



IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 37 & 62 of 2004

DAVID NDERITU ALIAS MACHANGI 1ST APPELLANT

PATRICK NGARI MOYA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nyeri (Juma & Ombija, JJ) dated 13th August, 2003

In

H.C. Cr. Appeals No. 345 & 346 of 2001)

JUDGMENT OF THE COURT

The two appellants, David Nderitu alias Machangi and Patrick Ngari Moya, together with a third man who was acquitted by the trial Magistrate, were charged and tried on one count of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of that charge were that on 7th May, 2001 at Likii River Farm in Laikipia District within Rift Valley Province, while armed with dangerous weapons namely a toy pistol, thunder flash, swords, pangas and a claw-hammer, they jointly robbed Charles Kamau Wamae on behalf of Likii Farm of cash Khs.505,000/- and at or immediately before or immediately after the time of such robbery, used actual violence against the said Charles Kamau Wamae.

On 10th May, 2001, three days after the robbery charged against the appellants, the two of them, together with a man who was acquitted by the Magistrate, appeared before Mr. S.M. Kibunja, a Senior Resident Magistrate at Nanyuki. The record of the Magistrate shows that an inspector of police, Inspector Ochieng', appeared as a prosecutor on behalf of the Republic while a court clerk called Sheilla was also in attendance. The Magistrate's record also shows that interpretation of the proceedings was being done from English to Kiswahili. The Magistrate recorded that he "*notified*" the appellants that the charge they faced carried with it the death penalty and each appellant is recorded as responding:-

"I understand."

The charge was then read out to them and each one of them pleaded not guilty to the charge. The case was thereafter heard by the same Magistrate and a total of thirteen witnesses testified on behalf of the Republic. Each witness was led through the evidence by Inspector Ochieng' and of the thirteen witnesses, twelve gave their evidence in Kiswahili while only one, Inspector Jane Kamau (PW13) gave her evidence in English. When the appellants were called upon to give their defences each chose to make an unsworn statement in the Kikuyu language. At the end of it all, the learned trial Magistrate found them guilty of the charge, convicted them and sentenced them to death.

Each of them appealed to the High Court of Kenya and in a judgment covering merely two and a quarter typed pages, the High Court, Juma and Ombija, JJ, dismissed their appeals against the conviction and confirmed the sentence of death

against each one of them. The appellants now come to this Court by way of a second appeal and that being the position and as is prescribed under **section 361(1)** of the Criminal Procedure Code, the Court's jurisdiction is limited to considering only matters of law.

Mr. Muchiri Wa Gathoni, of M/s Muchiri Wa Gathoni & Company Advocates, represented the two appellants before us and for each appellant he filed "*Further Supplementary Memorandum of Appeal*" containing four grounds of appeal. Because Mr. Wa Gathoni largely concentrated on those four grounds in arguing each appellant's appeal, we now set out in full, the four grounds and they are:-

"1. THAT the trial court and the 1st Appellant (sic) court erred in law in failing to find that the charge sheet (sic) was fatally defective.

2. THAT the 1st Appellate court erred in law in failing to find that the trial before the trial court was a nullity the proceedings having been conducted in a language that the appellants did not understand contrary to section 77 (2) (f) of the Constitution of Kenya.

3. THAT the 1st Appellate Court erred in law in failing to find that the proceedings before the trial court were a nullity the same having been conducted by an unqualified person.

4. THAT the trial court and the 1st Appellant (sic) court erred in law in failing to find that the prosecution case was fraught with fatal discrepancies and contradictions which raised doubts that should have been resolved in favour of the Appellants."

Elaborating on ground one with regard to the alleged "*fatal defective nature of the charge*" Mr. Wa Gathoni submitted that as the particulars of the charge alleged that Charles Kamau Wamae (P.W1) had been robbed "*on behalf of Likii River Farm*" it was not clear as to who had been robbed and hence the fatal defect in the charge. Taking into account the nature of the evidence led before the Magistrate, it is clear to us that the money which was stolen during the robbery did not belong to Charles Kamau Wamae but to Likii River Farm. Wamae had simply withdrawn that money from the bank account of the Farm to be paid out as salaries to the Farm's workers. When Wamae was in the office with the money preparing to pay it out to the Farm workers the robbers struck and took away the money. Wamae was in fact a "*Special Owner*" of the money under **section 268 (2)** of the Penal Code which defines that term as :-

"includes any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question."

Wamae was in charge of the money on behalf of the Farm and was, therefore, a special owner. There was accordingly, no need to state in the particulars of the charge that Wamae was robbed on behalf of the Farm, but with respect to Mr. Wa Gathoni, we do not think the unnecessary words in the charge occasioned to the two appellants any injustice. We asked Mr. Wa Gathoni what possible injustice the addition of the words could have occasioned to the appellants. He showed us none and in our view the irregularity is one curable under **section 382** of the Criminal Procedure Code. We reject ground one in the further supplementary grounds of appeal.

On ground two dealing with the language in which the proceedings were conducted, Mr. Wa Gathoni appeared to contend that because the record of the Magistrate does not show that the appellants were actually asked to state in what language each of them wanted to speak, they did not understand the language in which the proceedings were being conducted, particularly in view of the fact that the appellants chose to make their unsworn statements in their mother-tongue, namely Kikuyu. We have already set out the record of the Magistrate with regard to interpretation of the proceedings but it appears that Mr. Wa Gathoni was demanding more than what is shown on the record and would have preferred to see something like this:-

"Court to Accused : What language do you wish to speak?"

Accused: I wish to speak Kiswahili, Kikuyu etc.."

We must quickly point out that there is no set formula for keeping court records. So long as the record shows that there was interpretation from one language to the other, that is sufficient and there cannot be any formula as to how a court is to elicit the information from an accused person. Again it must be made abundantly clear to all concerned that when the Constitution and the Criminal Procedure Code talk about the language an accused person "*understands*" they do not mean the mother-tongue of such an accused person. English and Kiswahili are the two official languages in Kenya. We take judicial notice of the fact that those two languages though widely spoken do not constitute the mother-tongue of the majority of Kenyans. These two appellants clearly told the Magistrate that they understood Kiswahili and the

Magistrate did record that the interpretation was from English to Kiswahili. Virtually all the witnesses testified in Kiswahili and there was an interpreter Sheilla to interpret from English to Kiswahili . That the appellants in the end chose to speak in Kikuyu language does not and cannot mean that they did not understand Kiswahili. Kikuyu is their mother tongue but they understood Kiswahili as well. We reject ground two of the further supplementary grounds of appeal.

Ground 3 deals with the fact that on the day the Magistrate read out his judgment, the Republic was represented thereat by a Corporal Leichena who, after the conviction, informed the Magistrate that the appellants could be treated as first offenders as their previous records or antecedents were not available. In the view of Mr. Wa Gathoni this amounted to a prosecution by an unqualified person as was set out in the well-known case of **ELIREMA & ANOTHER VS. REPUBLIC [2003] KLR 537**. With respect to Mr. Wa Gathoni, Corporal Leichena conducted no prosecution as all the witnesses who testified in the case were led through their evidence by Inspector Ochieng. Leichena was present in the court to enable the Republic be represented at the delivery of the Magistrate’s judgment, but the prosecution of the case had by then long ended and the information Leichena gave to the Magistrate was wholly unnecessary with regard to the sentence which was to be imposed on the appellants. Leichana certainly conducted no prosecution in this case. We reject ground 3 of the grounds of appeal argued before us by Mr. Wa Gathoni.

That now brings us to the last ground which touches the substance of the prosecution’s case against the appellants and the manner the High Court dealt with evidence in the entire case. On that aspect of the matter, we have no hesitation in saying that the High Court actually failed to discharge its role as a first appellate court as set out in the other well known case of **OKENO VS. REPUBLIC [1972] EA 32** . As we have said, the judgment of the High Court dismissing the appeals by the two appellants covered a mere 2 ¼ typed-pages. **OKENO’S** Case, supra, directs the High Court on a first appeal as follows:-

“-----The High Court on the face of it appears to have approached the matter on the basis of whether the magistrate’s findings could be supported by the evidence instead of whether they should be supported. It is appropriate on a second appeal only to decide whether a judgment can be supported on the facts as found by the trial and first appellate courts as this is purely a question of law. The first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusion, in deciding whether the judgment of the trial court should be upheld, as well of course as deal with any questions of law on the appeal, see Selle vs. Associated Motor Boat Co., [1968] EA 123.”

In their short judgment, the learned Judges of the High Court merely confirmed the conclusions made by the trial Magistrate without themselves reconsidering the evidence, evaluating it and drawing its own conclusions before deciding to confirm the Magistrate’s findings.

Despite that failure by the High Court, we have no doubt ourselves that had they properly directed themselves, the Judges would nevertheless have inevitably supported the conclusions of the trial Magistrate. The two appellants were foolhardy enough to invade Likii River Farm in broad day-light and at a time when the Farm workers had gathered to be paid their wages. An alarm was raised within the offices where Wamae had the money ready to pay the workers. The appellants were directly chased from the offices and each of them was caught at separate points within the Farm. One of them attempted to cross the Likii River and was caught within the waters, making one of his pursuers nearly drown himself in the River. Neither appellant had any business being within the Farm at the time of arrest, both having been previously dismissed from their employment at the Farm. Their respective defences that they were caught outside the Farm was rejected by the trial Magistrate and in blanket conclusion by the High Court, confirmed. The discrepancies and contradictions which were there were minor and did not affect the substance of the prosecution’s case . On our own reading of the recorded word, we are satisfied the evidence against each appellant was simply overwhelming and each of them was rightly convicted. Their respective appeals must accordingly fail and we order that the appeals be and are hereby dismissed in their entirety.

Dated and delivered at Nyeri this 16th day of May, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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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.