



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI

Criminal Appeal 273 of 2007

JOSEPH MWAURA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

*dated 14<sup>th</sup> October, 2006*

in

**H.C.CR.A. NO. 1350 OF 2002)**

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**JUDGMENT OF THE COURT**

This is the second and final appeal by *Joseph Mwaura* (“*the appellant*”) against conviction for the offence of Robbery with Violence contrary to **Section 296(2)** of the Penal Code. It had been alleged in the charge sheet that on the 30<sup>th</sup> day of November, 2001 at Ahmediya Muslim Medical Clinic along Desai Road in Nairobi, jointly with others not before the court while armed with a pistol, he robbed **Dr. Laeeq Ahmed Absari** cash Shs.27,000, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Dr. Laeeq Ahmed Ansari**. He was tried and convicted before Kibera Principal Magistrate, Ms. Mwangi and his conviction was upheld by superior court (Lesiit & Makhandia, JJ) on appeal. As the law requires he was sentenced to death upon his conviction. He now comes before us to challenge the conviction on issues of law.

The appellant had drawn up a Memorandum of Appeal in person but it was abandoned at the hearing of the appeal, when learned counsel for him Mr. Kanyangi informed us that he would rely on a “Supplementary Ground of Appeal” filed by him upon his appointment as the appellant’s counsel. The supplementary grounds are six, but Mr. Kanyangi argued them as three. They may be summarized as:-

“1. THAT the 1<sup>st</sup> appellate court judges erred in law and fact in failing to consider that that the Appellant was in police custody for more than 14 days before being taken to court thus violating his constitutional rights under section 72(3) (b) of the Constitution.

2. THAT the 1<sup>st</sup> appellate court judges erred in law and fact in failing to consider that the language used

*in court was not understood in that the trial magistrate failed to indicate on record the language used during plea and trial, in violation of section 77(2) of the Constitution.*

3. *THAT the 1<sup>st</sup> appellate court judges erred in law and fact in failing to reconsider and re-evaluate evidence as a whole, and/or failed to give inter alia points for determination of the decision thereon and reason for the decision made in violation of section 169(1) CPC.”*

Simply put, he challenges the constitutionality of the appellant’s trial; the language used at the trial; and the re-evaluation of the evidence or lack of it by the superior court. We shall revert to those issues presently.

The facts of the case as established by the two courts below were fairly straightforward. **Dr. Laeeq Ahmed Ansari** (PW1) was the doctor in charge of the Ahmadiya Muslim Clinic in Desai road Nairobi. His residential house also adjoins the Clinic. Working with him in the Clinic was a receptionist nurse, **Winfred Lapando** (PW2). At the perimeter gate of the fenced compound of the Clinic was **John Mboya Omollo** (PW3), a security guard. There were also other workers.

At about 3.45 p.m. on 30<sup>th</sup> November, 2001, three men walked into the clinic and found nurse Lapando at the reception. One of them was a patient who had been treated there two weeks earlier on 17<sup>th</sup> November, 2001. He produced a card and the nurse retrieved his treatment file. His name was **Joseph Mwaura**. She then led him to the doctor as the other two men settled down at the reception. She went back to the reception. As Dr. Ansari was asking the patient what his complaint was, the patient whipped out a pistol and demanded money. The doctor gave him his mobile phone and the money he had. He was ordered to call in the nurse and the lab technician and he did so. One of the two men left at the reception also walked in armed with a gun. The nurse and lab technician were ordered to lie down as the patient and the second man led Dr. Ansari to his residence adjoining the clinic where they took another Shs.27,000/= and his car keys. In the meantime, the third man who had accompanied the patient went to the gate and told the two guards that the doctor wanted them inside the clinic. As they entered the clinic, the man whipped out a pistol and on seeing this Omollo quickly disappeared through another door and managed to make it outside. He locked the main gate and started screaming for help. Member of the public streamed in as the three intruders tried to escape from the clinic fenced compound. Omollo watched as the three climbed on a water tank to jump over the wall. Two of them successfully jumped over the wall and made good their escape, but the third one broke his leg on landing on the other side of the wall. Omollo and some members of the public apprehended him and returned him to the clinic. Nurse Lapando and Dr. Ansari identified the man as the patient who turned into a robber. The man was the appellant. He was subjected to mob injustice before he was rescued by Police officers who were on patrol in the area, among them **Pc. Charles Gachanja** (PW5), who rearrested him. The investigating officer, **Pc. Geoffrey Ngaia** (PW4) arranged for the appellant to receive treatment at Kenyatta National Hospital before he was charged with the offence of robbery and taken to court.

In his defence, the appellant disowned the name “Joseph Mwaura” and asserted that his name was “David Gachoka Ngugi”. On the day in question he was heading to Stima Plaza in Ngara where he was going to pay electricity bills for his residence in Zimmerman. As he passed by Desai road, he was surrounded by some street boys who robbed him of his money, identity card, driving licence, shoes, wallets, watch and the electricity bill. As he tried to struggle with the attackers he was thrown into a trench and broke his leg. The street boys ran away. Some two people then came along and as he tried to tell them what happened to him two policemen came and asked for identification. The two men produced their identity cards but the appellant had none since he had just been robbed. His explanation fell on deaf ears and he was carried into the clinic where an Asian doctor and other hospital workers were. He was then put in a police vehicle and was beaten unconscious by the police. He later found himself in Kenyatta National Hospital where he stayed for one month and was later taken to court.

Both courts below believed fully the evidence of security guard Omollo and nurse Lapando as to the identification of the appellant, at the scene of the robbery. The superior court stated in that regard:-

**“We do find that PW3 staged an active role in making it difficult for the robbers to escape and in**

identifying them. PW3 not only saw the three jump over the fence but actually went to the spot on the outside where they had landed to find the appellant crying with a broken leg. We find that the evidence of identification by PW3 was watertight. He was a quick thinker. He locked the gates then watched the three robbers looking in vain for an escape route. PW3's state of mind was undisturbed and unperturbed. It was in broad daylight. He followed the robbers into the neighbouring plot immediately they jumped over. We find that PW3 did not lose sight of the appellant from the moment he stepped out in the compound to the time he landed on the other side. Even if there was a moment he lost sight due to moving out of the clinic to the neighbouring compound, that moment was not significant as to create a doubt as to PW5's ability to identify the appellant. Bearing in mind PW5 was seeing the appellant a second time in broad day light, we find that the identification was correct, positive and free from any error or mistake.

The evidence of identification by PW2 served as a corroboration of PW5's evidence. PW2 had served the appellant two weeks before. She noticed him the moment he walked into the clinic, therefore PW2 had recognized the appellant when he walked into the reception on the day in question. The evidence of identification by PW2 was also correct and free from error or mistake."

With those findings the appellant's defence fell by the wayside and was disbelieved as "implausible and unreasonable", hence his conviction.

Turning now to the first ground of appeal, Mr. Kanyangi submitted that the appellant was kept in custody by the police from 30<sup>th</sup> November, 2001 and was not taken to court until 18<sup>th</sup> January, 2002. That was about 49 days and it follows that he was unlawfully detained for 35 days without any explanation. The burden of proving that he was lawfully detained was on the police but none was supplied and therefore the trial was a nullity. These submissions were in line with this Court's decision in Albanus Mwasia Mutua v R. Criminal Appeal NO. 120/04 (ur) and Gerald Macharia Githuku v R. [2007] eKLR, which Mr. Kanyangi relied on.

It is factually correct, as submitted by Mr. Kanyangi, that the appellant was arrested on 30<sup>th</sup> November, 2001 and was not taken to court until 18<sup>th</sup> January, 2002. The law is also clear as cited in *section 72(3) (b)* of the Constitution that, the burden of proving that the person arrested or detained has been brought before a court as soon as practicable shall rest upon any person alleging that the provisions of the law have been complied with. The issue was neither raised before the trial court nor the first appellate court but we are in no doubt that it would have been dismissed if it was. The record before us explains itself on the issue. We allude to the evidence tendered by the prosecution through the arresting officer *Pc. Charles Gachanja* (PW5), thus:

"We proceeded there and found somebody being subjected to mob justice. We rescued him from the mob and the duty officer arrived and we placed him in a vehicle belonging to the clinic. He was rushed to Kenyatta National Hospital. He is the accused now before the court.".....

"I found out where he was arrested by the mob. From the clinic is a road reserve and are street people. They are the ones who were subjecting him to mob justice. He was not in a position to talk. He was in a very serious condition. He wore clothes with no pockets. I did not get any document on him. We went trying to look for the other two. He was being taken to the hospital from the scene. He had multiple injuries. He had a wound on the head. One leg was broken from the ankle."

The fact that the appellant was taken to hospital was confirmed by the investigating officer *Pc. Geoffrey Ngaia* (PW4). He stated both in evidence in-chief and in cross-examination:

"On 30<sup>th</sup> November, 2001 I was at the station when Cpl. Mutiso and the OCS, and Parklands Officers on patrol brought one suspect, one Joseph Mwaura to the station with one leg broken ..... The statements were recorded and the suspect was taken to Kenyatta National Hospital for treatment..... The accused was taken to the hospital on the same day. Other officers took the accused to the hospital."

The prosecution was saying that the appellant could not have been taken to court on account of his medical condition. That the appellant was undergoing treatment at Kenyatta National Hospital was indeed confirmed by none other than the appellant himself who testified on oath at his trial. He stated:-

**“They beat me badly as we headed for Parklands. I lost consciousness, and I found myself at Kenyatta National Hospital at around 12 midnight..... At Kenyatta National Hospital I checked the file beside me and was amazed to miss (sic) my file. It had a name of Joseph Mwaura. That is not my name..... I was there for 1 month. I was taken on 18<sup>th</sup> January, 2002 to Parklands Police Station. After one day I tried to explain to the officer that was not my name and he said I could say it in court. On 19<sup>th</sup> I was brought to court and charged using a name that is not mine with an offence I never knew of.”**

We are satisfied on the totality of that evidence that there was a reasonable explanation for the delay in taking the appellant to court and we find no breach of his constitutional rights as claimed. The first ground of appeal fails.

On the second ground of appeal, Mr. Kanyangi submitted that the appellant appeared in court 19 times for his trial, including mentions, but on those occasions, the language used was not recorded. It was only recorded once at the commencement of the trial on 18<sup>th</sup> January, 2002 when the appellant’s plea was taken. In counsel’s submission, the language used in court must be recorded at every resumed hearing of the trial, and on mention dates, failing which there is a breach of **section 198(1)** of the Criminal Procedure Code and consequently a breach of the appellant’s rights under **section 77(2)** of the Constitution.

Once again Mr. Kanyangi is right about the seriousness with which this Court has taken in the protection of accused persons who must understand the charges made against them and the evidence adduced at the trial. The numerous cases which have construed **section 198** of the Criminal Procedure Code and **section 77** of the Constitution need not be rehearsed here. Suffice it to cite **Degow Dagane Nunow v Republic Cr. Appeal No. 233/05 (unreported)** where this Court stated in part:

**“Of course there was right from the beginning of the trial an interpreter present in court, that is clearly shown in the record of the magistrate. What is not shown throughout the record is the language which the appellant or the witnesses addressed the magistrate.....**

**On this aspect of the matter, the burden is on the trial court to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are interpreted to him. As we have repeatedly pointed out, those are not mere procedural technicalities. There is, first section 198 of the Criminal Procedure Code and that section provides:-**

**“198 (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.**

**(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English.”**

.....

**“The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of the trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak.”**

In the appeal before us, the appellant chose to speak the Swahili language when he first appeared in court for plea. There was an interpreter made available to him at the time and at every resumed hearing of the case thereafter. He was represented by counsel throughout and no issue of language was raised either at the trial or before the first appellate court. We think the same position, save for representation by counsel, obtained in **Francis Kimani Muthoko & Anor. v. Republic, Cr. Appeal No. 331/06 (ur)** where the

language chosen by the accused was recorded at the beginning of the trial when the plea was taken and interpreters were availed but the complaint was raised that the language was not shown in subsequent hearing sessions. This Court in the end stated:

**“We are not persuaded that the complaint about language and interpretation has any merits. At the commencement of the entire proceedings when the plea was taken, it was clearly recorded that interpretation was English/Kiswahili. There was no suggestion at that time that the two appellants could not communicate in Kiswahili. They conducted their defence in person and throughout the record in the subordinate court; there was no suggestion that interpretation from English into Kiswahili and vice versa was a problem. Indeed even before the superior court, that complaint was never raised. Much as the appellants were laymen and may not have known their rights until they had a counsel in this Court, nonetheless the record shows that the language of the subordinate court was clearly spelt out and interpretation provide through the various Court Clerks. Record also shows that the appellants had no difficulties in conducting their defence in Kiswahili and never complained of lack of an interpreter. We dismiss that complaint.”**

And so it is here. The language chosen by the appellant and therefore the language used at the trial was recorded and in our judgment that was in compliance with **section 77 (2) (b)** of the Constitution. That ground of appeal also fails.

The final ground of appeal is on re-evaluation of the evidence by the first appellate court. It was the submission of Mr. Kanyangi that the exercise was either lacking or insufficient. In his view, if it was satisfactory the court would have resolved the issue of the appellant’s name and found that he was not the person referred to by the witnesses who purported to identify him. The identification of the appellant was on the whole shaky.

An omission by the first appellate court to discharge its duty to analyse and evaluate the evidence afresh, is of course, an issue of law- see **Ngui v Republic [1984] KLR 729**. The issue is whether, in this case, there was such omission, or put another way, what amounts to re-evaluation? There is no yardstick for the manner in which the first appellate court ought to carry out the duty of re-evaluation or fresh scrutiny of evidence. We take it from the Supreme Court of Uganda in a persuasive authority, **Uganda Breweries Ltd v Uganda Railways Corporation [2002] EA 634** at page 641:-

**“There is no set format to which a revaluation of evidence by a first appellate Court should conform. The extend and manner in which evaluation may be done depends on the circumstances of each case and the style used by the appellate Court. In this regard, I shall refer to what this Court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 [SCU] Tsekooko JSC said at 11:**

*“I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence but that is really a question of style. There is really no set format to which re-evaluation should conform. A first Appellate Court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).”*

**In Odongo and another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki JSC (as he then was) said:**

*“While the length of the analysis may be indicative of a comprehensive evaluation of evidence nevertheless the test of adequacy remains a question of substance.”*

**I agree with the views expressed by the learned justices of this court in the two cases immediately referred to above.”**

Also see **Simon Kariuki Muriithi V Republic [2006] eKLR**.

The superior court was alive to its duty of re-evaluation of the evidence and stated so expressly reminding itself of the principles laid down in **Okeno v Republic [1972] EA 32**. It was a short trial and the court considered the evidence tendered by all the six witnesses including the appellant. As regards the alleged failure to resolve the issue of the appellant's names, it is our view that once the two courts below believed the evidence of nurse Lapando that the person registered in the clinic as Joseph Mwaura was the person who visited the clinic for the second time and turned robber, there was a clear displacement of the appellant's assertion that he was not that person, hence the rejection of his defence. We have no reason to depart from that assignment. The appellant may or may not be "David Gachoka Ngugi" as he asserted, but he was physically one and the same person as "Joseph Mwaura", the appellant before us. We find no basis in that complaint either and the ground of appeal fails.

On the whole we agree with learned senior state counsel Mr. Kivihya that this appeal lacks merit and is for dismissal. We order that it be and is hereby dismissed.

*Dated and delivered at Nairobi this 29<sup>th</sup> day of May, 2009.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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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**