits which were more incriminating which the prosecution produced. We do not think there was a failure of justice arising from the omission to tender those exhibits in court.

The remaining ground of appeal concerns delay in presenting the appellant to the trial court after his arrest. **Section 72(3)(b)** of the old Constitution stipulates that a person arrested for a capital offence should be presented to the court as soon as is reasonably practicable. There is a time frame of 14 days, beyond which the prosecution may be required to offer proof to show that the delay beyond that period was necessary for the conclusion of investigations and the delay was not unreasonable. The appellant was arrested on 1st September 2001 and he was presented before the Chief Magistrates Court at Nairobi on 11th October, 2001. Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter. The 14 days duration under **section 72(3)(b)** is not absolute. Circumstances may exist which militate against presenting a suspect before court within that period. The framers of the Constitution must have had that in mind when they provided that the duty of explaining the delay lay with the person who alleges that there was no delay in bringing the accused to court. By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit.

We have said enough to show that the appellant's appeal has no merit. Accordingly it is dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 10th day of December 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR