



IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO.134 OF 2005

- 1. DANIEL MUNYOKI NYANZA**
- 2. HAMISI GEORGE**
- 3. JOHN MUASYA NDEMO**
- 4. TITUS MUNYOKI MWELWA..... APPELLANTS**

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lessit & Ochieng, JJ) dated 1st July, 2004

in

H.C. Cr. Appeal Nos. 408 – 411 of 2001)

JUDGMENT OF THE COURT

The record before us shows that on 1st February 2000, Jacinta Daniel Ngovu (PW 2) (“**Jacinta**” in this judgment) had a provision shop at Kithumula Sublocation in Kitui District of Eastern Province. She employed Munyoki Muthangya (PW 1) (Munyoki) as a night watchman at that shop. Daniel Mwanja (PW 3) (Daniel) was working in the shop and was sleeping in one of the backrooms of that shop. Jacinta’s son Ngovu Musila (PW 5) (Ngovu) was a student at Kithumula Primary School but in the afternoon of that day he called at the shop from school. Jacinta was at her shop. The shop deals in retail goods such as Omo, cooking fat, salt, sugar and others. Hamisi George, the second appellant in this appeal went to the shop that evening between 7.00 p.m. to 8.00 p.m. and asked for cigarettes. Jacinta told him the shop did not stock cigarettes and he bought tobacco which was available. Ngovu, who had seen Hamisi together with John Muasya Ndemo, the third appellant, earlier on his way from school to her mother’s shop confirmed the visit by Hamisi to his mother’s shop that evening. Munyoki, who had reported on duty at the shop at 6.00 p.m. that day and who allegedly knew the second appellant, also confirmed having seen Hamisi at the shop at 7.00 p.m. that evening when he, the second appellant, was with the third appellant. Thereafter, Jacinta closed the shop, and she, together with Ngovu, left and went home leaving Munyoki on duty at the shop. At about 2.00 a.m. that night, Munyoki was attacked by four people whom he allegedly knew. He grabbed one of them whom he recognised as Titus Munyoki Mwelwa, the fourth appellant. As he did so, the first appellant cut him (Munyoki PW 1) on the head with

an axe. He started screaming. He recognised all his attackers through a bright torchlight from the torch the attackers were flashing and the bright moonlight that was there that night. He asked John Muasya Ndemo, the third appellant, why they were killing him and the third appellant responded that they would kill him. They broke his leg and then dragged him into a store at the backroom of the shop. Daniel who was sleeping in one of the backrooms, as we have stated, woke up and found his room full of light. He could not see anything at first due to dazing light from the torch the attackers had. He was tied with ropes on both legs and hands. The other person who was sleeping in the same room with Daniel was also tied with ropes. Daniel says one of the attackers threatened to shoot him. He saw and recognised two of the attackers and these were the first and second appellants. It was the first appellant who had ordered that Daniel be shot. According to Daniel, Munyoki, the watchman, was dumped into the room where Daniel and the other man were sleeping. Both Munyoki and Daniel witnessed the attackers breaking into the shop and stealing various items from the shop. After sometime, Munyoki heard the second appellant telling the third appellant “*uncle lets go*”. Thereafter the robbers left the shop with their loot.

Early in the morning of 2nd February 2000, Jacinta went to the shop. She found Munyoki had been attacked and had panga cuts on the head. She also found the shop had been broken into and all shop goods had been stolen. The stolen items, according to Jacinta, included weighing machine, bicycle, sewing machine, padlock and chain for the padlock and other items. She valued the goods stolen at Ksh.150,000/=. She sent for her brother-in-law, Boniface Kivisu Nguvu (PW 4) (Boniface). Boniface responded to Jacinta’s call and went to the shop at about 7.00 a.m. He found the shop broken into and shop goods stolen. He found Munyoki with head injuries. Munyoki gave him the names of those who had attacked him and these were Munyoki Nyanza, Hamisi, Munyoki Mwelwa and Muasya Ndemo, the first, second, third and fourth appellants respectively. He took Munyoki to Kitui District Hospital while the report of robbery was made to Kitui Police Station. John Mwangi (PW 8) (Mwangi) attached to Kitui District Hospital as Registered Clinical Officer examined Munyoki. He found that Munyoki had a deep cut wound on the parietal region, a minor cut wound on the right leg with limitation of movement. Xray showed he had a fracture of the leg. He formed the opinion that blunt and sharp objects were used to inflict the injuries and assessed the degree of injury as grievous harm. Jacinta’s husband, Daniel Musila Ngovu (PW 6) (Musila) took the police to the shop and helped in arresting one of the appellants whereas Muthengi Munyoki (PW 7) (Muthengi) was one of the people who traced and arrested one of the people originally charged with the appellants but who was acquitted by the trial court.

All the appellants were arrested at different times and at different places. None was found with any of the stolen items. They were apparently charged under two different charge sheets at different times. The record shows that some of the appellants were charged in Criminal Case No. 172 of 2000 whereas others were charged in Criminal Case No. 233 of 2000. However, on 10th May 2000, the charges were consolidated and a consolidated charge and particulars were read to each of the appellants. The particulars of that charge are as follows:

“On the night of 1st/2nd February 2000 at Kithumula S/Location in Kitui District of the Eastern Province, jointly with others not before court; being armed with dangerous weapons namely iron bars, axes and sticks, robbed Munyoki Muthangya of one bicycle, one singer sewing machine, one weighing machine, one radio, one pressure lamp, a bag of sugar, two cartons of omo, 3 cartons of Kimbo, two cartons of salt, 3 crates of milk, one carton of tea leaves, 3 bundles of maize, 4 bundles of wheat floor (sic) 3 bags of rice (50Kg) three dozen of eveready batteries, one carton of cotton wool, 3 creates of sodas, one carton of soap all valued at Ksh.150,000/= and at or immediately after the time of such robbery used actual violence to the said Munyoki Muthangya.”

They each pleaded not guilty to the charge. The first appellant in his defence stated under oath that on 1st January 2000 (we believe this was meant to be 1st February 2000), he was at home making bricks. The following morning, he went to his younger brother Makau to borrow cigarettes and he saw Makau with some things put in a carton on a bicycle. Those things were shop goods. He thereafter went to graze his cattle and to the garden with his wife to harvest beans and then to visit his sister. That is when he heard of the robbery and heard that one of Nyanza’s sons had been identified as one of the robbers. He informed his mother about it and asked his brother about the things he (his brother) had but he was told

not to talk about it. He later went to Nairobi and was there for six days. On his return, he found his wife had been arrested and when he went to enquire about it, he was arrested. He maintained that he was charged because he had no money to bribe the police. He was however sure that his brother Makau was involved. He confirmed that Munyoki knows him and he also knows Munyoki but stated that Munyoki had a grudge with him as Munyoki had sold bhang to him and he refused to pay for it. The second appellant's defence was that he was arrested on 16th February 2000 at Kaloleni by police and taken to Kitui Police Station where he was told about theft. He denied it.

The third appellant's version was that on 30th January 2000 he was at his uncle's place assisting him to harvest beans. He thereafter went to a market place where two people arrested him and took him to Kitui Police Station. He was interrogated about the allegations and was beaten but he denied the allegations.

The last appellant's defence was that he went to Wambua Ithenzu's home on 6th January 2000 where there was traditional liquor. While there, Munyoki's children took him to Kabati Market and handed him over to Kabati Police Post from where he was taken to Kitui Police Station. It was at Kitui Police Station where he was told about the alleged robbery which he denied. Thus, each appellant raised a defence of *alibi* and although the dates given by the first and fourth appellants were dates before the incident, yet because they each admitted having been arrested in connection with the robbery which took place on the night of 1st/2nd February 2000, we think the month of January they mention in their defences must be as a result of mistake. We are satisfied that the month was February 2000 and not January 2000 because, when, for example, the fourth appellant talks of 6th January 2000, as the date on which he was arrested for the relevant offences, he clearly meant 6th February 2000 and not 6th January 2000.

After full hearing, the learned trial Magistrate, in what we may, with respect, describe as a well considered judgment, found the appellants guilty as charged, convicted each of them and sentenced each to death as provided by law. He acquitted one of the original five suspects before him and released him. He was the third accused in that court. In convicting the four appellants before us, the learned trial Magistrate stated, *inter alia*, as follows:

“From my analysis of the issue of identification, I have no doubts that A1, A2 and A4 and A5 were positively identified. I have doubts about the identification of A3 Titus Cyomane Ndingi during the robbery. He was not even identified by anybody. He is connected with the robbery by virtue of the chain and padlock being found in his kitchen. I have dealt with that aspect earlier. The upshot of the above analysis of the evidence considered against the statements of denial by the accused persons is that I have no doubt that the charge of robbery with violence c/s 296(2) PC, has been proved against Daniel Munyoki Nyanza (A1) Hamisi George (A2), John Musya Ndemo A4 and Titus Munyoki Mwelwa beyond reasonable doubt. I have notable doubts whether Titus Cyomane Ndingi (A3) was involved.

Accordingly A1, A2, A4 and A5 are found guilty as charged and convicted accordingly as A3 is acquitted u/s 215 CPC for lack of sufficient evidence. That is the considered judgment of this court.”

The appellants felt dissatisfied with both conviction and sentence. They appealed to the superior court. The superior court (Lesiit and Ochieng JJ.) after hearing the appeal upheld the conviction and confirmed the sentences imposed upon each of the appellants and thus dismissed the appeal for lack of merit.

The appellants have now come before us on second and final appeal premised on nine grounds contained in a supplementary memorandum of appeal dated 5th November 2007 and filed on 9th November 2007. These grounds are in a summary; that the constitutional rights of the appellants under **sections 72(3), 74(1), (2) (a), (b), (c), (d), (e), (f) and 77(1) (2) (a)** of the Kenya Constitution were violated; that the plea was illegal in that it did not comply with the law; that there were material contradictions and inconsistencies that should have been resolved in favour of the appellants but were not; that the superior court failed to revisit the evidence afresh as is required by law; that the evidence of

identification did not warrant conviction; that the circumstantial evidence that was availed could not warrant conviction in law; that the trial court shifted the burden of proof contrary to the law; that the learned Judges of the superior court misapprehended the facts and applied wrong legal principles and thus misdirected themselves on law and that the conviction was entered against the appellants notwithstanding that the prosecution did not discharge its legal burden of proof beyond reasonable doubt as is required by law.

Before us, Mr. Ondieki, the learned counsel for all appellants, raised several points namely that the constitutional rights of the appellants were violated in that the appellants were each brought into the court well over fourteen (14) days after their arrest without any proper and acceptable explanation. That, he contended, entitled them to be released even if there was a strong case against them. In support of that argument, Mr. Ondieki referred us to the charge sheet in the record and submitted that the appellants, according to the charge sheet, were arrested on 3rd February 2000 and taken to court on 10th May 2000. According to him, the State, which has the burden of explaining that delay, did not offer any explanation, and therefore the appellants were entitled to their freedom. The second point he raised was that there was no evidence as to the language in which the appellants' pleas were taken by the trial court. He contended that the omission prejudiced the appellants even though they pleaded not guilty to the charge. The next point was that the appellants were tortured and, the courts below, in their analysis of the evidence before them, should have made a decision on that and given the benefit of any doubt to the appellants. He also submitted that the trial court and the superior court did not properly analyse the evidence as required by law and particularly the defence of the appellants, each of which raised an *alibi*. Lastly, he attacked the alleged identification of the appellants submitting that the then prevailing lighting conditions were not conducive to proper identification as the strength of the alleged torch light and moonlight were not stated in evidence.

Mrs. Murungi, the learned Senior Principal State Counsel, supported the conviction maintaining that the appellants were arrested at different places, on different dates, with the last one being arrested on 27th February 2000. They were taken to court on 14th March 2000 which did not represent excessive delay. She contended on the omission of the language in which the pleas were taken that as the appellants pleaded not guilty to the charge, they were not in any way prejudiced. She submitted further that the hearing was properly conducted in a language that all the appellants understood and an interpreter was provided throughout so that all the appellants took active part in their trial and so the complaint on the omission of the language used when taking plea was not merited. On identification, she referred us to the evidence and submitted that the witnesses recognised the appellants clearly as the people who took part in the robbery and as to the defence of *alibi*, Mrs. Murungi was of the view that the prosecution evidence displaced the *alibi* defences.

This Court has, in several decisions, made it clear that where an appellant is held in custody for a period beyond the period provided by law which in this case is **fourteen days** from the date of his apprehension (see **section 72(3) (b)** of the Constitution of Kenya) without acceptable explanation for such delay, the court would consider such extra period as being a period under which the person is under unlawful custody and in such circumstances, his constitutional rights will have been violated or breached, entitling him to be released by the court notwithstanding that the case against him may very well be strong. In the case of **Albanus Mwasia Mutua vs. Republic – Criminal Appeal No. 120 of 2004**, this Court after citing several past authorities on similar situations concluded thus:

“At the end of the day, it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the Constitution also amounted to a violation of his rights under section 77(1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his rights to liberty for a whole eight months before bringing him to court so that his trial could begin obviously

resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."

The above principles were adopted by this Court in the most recent decision in the case of **Paul Mwangi vs. Republic – Criminal Appeal No. 35 of 2006** where the Court indicated what explanations a court might consider in respect of a delay to avail an accused person to court within the period prescribed under **section 72(3) (b)** of the Constitution. Having done so, and considering the period of delay in that particular case, it stated:

"So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the Court in Mutua's case."

Thus, the law as to the treatment the courts will give to cases where **section 72(3) (b)** of the Constitution are violated without acceptable and reasonable explanation is now well settled. That, however, depends on such violation being established. The facts must exist to show that the police have detained a person in unlawful custody before the courts can act on the allegation. Such facts would be readily available in the record before the court in case of first or second appeal or would be adduced in evidence in case of the trial court. Courts of law do not act in a vacuum nor would a court of law act on half-baked evidence. In the cases we have cited above, there was, in the record, clear undisputed evidence of such violation and the period of the delay to take the appellants to court was well established.

What about in this case? Mr. Ondieki in his address referred us to the charge sheet in the record and submitted that the appellants were arrested on 3rd February 2000 and taken to court on 10th May 2000. If that were factually shown to be so, it would be a clear case of violation of the appellants' rights. Unfortunately, with respect, that allegation is not borne out by the record. Whereas it is true that the only charge sheet in the record states that the date of arrest was 3rd February 2000 and the date to court was 10th May 2000 and the Criminal Case is No. 233 of 2000, a reading of the proceedings shows that all the appellants were in court for the first time on 14th March 2000. However, on that day, although the record shows that all five were listed under Criminal Case No. 233 of 2000, the plea that was taken was only in respect of the first appellant, second appellant and 3rd accused who was later acquitted. On that day, the hearing in respect of those three accused persons was fixed for 10th May 2000. That case involving the three was then mentioned from time to time till 10th May 2000. On that day, the prosecution applied to consolidate that case with Criminal Case No. 172 of 2000 which had obviously been registered much earlier than Criminal Case No. 233 of 2000. That application was allowed and the two cases were consolidated to be heard in Criminal Case No. 233 of 2000. In short, the charge sheet on record appears to us to have been the one prepared and taken to court on 10th May 2000. The appellants must have been taken to court much earlier as the charge sheet on record was clearly the one in which the two charges were consolidated and was neither the original charge sheet in Criminal Case No. 233 of 2000 which had three accused persons and which was in existence on 14th March 2000 when the pleas of the three were taken; nor was it the charge sheet in respect of Criminal Case No. 172 of 2000 which must have been in court well before 10th May 2000 when Criminal Case No. 233 of 2000 went to court for plea. The record does not contain either charge sheets and thus it is not possible to tell when the appellants first appeared in court. That, in effect, means that no evidence of delay can be discerned from the record before us. Neither the prosecution nor the appellants have established the alleged violation as none has demonstrated that there was delay in taking the appellants to court and the period of that delay, if there was any delay at all. Further, the record shows that three appellants had previous convictions which were relevant and in fact as at the time they were due to be sentenced for this offence, one of them was still serving a sentence. Under all those circumstances, there is no proper evidence on the complaint based on violation of the appellants' rights under **section 72(3) (b)** of the Constitution. They cannot get the benefit of the alleged violation of that provision as no evidence of any such violation is discernable from the record.

The next point raised was that there was nothing to show in what language the pleas were taken. The

record shows that the first and second appellants' pleas together with that of the suspect who was acquitted were taken on 14th March 2000. Immediately after the charges were consolidated on 10th May 2000, pleas were again taken. On both occasions, no language used to communicate to the appellants was recorded. However, the court clerk, one Mulinge, was present on both occasions. The record shows the charges were read over and explained to each appellant. They each pleaded not guilty and the case proceeded to hearing. At the hearing stage, the learned Principal Magistrate was more careful and the language used was clearly stated to be Kikamba, Kiswahili and English. Mulinge, the court clerk, was in attendance throughout the entire proceedings. There was nothing to show that the court clerk was not of Kamba origin, and we believe he must have done his duty of interpretation. The complaint only concerns the language used in taking plea and not during the hearing. In our view, having observed that each appellant conducted his case properly and that at the hearing there is no dispute that interpretation was done in a language the appellants did not understand, we see no prejudice to the appellants occasioned by the non recording of the language in which the court communicated to them at the time their pleas were taken. In any case, they pleaded not guilty. Nothing turns on that ground. If they had pleaded guilty to the charge, different consideration would apply.

Identification of the appellants was attacked by the appellants through their learned counsel. Munyoki identified all the appellants as his attackers on the night of 1st/2nd February 2000. He stated in his evidence that they were people he knew very well. He gave their names to Jacinta and Boniface who in turn gave the names to the police officers. He gave the names of some of their other relatives and said he had known them for sometime. Daniel was also a victim. He identified the first and second appellants and thus as to identification, his evidence corroborated that of Munyoki. Though the incident happened at night, and conditions for proper identification were difficult, Munyoki said his sources of light were a strongly bright torch held by the appellants and bright moonlight. The law as to identification and/or recognition as was the case in this appeal is now well settled. The court has to be cautious before accepting evidence of recognition and using it to convict an accused person and the court must first ensure that such evidence is watertight and not mistaken in any way before acting on it. In the case of **Roria vs. Republic (1967) EA 583** the predecessor to this Court stated:

“A conviction resting entirely on identity invariably causes a degree of uneasiness

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that conviction based on such identification should never be upheld, it is the duty of the court to satisfy itself that in all circumstances it is safe to act on such identification.”

In the well known case of **R vs. Turnbull (1976) 3 WLR 455**, which has been cited with approval by this Court, the courts are warned to take extra care even in cases of recognition for witnesses purporting to recognise people they know may still be mistaken. It states:

“Recognition may be more reliable than identification of the stranger; but even when the witness is purporting to recognise someone whom he knows the jury should still be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

We have perused and considered the decision of the trial court and the superior court with the above legal principles in mind. In our considered view, the learned Magistrate was clearly aware of the duties placed upon him by the law in cases of identification and/or recognition. After analysing the evidence, the learned Magistrate proceeded thus:

“I have warned myself about the danger of there being a case of mistaken identity. I find the circumstances and lighting conditions were conducive to positive identification and that Munyoki Muthangya (PW 1) positively identified Munyoki Nyanza (A1), Hamisi Geroge (sic) A2, Musya Ndemwa (A4) and Titus Munyoki Mwelwa A5 during the robbery. I also find this was a case of recognition as PW 1 knew the accused persons before as residents of his village.”

We are also of the view that the superior court analysed the evidence on identification afresh as is

required of it by law – see the case of **Okeno vs. R. (1972) EA 32**, and came to its own conclusion on the issue. Its independent conclusion resulting from evaluation of the evidence confirmed the learned Magistrate’s conclusion on that issue of identification. For our part, having considered the issues and the decision of the superior court on that aspect and the law, we find no basis in law for interfering with the concurrent finding of the two courts below that Munyoki Muthangya recognised and subsequently named the appellants to the other witnesses.

On the complaint that the trial court did not properly analyse the defence case, we agree with the superior court’s finding that the learned trial court did not go into details in considering the defences of the appellants. However, the superior court, in its duty as a first appellate court, admirably analysed and evaluated the defences but came to the same conclusion that they were mere denials that did not, in any way, shake the evidence that was on record against the appellants. We have considered that decision together with the submission by Mr. Ondieki that the defences raised *alibis* which were not considered. In our view, the prosecution case on identification which was accepted by the subordinate court and the first appellate court displaced the *alibi* defences. Once it was accepted that Munyoki and Daniel were truthful witnesses, then their evidence that the appellants were at the scene of the crime and did take part in the robbery displaced their defences that they were not there. Those two grounds, namely that the trial court and the superior court did not analyse the evidence properly and did not consider *alibi* defences, cannot stand.

Lastly, what we have stated above takes care of the allegations that, because of lack of proper analysis by the trial court and the superior court, gaps in evidence were not evaluated as should have been done and thus the appellants missed out on the benefit of doubt that would have resulted from the evaluation. We were not shown material gaps that were not taken into consideration by the two courts below and we see none. In any event, this is a second appeal and we are, in law, enjoined to consider points of law subject only to few exceptions which do not exist here. We have stated that the superior court which has the duty to analyse and evaluate the evidence afresh did its work admirably. We see no merit in this ground of appeal.

In the result, from what we have stated above, we find that this appeal lacks merit and cannot stand. It is dismissed in its entirety.

Dated and delivered at Nairobi this 30th day of May, 2008.

R.S.C OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR