IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 331 OF 2006

FRANCIS KIMANI MUTHOKO

JAMES KIBIRA KAMITI …….………………………. APPELLANTS

AND

REPUBLIC ………………...…………..……………..RESPONDENT

(Appeal from a judgment of the High Court of Kenya Nairobi (Lesiit & Mutungi, JJ) dated 14th April, 2005in H.C.CR.A. NOS. 260 & 262 OF 2001)
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JUDGMENT OF THE COURT

Edward Okoth Jawuo (PW1) (Okoth) was at the relevant time working as a salesman with Keetons Bakery Oswal and was staying at Ruiru. Davis Manyonge Mumelo (PW2) (Manyonge) was working with the same company as a driver. They were both working at Ruiru. On 24th November, 1999 they went to Ruiru Ndakaine area to sell bread. When they reached Gatukuyu the last centre, they stopped the vehicle to collect crates which they had left there. Just as Okoth was alighting, they were accosted by three people all allegedly armed with pistols. Those three people forced them into the motor vehicle which was Registration Number KAC 255L Mitsubishi Canter. One of the three people later identified as James Kibira Kamiti, the second appellant in this appeal before us, took over the vehicle and drove it, while Okoth and Manyonge were squeezed into the vehicle after being threatened with the alleged guns. The vehicle then took off with the two complainants, and the three thugs inside it.

As the vehicle was moving, the complainants were continuously beaten as they were asked for money. They were also shifted from one place to another in the vehicle and sometimes the vehicle would be stopped for that purpose. Okoth gave them Ksh. 28,000 which was taken by Francis Kimani Muthoko, the first appellant in this appeal. Eventually the vehicle reached a coffee plantation and probably as the road within the coffee plantation was wet and slippery, the three attackers put both Okoth and Manyonge into the rear cabin of the vehicle and abandoned the vehicle with the complainants locked in the rear cabin of the vehicle. The thugs escaped into the coffee plantation. But before they escaped they took with them Okoth's umbrella, and a cap. They also took Manyonge's jacket in which was a driving licence. First appellant also took a wrist watch and Kshs. 450/= from Manyonge. Okoth and Manyonge screamed. The time was 2.30 p.m. Fortunately, the farm employees were working nearby in the farm and witnessed the complainants being abandoned in the vehicle. They also screamed as they went for the rescue of the complainants. The complainants told those farm employees that they had been robbed.

They were released from the vehicle with the help of members of the public and they went to Thika Police Station to lodge a complaint. In the meantime, some of the employees of the coffee farm pursued the robbers. Mbii Mutuma (PW3) (Mutuma) was a watchman at Thumbi River farm. He was at home when he heard noise from workers in the estate. He heard shouts of *"thief, thieves"*. He went to where the noise was coming from. He joined the other people and saw three people inside the coffee plantation. The workers organized themselves and arrested the first appellant. By that time the complainants and police had not arrived from Thika. The first appellant was eventually put in the Managers motor vehicle. John Kangethe Mwangi (PW4) was together with Mutuma and also helped in the arrest of the first appellant. Later at about 4.30 pm PC Mariche Abdul (PW6) (Mariche) attached to Thika Police Station together with other Police officers arrived at the farm. He found some workers who told him they had arrested the first appellant. The same workers had recovered a harmer in a polythene paper. He, together with the workers continued to search for the other two robbers. He used teargas canister, smoked out, and arrested the second appellant.

According to him, the second appellant was arrested wearing a black leather jacket, and also had an umbrella. The third suspect could not be traced. PC Mariche also re-arrested the first appellant and escorted both appellants to the police station where they were each charged with two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the charges read as follows:

"Count 1

On the 24th day of November 1999 along Thika Gatunyu Road in Thika District of the Central Province, jointly with another not before Court while armed with a pistol robbed Edward Okoth Jawuo cash Ksh. 26,000, a cap and an umbrella all valued at Ksh. 27,750/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Edward Okoth Jawuo.

Count II

On the 24th day of November 1999 along Thika Gatunyu road in Thika District of the Central Province, jointly with another not before the Court while armed with a pistol robbed Davis Manyonge Mumelo, one leather jacket, one wrist watch all valued at Ksh. 6,650/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Davis Manyonge Mumelo."

They were apparently arraigned in Court on 6th December, 1999. We say so because the date when the plea was taken was not entered and so we go by the date in the charge sheet. They pleaded not guilty to both charges. On 10th January 2000 before their case could be heard, Tabitha Nyambura (PW5) (Nyambura) who works at the coffee farm was assigned a duty to dig a part of that farm. As she was digging her panga hit a metal in the soil. She looked and saw a pistol. She showed it to other people and then passed it on to her supervisor who took it to the police station. That pistol was produced as an exhibit during the hearing of the case.

When put to their defence, the first appellant stated that he was at the relevant time doing the business of selling groceries. On 24th November, 1999, he left home in a matatu and was going to visit a friend. He alighted from the matatu. He went to see business besides the road (whatever that meant), when he heard people screaming for help. He saw people armed with jembes, rungus, and other weapons. Those people beat him and cut him until he lost consciousness. He regained consciousness in the hospital. He was charged with offences which he knew nothing about. The second appellant said he was a painter by profession. On 24th November, 1999 he had painting work at Kahawa. He proceeded there and worked till 1 pm. In the afternoon he boarded a matatu to Thika town. He was heading for Kairi along Thika Gatukuyu road as he was to meet somebody over some business at Kairi. He accomplished his mission after 3.00 pm and then proceeded down the road to board a matatu headed to Thika. Since he was a stranger in the area, he decided to stroll around before the matatu arrived. However, before he reached

the entrance of the twin river, he noticed a commotion as people were running out of the coffee farm. He was stuck in the confusion and entered the coffee farm and hid there. He stayed in hiding for ten minutes. After matters cooled down, he came out of his hideout to find out what was happening. Police and workers approached him to know his identity and his mission in the farm. He showed them his identity card but that notwithstanding, he was arrested by the police at the instigation of the workers. He was taken to Thika Police Station but after investigation for eleven days, he was taken to Court and charged with the offence he never committed.

The learned Principal Magistrate (Betty Rashid) after hearing the entire case found both appellants guilty as charged, convicted and sentenced them to death. That judgment was not dated but from the original record of that court it would appear that it was delivered on or immediately before 7th February, 2001 as that is the date that appeared in the committal warrants for both appellants. That judgment was delivered over five months after the close of the defence case which, according to the aforesaid record was closed on 24th August 2000. In her judgment, the learned Magistrate stated, *inter alia*:

"PW1 stated that he was beaten till 1st and 2nd accused took 28,000/= from him (being proceeds for sale of bread). PW2 was robbed by 1st accused of a black leather jacket, one wrist watch and 450/=. Though both PW1 and PW2 were made to knell, (sic) lie down on floor of motor vehicle the robbers kept beating them and turning them in different positions to be robbed and hence the issue of identity is clear. The persons before the Court are clearly the ones who had ambushed the two complainants and robbed them of money and other valuable goods. The motor vehicle went into a coffee plantation and all witnesses who testified and worked in that coffee plantation from where both accused persons were arrested noted that accused persons were strangers there and there was nobody else loitering in that coffee plantation except the workers who all knew each other. ………. I dismiss both defences tendered by both accused persons that they were merely walking by when they were arrested in view of the above corroborated evidence of identification.

I find that both accused persons jointly with another not before the Court and while armed with dangerous weapons robbed PW1 and used violence on them during the period of the robbery. I find them guilty as charged on both counts and I convict them both accordingly".

The appellants were dissatisfied with that decision and the sentence of death imposed and appealed to the superior court. That appeal was dismissed. Concerning the first appellant, the superior court stated, *inter alia*:

"We are satisfied that the complainants had ample opportunity to see and identify their assailants. The recovery of the jacket, cap and umbrella from the 1st appellant at time of apprehension by PW3 and PW4 strengthened further the evidence of identification by the complainants. The 1st appellant did not explain his possession of these items soon after they had been stolen from the complainants. We agree with the learned counsel for the State that possession of the three properties which the complainants positively identified as theirs, was sufficient to sustain a conviction against the 1st appellant for the charge, applying the doctrine of recent possession."

And as to second appellant, the superior court found that he was not a worker in that farm where he was arrested and which was a private property far from the main road. His defence that:

"he was strolling around the road to see the place when he was arrested was not probable or plausible."

The appellants were still not satisfied with the superior court's decision dismissing their first appeal and hence the second appeal premised on seven grounds set out in their joint Supplementary Memorandum of Appeal filed on 18th December, 2007. These grounds were, in summary that the judgment pronounced by the learned Principal Magistrate was a nullity in that it did not comply with the provisions of ***section 169*** of the Criminal Procedure Code Chapter 75 Laws of Kenya; that the same judgment was vitiated by the failure of the trial court to indicate the language in which the trial was

conducted and that contravened the provisions of ***section 72 (2)*** and ***(3) (f)*** of the Constitution of Kenya and ***section 198*** of the Criminal Procedure Code; that part of the proceedings was conducted without both Court Clerk and Court Prosecutor; that conviction was entered when circumstances prevailing did not favour positive identification; that the appellate Judges erred in law in upholding the appellants' conviction when the charges were not properly proved as the appellants' defenses were not displaced by the prosecution evidence as is required by law and that the learned Magistrate erred in relying on inadmissible evidence.

At the hearing of this appeal Mr. Oundu, the learned counsel for the appellant argued on the main, three points. These were that the judgment delivered by the trial court did not comply with the requirements of the provisions of ***section 169*** of the Criminal Procedure Code Chapter 75 Laws of Kenya as it was not dated; that there was no indication as to the language in which the trial was conducted and that the superior court confirmed the conviction and sentence without itself analysing and evaluating the evidence afresh as is required of it by law.

Mrs. Murungi, the learned Senior Principal State Counsel, in opposing the appeals maintained that the language used in conducting the case in the subordinate court was spelt out at the commencement of the proceedings. It was English/Kiswahili. Both Court Clerks at the time the plea was taken and at the hearing respectively were trained people who knew English and Kiswahili. In any case, she contended, the appellants conducted their defence efficiently without any apparent hitch to suggest they had difficulties in comprehending Kiswahili. She conceded that the judgment delivered by the subordinate court, though signed, was not dated but in her view that omission was curable under ***section 382*** of the Criminal Procedure Code as no prejudice was occasioned. As to lack of fresh analysis and evaluation of evidence by the superior court; her stand was that the superior court did so. She maintained that as the jacket in question had driving licence in it, it would not matter who was found with it between the two appellants. She submitted that PC Mariche was mistaken in his evidence but that such mistake would not vitiate the decision as there was still enough evidence to sustain conviction.

The above were the salient aspects of the appeal before us. We have perused the record and considered the legal principles raised by the consolidated appeals. 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 provided 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.

The next point raised is that of non-compliance with the provisions of ***section 169*** of the Criminal Procedure Code. We have perused the judgment of the learned Principal Magistrate. It is signed but not dated. There is no dispute on that and Mrs. Murungi concedes that much. All she says is that the omission is curable under ***section 382*** of the Criminal Procedure Code. Is that so?

Section 169(1) of the Criminal Procedure Act Chapter 75 Laws of Kenya states:

"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points of determination, the decision thereon and the reasons for the decision, and <u>shall be dated</u> and signed by the presiding officer in open court at the time of pronouncing it." (underlining supplied)

This provision is an Act of Parliament. It is clearly mandatory and the word ***shall*** is used to demonstrate Parliament's emphasis on what the presiding officer of the court is required to do. We find it difficult to

accept Mrs. Murungi's submission that such a requirement can be wished away under the provisions of ***section 382*** of the same Code. In our mind, to do so would mean using provisions of ***section 382*** of the Criminal Procedure Code to whittle down other provisions of the same act which are mandatory into mere irregularities. That could not have been the intention of Parliament. In the case of ***Richard Kamisoi and Another v. Republic***, Criminal Appeal No. 254 of 2006, (unreported), this Court was faced with a similar situation where a judgment was not dated but a certificate was later attached to the effect that judgment and sentence was dated and signed by the trial Magistrate in open Court in the presence of both accused persons, Court prosecutor and Court Clerk.

This Court read that certificates as an attempt to camouflage the fact that judgment was not itself dated and taking that view this Court stated:

"Mr. Musau, the learned Senior Principal Counsel submits that such a failure to date the judgment cannot vitiate the entire proceedings and that it is curable by the provisions of section 382 of the Criminal Procedure Code and urges us to treat it so. With respect, we do not agree. The requirement that a judgment be dated and signed at the time of pronouncing it is mandatory and is a statutory requirement. In our view, a judgment that is not dated is not a judgment at all and so defect in it cannot be cured under section 382 of the Criminal Procedure Code because for the defect in a judgment to be so cured, the judgment must itself exist. In a case where it is not dated, it is not a valid judgment and therefore a nullity and therefore incapable of being cured."

The views of this Court in the above case provides an answer to Mrs. Murungi's submissions and we need not belabour it any further save to emphasise that in that case of ***Richard Kamisoi and Another vs. Republic*** (supra), there was an attempt to show the judgment had been dated. In this case before us, there is no such attempt at all. Even worse, in this case apart from the judgment itself not being dated, there is nothing in the records to show the date on which it was pronounced. The record shows as we have stated hereinabove that the defence case was fully heard by 24th August, 2000 and the court ordered judgment to be delivered on 22nd September, 2000. On that day judgment was not delivered as the second appellant was not produced in court. The matter next came up on 1st November, 2000 but again both appellants were absent and judgment was not delivered. It was adjourned to 17th November, 2000 but again the appellants were absent and the matter was adjourned to 8th December, 2000 when it was again adjourned to 22nd December, 2000. The case was mentioned on 5th January, before another Magistrate and was fixed for hearing (we understood this to be for judgment) on 19th January, 2001. On that day, it would appear the appellants appeared before a different Magistrate again but they were marked on the same day as having not appeared before the trial Magistrate and then judgment was adjourned to 25th January, 2001. Thereafter there is nothing on the record to show when judgment was pronounced in open court. In these circumstances, where the actual judgment was itself not dated and even the date on which it was pronounced is not in the record and there is no evidence that it was pronounced in open court as there is no entry of the same in the record, we cannot for certain conclude that the appellants were not prejudiced. Thus, not only was the judgment not dated, but its delivery was clearly inordinately delayed for over five months and as if that was not enough there is nothing to show when it was pronounced and the Coram on the date it was delivered. We only go by the date in the committal warrants which may themselves not correctly reflect the date of delivery.

The above are enough to dispose of this appeal. However, certain matters were raised both in the Supplementary Memorandum of Appeal and in the submissions by the learned counsel which we need to comment upon before we allow this appeal. The first point was that the conviction was entered without considering that there was neither Court Clerk nor Court Prosecutor present when evidence of Mbii Mutuma (PW3) was taken. This complaint lacks merit. The record shows that the hearing of the case started on 12th July 2000. On that date Inspector Gicheha was the prosecutor and Wamae was the Court Clerk. Evidence of Okoth and Manyonge was taken on that day and hearing was adjourned to 19th July, 2000. On 19th July 2000, the record shows that the court entered *"Coram as before."* That clearly meant, in the legal jargon, that the appearences were as they were on 12th July 2000. Thus Inspector Gicheha as prosecutor and Wame as Court Clerk were in attendance. That was when Mutuma's evidence was taken.

That is why we say that the complaint lacks merit.

The second and final matter we need to consider in passing on an assumption that the trial court's judgment was valid is that the superior court failed to properly analyse the evidence that was adduced in the superior court. Mr. Oundu in particular took issue with the part of the superior courts judgment which reads as follows:

"The recovery of the jacket, cap and umbrella from the 1st appellant at time of his apprehension by PW3 and PW4 strengthened further the evidence of identification by the complainants. The 1st appellant did not explain his possession of these items soon after they had been stolen from the complainants."

His position is that that finding ignored evidence of PC Mariche who arrested the second appellant and who stated:

"2nd accused was wearing the black leather jacket which belongs to the complainant and this MF13. He also had this umbrella, and jacket belonged to PW2 and jacket and umbrella to PW1. I kept all these items in my custody and I now produce them as exhibits 1 to 6."

These two aspects of evidence clearly contradicted each other and Mr. Oundu submitted before us that there was a need to analyse the two and make an independent finding on the same before settling for one version. Mrs. Murungi does not dispute the contention that the superior court needed to critically analyse and evaluate the evidence as is its duty but was of the opinion that the evidence of PC Mariche on recovery was mistaken and that mistake could not vitiate the other evidence on record. We have perused the record as well as the judgment delivered by the superior court. Okoth's evidence in chief is that:

"my driver's jacket was robbed. My cap MF13 was robbed and found with 1st accused. My umbrella MF14 was also recovered from 1st accused together with the cap. 1st accused was wearing my "driver's jacket MFI5 when he was arrested."

In re-examination this witness said:

"1st accused wore his jacket. 2nd accused had my umbrella and cap. 1st accused wore his leather jacket on top of what he was wearing."

Against the above, Manyonge's evidence was that after robbery he and Okoth went to Thika Police Station and on going back with PC. Mariche and other police officers they found when the first appellant had been arrested by members of the public and on recovery he said:

"I found my jacket MF5 and this umbrella had been recovered and it belongs to PW1."

And lastly on recovery Mbii Mutuma who was one of the members of the public who chased the first appellant said the first appellant had a hammer "tied" in a polythene paper. In cross-examination he said:

"We had talked to PW1 but only a hammer was removed from the accused 1 wearing a white T-shirt, black leather jacket ……. PW1 identified the jacket as theirs",

And Kangethe's evidence on that point was that nothing was recovered from second appellant. All the above evidence needed to be properly analysed and evaluated by the trial court. We further note that there was variance between the particulars of the charges and evidence in that the charges stated that the robbers threatened to use actual violence upon the complaints whereas the evidence by Okoth is that he was beaten by one of the robbers. Both courts did not consider that aspect. Further whereas Manyonge said in evidence that Kshs.450/= was taken from him, the charge is silent on that. The superior court, being the first appellate court had the duty to analyse and evaluate the same evidence afresh. That was the principle enunciated by this Court in the case of ***Gabriel Njoroge vs. Republic*** (1982-88/1 KAR 1134

where it stated at page 1136 as follows:

"As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inference and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v. R. (1957) EA 336, Rawala v. R. (1957 (EA 570)".

We may also add to this the well known case of ***Okeno v. R*** (972) EA 32. In our view, as we have stated, the superior court needed to analyze and evaluate the conflicting evidence of Okoth, Manyonge, Mutuma, Kangethe and PC. Mariche and come to its own independent conclusion but putting in mind that it did not hear and see the witnesses and give allowance for that. Unfortunately it did not carry out that duty effectively, as is demonstrated above. We agree with Mrs. Murungi, that the evidence of recovery of the jacket with a licence in it was not contradicted and that alone could have carried the day but the superior court never made that finding.

In the case of ***Ngui v. Republic*** (1984) KLR 729 where the court found that the first appellate court had failed in its duty to analyse and evaluate the evidence afresh, it treated the omission as a point of law and made its own evaluation of the evidence so as to satisfy itself that no failure of justice had been occasioned by the defects in the first appellate courts judgment. However, in this case, our view, based on what we have stated above in this judgment, is that such would be an exercise in futility and further that as we do not know what conclusion the first appellate court would have come to had it carried out its duty properly, the benefit of doubt must go to the appellants.

In conclusion, the cumulative effect of all the above is that this appeal must be allowed without any need for a retrial which in any case was not sought. The appeal is allowed, conviction quashed, sentences imposed on the two appellants are set aside and the appellants are set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 25th day of April, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

………………………..

JUDGE OF APPEAL

D. K. S. AGANYANYA

…………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR