IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 182 OF 2002

MARINE OLE KAKAI .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

(Mbogholi & Mbito, JJ.) dated 2nd October, 2002

in

H.C.CR.A. NO. 1141 OF 1998)

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JUDGMENT OF THE COURT

Marine Ole Kaikai, the appellant was convicted by the court of the Senior Resident Magistrate at Kibera (Mrs. Nzioka) of the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code and sentenced to the mandatory sentence of death as provided by law.

The appellant was a watchman assigned to guard the house where Hencok Tedla Welder Mariam, (PW1) the complainant, resided at Ongata Rongai Township in Kajiado District.

On 31st January 1998, the complainant was asleep at his house when the appellant called him out at 3.00 a.m. to collect a jerrican he had filled with water as earlier instructed.

When he came out to collect the jerrican, the complainant was instead attacked by three people who robbed him of one leather jacket, one overcoat, two T-shirts and cash Kshs.20,000/=, all valued at Kshs.37,200/= and in course of this attack, he was hit or cut by the robbers and injured on the head.

The appellant was arrested the following morning by Tedesse Gizaw (PW2) and other security men at Kiserian and taken to Ongata Rongai Police Station where No. 53373 Pc. Joshua Awino (PW4) re-arrested him, carried out investigations and later charged the appellant with the offence stated herein before.

Dr. Z. Kamau (PW5), a Police Surgeon, examined the complainant following the attack and found that he had suffered some injuries which he classified as harm.

In his unsworn evidence, the appellant admitted he used to work as a watchman for the complainant and had been with him for one month and that at 4.00 a.m. thieves came to the compound and went into the complainant's house and beat him up. The next day he was in town when he was arrested and accused of knowing where those who assaulted the complainant were.

He was thereafter taken to Ongata Rongai Police Station and charged with stealing Kshs.20,000/= and a jacket. It was after his arrest that he learned that the complainant had been cut and beaten but that he did not know what had actually happened. He said he was thoroughly beaten up at the police station and this is why he admitted the offence.

In her judgment the trial Magistrate said:-

"***The accused has denied the offence. He states that he had been assigned duties at the bar and not the residence of the complainant, but the complainant told the court that he had even given the accused a jerrican to fetch water for him. That it was the accused who subsequently called him out before he was assaulted. He knew the accused well. I have further considered that after the robbery the accused could not be traced. He alleges there were people who attacked the complainant but if he was not attacked himself then why did he vanish? Why didn't he respond to the complainant's call for assistance and assist. The accused was arrested thereafter at Kiserian having deserted duty. I find that his defence that he was not involved in the commission of the offence as unsatisfactory and untruthful. I believe he was involved in the commission of the offence and I find him guilty as charged and accordingly convict him."***

After the appellant had been sentenced as above stated, he appealed to the superior court at Nairobi through a petition of appeal which he amended. In his amended supplementary grounds of appeal he listed four grounds.

In these grounds he complained that the trial Magistrate erred both in law and fact when she believed the complainant's allegation that the appellant was one of his assailants without considering that the circumstances prevailing then did not favour a free from error kind of identification; that she erred in failing to caution herself in regard to the inherent dangers in relying on the evidence of a single witness pertaining to identification, that she erred in failing to consider that the appellant's arrest was on suspicion before rejecting his defence regarding where he worked and that he was not accorded a fair trial because he was not provided with a Masai interpreter up to the end of the trial; hence was not able to follow the proceedings.

During the hearing of the appeal on 12th November 2001, the appellant handed in written submissions. These submissions were in line with the grounds set out and filed in court. The appellant did not elaborate on them or add any other submission thereto in court.

The State was represented by one Okello who did not give his position at the Attorney-General's Chambers. He supported the appellant's conviction and said on identification that the complainant knew the appellant and that on the issue of interpretation there was an interpreter in the trial court.

In dismissing the appeal on 2nd October 2002 the superior court (Mbogholi Msagha and Mbito JJ.) said:-

"We have considered that the appellant was not a stranger to the complainant him (the appellant) having been his employee. He was on duty on that night. He said as much. That placed him at the scene. As a watchman he did not raise any alarm when the alleged thieves came. In fact he did not even remain in the compound after the robbery. He did not report to the police or any authority. We know an accused person is convicted on the strength of the prosecution case not the weakness of his defence. We believe the evidence of the complainant, the conduct of the appellant and the attendant circumstances were sufficient to sustain the conviction.

The appellant fully participated in the proceedings as can be seen from the record and his complaint at

this stage that he was not provided with an interpreter is an afterthought. The ingredients of the offence charged were proved.

We accordingly uphold the conviction and dismiss this appeal.

Order accordingly."

The appellant was not satisfied with the superior court's decision and, through counsel, Ojwang Agina, lodged this appeal before us. In his Supplementary Memorandum of Appeal he has listed ten grounds of appeal; the main of which were on identification and the language used in the trial court.

In court on 3.4.2008 counsel for the appellant argued that his client was not properly identified as being among the group of people who assaulted the complainant and/or robbed him of the items listed in the charge sheet. He argued that the appellant's description was not given to confirm his participation in the robbery; that it was not shown what clothes he was putting on the night of the attack; and since the offence took place at 3.00 a.m. there was need for such description to be given.

According to counsel, even the manner of the appellant's arrest was of concern because there was no identifying person; and that though there was mention of rescuers, none of them were called to testify in the lower court.

Counsel also complained about the language used at the trial which the appellant said he did not understand, and specifically referred us to page 6 of the proceedings where the name of the interpreter was not given.

He prayed that this appeal be allowed, conviction quashed and sentence be set aside.

Mr. Kaigai, for the State supported the appellant's conviction and sentence and said the appellant had worked with the complainant for one month, and that though the said complainant was the sole identifying witness in the case, an accused person can be convicted on the evidence of one witness.

He submitted that the duties of a watchman are known and there was no explanation by the appellant why he did not perform them during the robbery.

On the issue of interpretation ***section 77(2)*** of the constitution states as follows:

"77(2) Every person charged with a criminal offence:-

(a) .....

(b) Shall be informed as soon as reasonably practicable, in a language that he understands and 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 charge."

If we pause here for a moment and peruse what transpired before the trial Magistrate, this is what we find on the record:-

"11.2.98

Coram – Mrs. Ondieki (PM)

Court Prosecutor – IP. Githitu

Court Clerk – Obonyo

Accused present

Interpretation – English/Swahili

The substance of the charge and every element thereof has been stated by the court to the accused person who, being asked whether he admits or denies the truth of every element of the charges replies:

Accused does not understand Swahili/English and only understands Masai. Plea will be on 25.2.98 when the Executive Officer will produce a Masai interpreter. Accused remanded at Kamiti Maximum Security Prison."

On 25.2.98, plea was not taken because the accused was not produced in court. Then followed various adjournments due to various reasons until 26th June 1998 when it was confirmed that a Masai Interpreter was available in court to interpret.

On 4th August 1998 the record shows as follows:

"4.8.98

Coram – Mrs. Nzioka (SRM)

Court Prosecutor – IP. Wambua

Court Clerk – Mwangi

Accused present

Interpretation – English-Kiswahili into Masai

Court – The charge is read out to the accused and explained in Masai language and he pleads:

Not true.

Court: Plea of not guilty maintained."

To our mind this was in strict compliance with ***section 72(2)(b)*** of the Constitution. At the initial stage of plea the appellant had sought the assistance of an interpreter in the Masai language and this was done on 4.8.98.

From that time throughout the hearing of the case before the lower court, the appellant took part in the proceedings including cross-examining the witnesses fully.

Even in respect to the evidence of No. 53373 Pc. Joshua Owino (PW4) and Dr. Z. Kamau (PW5) the Police Surgeon, the appellant raised no complaint that he was not following the proceedings as he did at the beginning of the case.

In fact PW4 and PW5 were formal witnesses. PW4 re-arrested the appellant at a bar at Kiserian, took him to Ongata Rongai Police Station where he then charged him with the offence subject of this appeal, while (PW5) examined the complainant for the injuries he complained of as a result of the robbery which he classified as harm.

In fact the appellant cross-examined PW4 after the latter testified which was proof enough that he followed the evidence of this witness.

Moreover the two witnesses were formal witnesses whose evidence was straight forward which we hold that the appellant followed. We do not think the circumstances of this case were anywhere near those in the case of ***Degow Dagane Nunow v. R. Criminal Appeal No. 223/05 (UR)*** where there was no attempt by the trial Magistrate to indicate at any stage what language was used in the trial except at the end of the judgment when he recorded that

"***Judgment was delivered in open court in presence of the accused, IP. Mukoko for State, Court Clerk Mohamed Somali/Kiswahili***."

We think in all the circumstances of this case there was compliance with ***section 77(2) 2(b)*** and ***(f)*** of the Constitution and we cannot declare the trial a nullity on this ground which fails.

In regard to the identification of the appellant by the complainant which the latter claims was flawed, the complainant stated that he had been with the appellant for one month and just before the attack he had left a jerrican with the appellant to fetch water for him.

The complainant stated that:-

"The watchman called me out." He did not say ***'someone'*** called him out. He specifically referred to the watchman; and he pointed out the appellant to the trial Magistrate. If this be so then the appellant cannot be right to say in his submission on this appeal that the complainant could be mistaken to answer to anybody calling him outside and believe it was his watchman.

This is a watchman the complainant knew as he had worked with him for one month. He himself admitted he was working for Enock (which the complainant said was ***"Henock***"). The appellant could not turn round and say he was only working in the bar and not for the complainant.

It is true the complainant was the sole identifying witness in this case. But there is no rule of law that an accused person cannot be convicted in a criminal case on the evidence of a single witness.

In ***Ogeto v. Republic [2004] 2 KLR*** 14 Judges of Appeal Omolo, Githinji and Onyango Otieno had this to say at page 19:-

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such witness especially when it is shown that conditions favouring a correct identification were difficult."

See also ***Marube & Another v. Republic [1986] KLR. 356***.

This incident took place at 3.00 a.m. on 31st January 1998. There was no evidence that there was light of any kind around to enable the complainant see his attackers. This attack was also sudden when the complainant came out of the house to answer to a call by the appellant to go and collect his water in a jerrican.

But the complainant was certain the person who called him out to collect the jerrican of water was the appellant. He said he saw him in the group of three attackers. The two courts below believed him on this.

It is also trite law that in all criminal cases the burden remains with the prosecution to prove its case against an accused person beyond any reasonable doubt.

See ***Mkendesho v. Republic [2002] KLR 461***.

The accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on the accused to explain matters which are peculiarly within his personal knowledge – see ***Chamagong v. Republic*** ***[1984] KLR 611***.

Section 111(1) of the Evidence Act provides that:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution whether in cross-examination or otherwise that such circumstances or facts exist.

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given either by the prosecution or the defence creates a reasonable doubt as to the quilt of the accused person in respect to that offence.

(2) Nothing in this section shall –

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the accused is charged, or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection 1 do not exist, or

(c) affect the burden placed upon an accused person to prove a defence of intoxication."

The appellant in this appeal was a watchman with an obligation to guard the premises where the complainant resided. He never screamed, never came to the rescue of the complainant nor did he report this incident to any police station or any authority. He did not even explain when he reported off duty on that day!

Next day he was seen at Kiserian on his own errands as if nothing had happened. This is when he was arrested. It does not amount to shifting of the burden of proof from the prosecution to the appellant if the court were to ask him to explain what his role was in this whole matter given his despicable conduct.

That nobody pointed him out before he was arrested or that none of the rescuers came to testify in the case is neither here nor there.

In our view the circumstances of this case justified the decision arrived at by the two courts below and we have no alternative but to dismiss this appeal in its entirety.

Delivered, dated and signed 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

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR