IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 107 OF 2004

DAVID MUNYWOKI KATUTU .....1ST APPELLANT

KIMANZI KITUO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya

at Nairobi (Mbogholi & Mutitu, JJ.) dated 13th August 2003

in

H.C.Cr. A. No. 505 & 506 of 2000)

****

JUDGMENT OF THE COURT

The appellants, **David Munywoki Kitutu** and **Kimanzi Kituo,** were convicted by the Principal Magistrate's Court at Kitui (N. Ithiga) for the offence of robbery with violence contrary to **section 296(2)** of the Penal code. It was alleged that on 8th September 1999 at Mathyakani Sub-Location, Kanzanzu Location, Mwingi District of Eastern Province jointly robbed Agnes Mwanzi of a porch, cash Kshs.20,200/=, a lesso, bank plates for Kenya Commercial Bank Mwingi and a bunch of keys all valued at Kshs.20,850/= and at or immediately before or immediately after the time of such robbery used personal violence and wounded the said Agnes Mwanthi.

Upon such conviction, the mandatory death sentence was meted out to them.

They both appealed to the superior court which dismissed their appeals, as a result of which they appealed to this Court.

After they lodged their appeals to this Court and were in prison awaiting the outcome, one of them, Kimanzi Kituo, (the deceased), passed on. Consequently his appeal abated pursuant to the provisions of **rule 68(a**) of the Court of Appeal Rules. We shall henceforth refer to the second appellant as "**the deceased**".

Being a second appeal, it must be confined to points of law only as provided by **section 361(1)** of the Criminal Procedure Code. This Court has stated from time to time in its previous decisions that it will not

interfere with concurrent findings of fact arrived at by the two Courts below unless they were based on no evidence or on a misapprehension of the evidence adduced. The test applied is whether there was any evidence upon which the trial court found as it did -, see **Ngui v. Republic [1984] KLR 729** or that the trial Judge is shown to have demonstrably acted on wrong legal principles in reaching the decision, see **Chemagong v. Republic [1984] KLR. 611.**

In the remaining appellants' memorandum of appeal drawn in person, four grounds of appeal were listed. Counsel for the appellant, Mr. Wamwayi who represented him before us addressed us on ground 1 in the original memorandum and also filed a supplementary memorandum of appeal with six grounds.

Ground 1 of the original memorandum of appeal states as follows:

(1) That the appellate Judges erred in law while upholding my conviction or reliance to the purported visual identification by recognition made against me at the locus in quo by PWs' 1, 2 and 3 without observing that the circumstances prevailing at the same were not ideal to any clear observation.

The six grounds listed in the supplementary memorandum of appeal are:

(1) That the learned Judges of the High Court erred in law in affirming the conviction of the appellant while the defence of the 1st appellant was not considered or adequately considered.

(2) That the learned Judges of the High Court erred in law in affirming the conviction of the 1st appellant whereas the evidence was not subjected to a fresh and exhaustive analysis, evaluation, and review.

(3) That the learned Judges of the High Court erred in law in affirming the conviction of the appellant whereas the trial of the 1st appellant on 29th March was conducted without a qualified prosecutor or prosecutors.

(4) That the learned Judges of the High Court erred in law in affirming the conviction of the appellant while the trial of 29th March 2000 was without quorum.

(5) That the learned Judges of the High Court erred in law in affirming the conviction of the appellant while the trial of the 1st appellant on 29th March 2000 was conducted in English, a language the 1st appellant did not understand and as he was not afforded interpretation as he was entitled to under *section 77(2)(b*) of the Constitution and *section 198(1)* of the Criminal Procedure Code.

(6) That the learned Judges of the High Court erred in law in affirming the conviction of the 1st appellant whereas the Judgment of the High Court was only signed by one Judge, namely Justice M. Mbogholi.

We shall shortly revert to those grounds, but the facts of the case in the trial and accepted by the superior courts were that on 8th September 1999 the complainant Agnes Mwanzi (PW1) set out to go to Mwingi Market to buy some shop goods. She carried with her a handbag in which were cash, Kshs.20,200/=, a purse, identity card, calculator, keys, Post Bank pass book and a Kenya Commercial Bank plate.

After passing Mathyakani she caught up with some other ladies, including Agnes Muthangya, Anne Kimwele and Anne Paul (PW3). She had passed some four young men, including the appellant and the deceased, seated at Mariakani. As she walked on, she looked behind and saw the deceased appellant walking behind her and the appellant herein following him. She said she gave the deceased way to pass but instead he grabbed her handbag. Then he removed a knife from a sheath in an attempt to frighten her.

When she held onto the knife, the deceased pulled it and it cut her on the left hand (palm) whereupon she let go off her handbag. She remained with the sheath.

In the meantime, she screamed for help and the deceased and the appellant ran together into some thicket nearby.

The complainant reported the incident to Mwingi Police Station and the appellant and the deceased were looked for, apprehended and taken to Mwingi Police Station on the same day where they were charged with the offence the subject of this appeal.

When the complainant testified in the trial court, she said she knew the deceased and the appellant. She also said so during cross-examination and that as she struggled with the deceased; the appellant stood by and did not come to help her.

The complainant was supported in this testimony by Agnes Muthui (PW2) and Anna Koli Paul (PW3).

PW 2 said of the appellant in cross-examination:

"I saw you clearly. You were with Kimanzi and you ran into the bush together."

Anne Koli (PW 3) had this to say in cross-examination by the appellant

"I saw you commit the robbery with my own eyes and ran towards the hill; you ran away with the handbag of the complainant. It was daylight robbery".

In his judgment the trial Magistrate said:-

"The accused were hunted, arrested and handed over to the police. Why only them? Because they were known. It was not a coincidence. This evidence is so overwhelming to cast any doubts as to the identity of the robbers".

When Mr. Wamwayi addressed us on this appeal, he abandoned grounds 3, 4 and 6 and only addressed us on grounds 1, 2 and 5 of the supplementary grounds of appeal. He also argued ground 1 of the original memorandum of appeal which dealt with identification.

On ground 1 of the supplementary memorandum of appeal, counsel for the appellant complained that the defence of the appellant was not considered or adequately considered. This same ground was raised in the superior court.

What was the appellants' defence? He testified as follows:

"On 7.9.99 I was working at some place. I was paid and I went to my house. This was in Nairobi. I went to the bus stage for Mwingi. I boarded a vehicle at 9 a.m. in Nairobi on 8.9.99. I alighted at Mwingi Stage at 12 noon. I saw 2 people pointing at me. I boarded another vehicle and alighted at Kalisasi I was to borrow a bicycle at my sister's home to ferry the heavy bag I had carried. As I waited for my sister many armed people approached from the shambas. I climbed a tree to see what was happening. Somebody hit me with a stone on the head. I climbed down. The people started beating me. The Chief of the area came and he saved me. They took me to a vehicle and to Mwingi P. S. I was locked up. I had serious injuries. I was taken to hospital and treated. Back to the station the present charges were framed against me. I was charged before this court with charges which I deny. I know nothing about them. That is all I wish to state."

On this the trial Magistrate said:

"**Though the two denies (sic) the charges, their denial does not match the evidence by the prosecution witnesses. I dismiss their defences."**

The superior court did not specifically refer to the appellant's defence.

It is true the trial court did not give the details of the appellants defence in its judgment but it was an alibi because he testified that he was at his home at the time of the alleged offence.

However, considering that defence against the background of the prosecution evidence that the appellant was known to the complainant and PW2 and that this robbery was committed in broad daylight, that this appellant ran together with the deceased to the bush after the robbery and that he failed to help the complainant as she struggled with the deceased and screamed for help, the denial and alleged the alibi defence were for rejection.

On ground 2, the case was simple as the complainant knew the people who attacked her. The appellant accepted this and both the trial court and the superior court commented on this aspect of the case. The trial court gave an account, evaluation and analysis of the evidence in its judgment.

The superior court on its part captured the evidence before it and rendered this in its judgment:

"**We have carefully considered the evidence adduced by PW1 and PW2. We have noted that the robbery took place in broad daylight and that the two witnesses knew the two appellants according to the evidence on record.**

In cross-examination, it is noted that the two appellants did not deny being known to the two eye witnesses. All the stolen items (except the cash of course) were recovered from the 1st appellant by PW4 and PW5 according to evidence on record.

This was surely an analytical evaluation of the evidence adduced in the trial court. In addition to this, the trial and superior courts were discounting ground 1 of the original memorandum of appeal which complained about lack of identification of the appellant. Mr. Wamwayi dealt at length on this and cited the case of **Karanja & Another v. Republic [2004] 2 KLR. 140.**

With respect to Mr. Wamwayi, this decision dealt with a case where this type of offence is committed at night or in circumstances where identification of the culprit would be doubtful or difficult – see also **Charles O. Maitanyi v. Republic KLR 198**.

This was not the case here where the robbery was committed in broad daylight and the appellant and the deceased were known.

On ground 5, the complaint relates to the hearing of the case before the trial court on 29th March 2000 when it is alleged the hearing was conducted in English, the language the appellant did not understand and that he was not afforded interpretation as he was entitled to under **section 77(2)(b)** of the Constitution and **section 198(1)** of the Criminal Procedure Code.

The issue of '***language***' in criminal trials has been a subject of several decisions of this court in which the court made strong expressions about compliance with the legal requirements.

In a recent case of **Degow Dagane Nunow v. Republic (Criminal Case No. 223 of 2005)** – (Unreported), the court revisited the issue and stated thus:-

"On this aspect of the matter the burden is on the trial court itself to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. As we have repeatedly pointed out these are not mere procedural technicalities. There is, first *section 198* of the Criminal Procedure Code which 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 discretion of a 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. *Section 77* of the Constitution is in relevant parts, in these terms:-

"77(2) every person who is charged with a criminal offence;

(a) .....

(b) Shall be informed as soon as reasonably practicable, in a language that he understands in detail of the nature of the offence with which he is charged;

(c) .....

(d) .....

(e) .....

(f) Shall be permitted without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charges.

It is the responsibility of the trial courts to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why the trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place."

In the **Nunow Case**, there had been no attempt by the trial Magistrate to indicate at any stage what language was used in the trial and it was only at the end of the Judgment that he recorded "**Judgment was delivered in open court in the presence of accused, I.P. Mukoko for State, Court Clerk Mohamed, Somali/Kiswahili."** The appellant in that case had raised the issue before the superior court when he asserted that the trial was conducted in a language he never understood. The plea itself according to the record in the case was recorded in English though the appellant only understood the Somali language. And so it was throughout the record up to the day of judgement, and this was why there was this strong admonition by this court.

Compare these observations with the present case. When the appellant and the deceased first appeared before the trial Magistrate for plea on 17th September 1999, the language of the court was recorded as **Kik/Eng**; which we interpret to mean "**Kikamba/English**." From that date to 26th November 1999, the appellants appeared in court only for mentions.

And when major witnesses were called to testify, it is indicated they did so in Kikamba and that the appellants were afforded an opportunity to question them in that language.

The appellant's only complaint was about the hearing of 29th March 2000 when the witness called, Pc. Moses Wanjala, testified in English. It was based on the typed record which omitted the coram of 29th March 2000. But on perusal of the original record we found the coram had been included specifically with regard to an interpreter who was present when No. 33117 Pc. Moses Wanjala testified in English. On this discovery Mr. Wamwayi abandoned ground 4 of the supplementary memorandum of appeal.

Pc. Wanjala was the last witness for the prosecution and was only concerned with the arrest of the appellant from whom the witness recovered 11 sticks of cannabis sativa; it was formal evidence and there was an interpreter present. The appellant was given an opportunity to and he did cross-examine this witness at length. This complaint would have no basis in fact or in law.

With much respect, we do not feel the case before us is anywhere near the circumstances surrounding the **Nunow case**, nor do we think the authority cited to us by Mr. Wamwayi namely; **Jackson Leskei v. Republic (Criminal Appeal No. 313 of 2005)** takes the argument any further. The facts thereof are distinguishable from those of the appeal before us.

In the case before us, the sessions for taking plea by the appellants was 17.9.99; the earliest opportunity for the trial court to comply with **section 77** of the constitution, which it did as per the record of that date. It shows that the language understood by the appellant was Kikamba and therefore the charges drawn up in English were interpreted to him in that language.

Throughout the hearings the appellant participated fully in cross-examining the witnesses and in stating his case. The appellant conducted his own appeals in the superior court and at no time did he complain about the language used during the trial at the Magistrate's court. Indeed a court interpreter was always at hand in the course of the proceedings.

In all the circumstances of the case, we think there was compliance with ***section* 77(2)(b)** and **(f)** of the constitution and we do not find any good reason for declaring the trial of the appellant a nullity as submitted by counsel.

This appeal was opposed on behalf of the state by learned Principal State Counsel, Mr. Kivihya, to whom we are indebted for his assistance.

The upshot of what we have observed herein above is that this appeal has no merit and is hereby dismissed.

Dated and delivered at Nairobi this 14th day of March 2008

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR