



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 217 OF 2005**

**DOMINIC MUTIE MWALIMU .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Machakos (Lesiit & Wendoh, JJ.) dated  
18<sup>th</sup> November, 2004**

**in**

**H.C.CR.A. NO. 97 OF 2004)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant and four other were charged with robbery with violence contrary to **section 296 (2)** of the Penal code before the Chief Magistrate, Machakos. The trial magistrate however made a finding after the close of the prosecution case that the appellant's co-accused had no case to answer and acquitted them under **section 210** of the Criminal Procedure Code. The appellant was put on his defence after which he was convicted and sentenced to death. His first appeal to the superior court was dismissed.

The complainant was George Wambua Kathime (PW1). The charge sheet stated that on 28<sup>th</sup> January, 2004 at 9.30 p.m. along Mombasa/ Nairobi Highway, the appellant and the four co-accused robbed the complainant of motor vehicle Reg. No. KAH 467P – Mitsubishi Canter, 100 bags of cement, 15 pieces of plywood, one bag of red oxide, 10 iron bars, 3 bundles of sisal threads, four bundles of iron-sheets 2.5 meters each, 3 bundles of iron sheets, 3 meters each and 5 bags of nails of 50 kg each all valued at Shs.1,320,000/=.

The complainant was employed as a driver by Joseph Kimolo Mgotu (Mgotu) (PW3) a businessman at Makindu along Mombasa/ Nairobi Highway. On 28<sup>th</sup> January, 2004, Mgotu bought construction materials in Mombasa which were loaded in his motor vehicle Reg. No. KAH 867P Mitsubishi Canter. He then instructed the complainant and the turn-boy Sila Gideon (PW2) to transport them to his business premises at Makindu. He remained behind to travel by a night bus.

According to the evidence of the driver and the turn-boy, the driver slowed down between Kibwezi and Kambu to avoid potholes and thereupon highway robbers emerged from both sides of the road. They knocked the vehicle and forcefully boarded it, beat the driver and turn-boy and ordered them to alight.

The robbers thereafter drove the vehicle away.

The complainant rang the police and PC. Erick Muli (PW8) and CI. Wamatu (PW9) and other police officers drove to the scene at “Kwa Kieti” area. On the following morning – 29<sup>th</sup> January, 2004 at 6 a.m. AP. Sgt. Lemishion Johana of Kambu D.O.’s office received a report from members of public that a vehicle had been abandoned at a place called Pipeline. He went to the scene and found motor vehicle Reg. No. KAH 467P Mitsubishi Canter abandoned with its two rear wheels and battery missing. He called IP. Johana Ekidor (PW11), the OCS Mtito Andei who went to the scene. Some of the construction materials in the vehicle e.g. bags of cement, iron sheets, sisal ropes, red oxide, iron bars were still intact. The owner of the vehicle however, later found that some of the goods including iron sheets, cement, nails were missing. On 2<sup>nd</sup> February, 2004, IP. Johana Ekidor got information that some people had been seen pushing bicycles carrying iron sheets. He followed the bicycle tyre marks which led to the home of Domiana Mwikali Muli (Domiana) (PW6) where 68 iron sheets were recovered.

Domiana testified that on the morning of 2<sup>nd</sup> February, 2004 at 6 a.m. the appellant and three others took 68 iron sheets to her home and offered to sell them to her. Since Domiana was taking her child to school, she told them to leave the iron sheets in the compound and return on the following day. When she later returned to her home, she learnt that police had arrested her father and taken away the iron sheets. She explained to police that the iron sheets had been left by four people whom she could identify and her father was released. On 4<sup>th</sup> February, 2004 AP Sgt. Lemishion Johana arrested the appellant in a bar at Kambu market and on 9<sup>th</sup> February, 2004, Domiana identified him at an identification parade conducted by Ag. IP Lennox Owango (PW10) as one of the four people who brought iron sheets to her home.

The appellant stated at the trial that he did not commit the offence and that he was wrongly picked at the identification parade by people he knew.

The trial magistrate believed the evidence that the 68 iron sheets were parts of the goods that the complainant was robbed of and said in part:

***“The accused (actual) owner of the stolen vehicle and goods was Joseph Kimolo Ngutu (PW3), a businessman in Makindu. He had purchased the goods in Mombasa on the material 28<sup>th</sup> January, 2004. He identified the sixty eight pieces of iron sheets (P Ex3) as being part of the goods. The ownership of the said pieces of iron sheets was not at all substantially disputed. It would therefore be safe to hold that the iron sheets belonged to Joseph Kimolo Ngutu (PW2) and were part of the goods stolen from his driver the complainant (PW1)”.***

The trial magistrate further believed the evidence of Domiana that the 68 iron sheets were taken to her home for sale by the appellant and three others on the morning of 2<sup>nd</sup> February, 2004 and said in part:

***“Conditions and circumstances rendered it possible for Dominica (sic) (PW6) to be able to identify the first accused as one of the four young men who were in possession of the iron sheets (P Ex3) before they left them in her homestead. Her demeanor indicated that she was firm and credible in her identification of the first accused and that the iron sheets were innocently in her homestead not knowing that they had unlawfully been obtained .....”.***

The trial magistrate convicted the appellant on the basis that he was in recent possession of the 68 iron sheets which had been stolen.

The appellant raised three main grounds of appeal in his petition in the superior court, namely; that he was not identified at the scene of the crime; that the 68 iron sheets were not in his possession and that there were no documents to prove that he is the one who sold the iron sheets to Domiana.

The superior court on its part evaluated the evidence and believed the evidence of Domiana saying in part:

***“We do agree with the trial magistrate that the circumstances under which the appellant met PW6 were favourable for PW6 to identify the appellant later. It was a peaceful meeting whereby a seller was offering goods to a buyer. The appellant had not disguised himself in any way. Identification was sound and we have no reason to interfere with the magistrates finding even as to the demeanor of PW6 which the magistrate commended”.***

Regarding the identification of the iron sheets recovered the superior court, said:

***“After the robbery, not all goods were stolen from the vehicle. Some goods were found on the vehicle. They were bulky in nature. PW1 (PW11) recovered iron sheets from PW2 (PW6). PW3 identified the iron sheets. He produced receipts to confirm that he had purchased them in Mombasa among other things”.***

The superior court made a finding that the appellant was found in possession of the stolen iron sheets three days after the robbery and dismissed the appeal.

There are several grounds of appeal, the main ground being the complaint that the superior court erred in law in failing to re-examine, and re-evaluate the entire evidence particularly the evidence connecting the appellant with the possession of the 68 iron sheets.

The question of the language used by the appellant at the trial is also raised. It is submitted that the failure by the trial court to indicate the language in which the appellant made his statement in defence rendered the trial a nullity. The record of the proceedings show that seven of the eleven witnesses gave evidence in Kiswahili while the remaining four all senior police officers gave evidence in English and that the appellant was represented by one Mr. Mugambi, throughout the trial. The appellant does not say that he was forced to speak in a language that he was not fluent in or that he was prejudiced in any manner. This ground was not raised in the superior court and is an after-thought. It has no merit.

It was further submitted that the appellant was taken to court 17 days from date of arrest, thereby breaching his constitutional right and thus rendering the entire proceedings a nullity. The alleged breach of a constitutional right is based on **section 72 (3)** of the Constitution which provides:

***“A person who is arrested or detained –***

***(a) .....***

***(b) Upon reasonable suspicion of him having committed, or being about to commit a criminal offence***

***and who is not released, shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”.*** (Emphasis ours).

A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court *as soon as is reasonably practicable* (emphasis ours).

The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court *as soon as is reasonably practicable* rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person

charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court *as soon as is reasonably practicable* notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not *ipso facto* prove a breach of the Constitution. The wording of **section 72 (3)** above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of **section 84 (1)** of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity.

In this case, the proceedings show that the appellant was arrested on 4<sup>th</sup> February, 2004 for a capital offence and was brought to court on 20<sup>th</sup> February, 2004. By **section 57 (a)** of the Interpretation and General Provisions Act, the day on which the appellant was arrested has to be excluded from computation time. It follows therefore, that the appellant should, have been brought before the court on 18<sup>th</sup> February, 2004 when the 14 days expired. He was brought to court 2 days later on 20<sup>th</sup> February, 2004. The appellant did not complain in the trial court that he was not brought to court as soon as was reasonably practicable. Needless to say the prosecution was not called upon to show that the appellant was brought to court as soon as was reasonably practicable. There is no merit in this ground.

On the main ground of appeal both courts below appreciated that the prosecution case depended on the evidence of Domiana. Before us, Mrs. Murungi, learned Principal State Counsel did not support the conviction on the ground that the superior court failed to evaluate the evidence. She submitted in particular that there were no receipts to prove that the iron sheets belonged to the complainant and that the superior court misdirected itself when it made a finding that a receipt for the iron sheets was produced as an exhibit.

It is clear in this case that the superior court evaluated the entire evidence. The superior court re-appraised the evidence of Domiana and accepted it as truthful. It agreed with the finding of the trial magistrate. Thus, there are concurrent findings of fact that the complainant was robbed of motor vehicle, 68 iron sheets and other goods on the night of 28<sup>th</sup> January, 2004; that on the morning of 2<sup>nd</sup> February, 2004 the appellant and three others took 68 iron sheets to the home of Domiana and offered to sell the iron sheets to her, that Domiana told them to leave the iron sheets in the compound and come on the following day as she was taking her child to school, that the police collected the iron sheets on the same day in the absence of Domiana and that Domiana identified the appellant in the identification parade as one of the four people who brought the iron sheets at her home; that the appellant was in recent possession of the stolen iron sheets and thus one of the people who robbed the complainant.

The trial magistrate had the advantage of seeing and hearing Domiana give evidence. The superior court appreciated the advantage enjoyed by the trial court and declined to interfere with the findings. The superior court with respect directed itself properly. It could not have interfered with the findings of the trial court based on the credibility of the witness unless no reasonable tribunal could have made such findings or if it was shown that the findings were erroneous in law (see **Republic v Oyier** [1985] KLR 353).

Furthermore a second appellate court will not lightly interfere with concurrent findings of fact by a trial and first appellate court unless it is shown that they were based on no evidence (see **Karingo v Republic** [1982] KLR 213; **Mwita v Republic** [2004] 2 KLR 60).

The record shows that Mr. Omirera, a Senior State Counsel who appeared for the Republic in the superior court supported the conviction. It is true as Mrs. Murungi submitted that the superior court misdirected itself that the receipts in respect of the iron sheets were produced as exhibit as the complainant did not produce them.

However, there are concurrent findings of fact that the 68 iron sheets taken by the appellant and three others to Domiana were part of the goods that the complainant was robbed of. No question was raised by the appellant in the two courts below or in this Court about the ownership of the 68 iron sheets.

Indeed, considering the geographical location of the scene of robbery; the location where the complainant's vehicle was recovered with some of the goods (Pipeline) and location of the house of Domiana where the iron sheets were recovered, the findings of the two courts below that the recovered iron sheets belonged to the complainant cannot be faulted. We think, we respect that Mrs. Murungi did not fully appreciate the prosecution case.

For those reasons, we find no merit in this appeal. It is accordingly dismissed.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2008.**

**S. E. O. BOSIRE**

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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**