



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAKURU**

**Criminal Appeal 60 of 2005**

**ROBERT SIMIYU KHAEMBA .....APELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Nakuru (Kimaru & Muga Apondi, JJ) dated 3/12/04***

**In**

**H.C.CR.A. NO. 173 OF 2003)**

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**JUDGMENT OF THE COURT**

The appellant herein *ROBERT SIMIYU KHAEMBA* was charged jointly with *ROBERT SALLY KISACHI* with Robbery with Violence, contrary to *Section 296(2)* of the Penal Code and each sentenced to death. The appellant's first appeal to the High Court was dismissed on 3<sup>rd</sup> December, 2004, and hence this appeal. The appeal of *Kisachi* was allowed and he was set free.

This being a second appeal, only matters of law call for consideration.

The main issues in this appeal are identification and the doctrine of recent possession of stolen goods, as well as the complaint about language of the proceedings at the trial.

The facts on which the appellant was convicted by the trial magistrate were that the complainant, *Arthur Ng'ang'a Peterson, (PW1)*, a taxi operator in Nakuru went to work at Millennium Hotel at 11 p.m. on the night of 30<sup>th</sup> July, 1998. Two people hired his taxi at midnight, and asked to be driven to Agip. The hiring charges were agreed upon and the two boarded the taxi, a Toyota Corolla, NO. KXU 404.

On reaching their destination, one of the two men placed a wire around the complainant's neck. They strangled him and robbed him of cash and identification card. They then tied his hands and threw him outside his taxi and drove off in it.

The complainant walked to the road and reported to the police. He told the police that he could

identify the people who attacked him. This was after midnight.

The following morning he went to the police station and recorded a statement. He re-called that as the two people tied him, one sat at the passenger seat, and the other sat at the back seat behind him.

The complainant had not known the two people before. He later learnt after three weeks that his vehicle was found in Bungoma with the appellant trying to sell it. He travelled to Bungoma where he identified the vehicle. It was photographed and in the magistrate's court, he identified the photographs of the vehicle. Two people had been arrested in Bungoma and he identified the appellant as one of the people who hired his vehicle to Agip, on the night of 30<sup>th</sup> July, 1998.

Further evidence was adduced by *Benard Wafula Kwobe (Benard)* a tinsmith at Kaptembwa Market in Nakuru. He re-called the 2<sup>nd</sup> August, 1999 at about 4 p.m., when the appellant *Robert Simiyu Khaemba*, and one *Robert Salik Haji*, the original second accused, came to his workshop and asked to borrow Ksh.3,000/= from him. He had known the two before as they used to repair bicycles in his workshop.

*Benard* did not have the full amount of Ksh.3,000/=, but gave them Kshs.2,000/=, which they were to refund later. He did not see them again until 14<sup>th</sup> August, 1999, when one of them *Robert Saji* came back to the workshop. *Benard* asked for the refund of his money, but was told to wait for *Simiyu*, the appellant who was in Bungoma, trying to sell land to raise money for the refund.

The appellant came to the workshop on 16/8/99 but did not have the money to refund, and instead asked *Benard* to accompany him to Bungoma, where he was trying to sell land to raise money.

The two travelled to Bungoma and on arrival at Brigadiah Centre, they found motor vehicle registration number KXU 404 in a workshop. The appellant went into the vehicle, and at that point, the police arrested both *Benard* and the appellant, but *Benard* was later released.

*AP Inspector Isaac Shitiemi, (PW3)*, acting on information received from the Chief's Office at Manyanja about the two men who were trying to sell a motor vehicle which had mechanical problems, proceeded to Manyanja and was shown the two men. He was also shown one Mohamed who was said to be the buyer of the vehicle. The three men boarded a matatu and left for Brigadiah where the vehicle was said to be, and he followed them, and arrested all three. The appellant was one of those arrested as he was showing the vehicle to Mohamed who was to buy it. He said the vehicle belonged to his brother in Nakuru who had sent him to sell it. He was arrested and brought back to Nakuru from where the vehicle was said to have been stolen. *Inspector Birikati Chesire, (PW4)*, was in the team of the Police Officers who arrested the appellant and recovered the motor vehicle.

The appellant denied the offence at the trial and said that on 16<sup>th</sup> August, 1999, he went to his place of work at Kaptembwa in Nakuru, when *Benard* came to ask for the refund of his money as he wanted to go home. That the two went to Manyanja Trading Centre in Bungoma and whilst he was negotiating with one *Yakub Mohammed* to lease his land, he was arrested. He denied being arrested with the motor vehicle belonging to PW1.

In urging the appellant's appeal, *Mr. Ombati* submitted that the superior court rightly held that the appellant was not identified during the robbery, but wrongly held that he was found with the motor vehicle. He noted that the owner of the workshop was not called to give evidence at the trial court, yet he was the one in actual possession of the stolen motor vehicle and not the appellant, who denied possession of the vehicle in his defence. He urged the court not to believe the evidence of *Benard* as he was initially arrested with the appellant.

In his further submissions, *Mr. Ombati* argued that the appellant's plea was taken in a language he did not understand. He conceded, however, that this point was not raised both in the trial court and the first appellate court. He also raised the issue of the appellant's constitutional rights having been violated as he

was remanded for a period longer than fourteen days prescribed by law, before being taken to court. On these grounds he urged the court to allow the appeal.

*Mr. Gumo*, the Provincial State Counsel, supported both the conviction and sentence of the appellant. He submitted that the appellant was found in possession of the stolen vehicle, and he failed to give a satisfactory explanation as to how he came to have it.

On the issue of the appellant's fundamental rights having been violated, *Mr. Gumo* submitted that this Court cannot resolve the issue at this stage, the same not having been raised both in the trial court and the superior court.

He submitted further that though the language of the court might not have been indicated on the record, he was certain that the appellant did understand the proceedings. That is why in his view, the appellant did not raise the issue in the superior court. He urged the court to disallow the appeal in its entirety as the conviction was safe in the circumstances.

In convicting the appellant, the then Chief Magistrate *Gladys Ndenda* dealt with the issue of identification and found that the complainant identified accused 1 (*Robert Simiyu Khaemba*). She also found that that evidence, "was corroborated by the fact that the said accused was later found in Bungoma trying to sell the motor vehicle."

The superior court re-evaluated the evidence and found that:-

*"the appellant was identified by the complainant as being among those who robbed him. The 2<sup>nd</sup> appellant (Robert Simiyu Khaemba) was found in recent possession of the stolen motor vehicle which was robbed from the complainant. It is our finding that the evidence of PW1, PW2, PW3 and PW5 taken in totality sufficiently connects the 2<sup>nd</sup> appellant to the robbery."*

The superior court rightly warned itself of the dangers of relying on the testimony of a single witness on identification, and the difficult circumstances under which the said identification was made as the incident took place at night. In this respect, the superior court applied the principles laid down in the case of *MAITANYI V. REPUBLIC* [1986] KLR 198.

We are satisfied that both the trial court and the superior court came to the correct finding as far as the identification of the appellant was concerned. To this extent, we find *Mr. Ombati's* submission that the superior court held that the appellant was not identified during the robbery to be incorrect.

On the submission that the plea was taken in a language the appellant did not understand, we perused the original handwritten record of the trial magistrate and found that the proceedings were conducted in both English and Swahili languages. The interpretation to the Swahili language could only have been for the benefit of the appellant.

In the case of *KIYATO V REPUBLIC*, [1986] KLR 419, this Court held,

*"It is a fundamental right, under the Constitution of Kenya section 77(2) that the accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through whom he can put questions to the witnesses, make his statutory statement or give his evidence. Moreover, the Criminal Procedure Code (Cap 75 section 1981) also requires that evidence should be interpreted to an accused person in a language that he understands"*.

Other decisions in line with this one include *SWAHIBU SIMBAUNI SIMIYU & ANOTHER VS. REPUBLIC*, C.A. NO. 243 OF 2005 (unreported).

The court is satisfied from the trial magistrate's record that the appellant understood the language in which the plea was taken and the trial was subsequently conducted.

As regards the complaint that the appellant was detained in police custody for longer than 14 days before being taken to court, we say this:-

Section 72 (3) (b) of the Constitution provides that:-

*“a person who is arrested or detained, and who is not released, shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest where he is arrested or detained upon reasonable suspension of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”.*

In the present appeal, the appellant was arrested on 18<sup>th</sup> August, 1999 and arraigned in court on 3<sup>rd</sup> September, 1999.

By computation of time, his detention was 15 days, a day more than the statutory period of 14 days. He did not raise the issue both in the trial court and the 1<sup>st</sup> appellate court.

That notwithstanding, we refer to this Court’s decision in the case of *NDEDE V REPUBLIC*, [1991] KLR pg 567, in which this Court stated:-

*“where, as happened in this case, at the time of the taking of the plea there appears to be an unusual circumstance such as injury to the accused or the accused is confused, or there has been inordinate delay in bringing the accused to court from the date of the arrest etc then an explanation of the circumstances must form an integral part of the fact to be stated by the prosecution to the court”.*

We find that the delay of one day in bringing the appellant to court could have been explained by the prosecution, if the issue was raised at the appropriate time.

In the result we are satisfied that there is no basis for interfering with the decision of the superior court. Accordingly the appellant’s appeal is hereby dismissed.

Order accordingly.

**DATED and DELIVERED at NAKURU this 22<sup>nd</sup> day of FEBRUARY, 2008.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

*J. ALUOCH*

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*JUDGE OF APPEAL*

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

**DEPUTY REGISTRAR**