IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 223 OF 2004

PETER KIMATU MUTUA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

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

(Lesiit & Wendoh, JJ) dated 2nd November, 2004

in

H. C. Cr. A. No. 48 of 2004)

****

JUDGMENT OF THE COURT

Peter Kimatu Mutua, the appellant herein, comes before this Court by way of second appeal, his first appeal having been dismissed by the superior court (*Lesiit and Wendoh, JJ*.) on 2nd November 2004. The appellant had been tried and convicted on a charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code. Upon that conviction the Senior Resident Magistrate at Machakos sentenced him to death, the only lawful sentence provided by law for this offence. By dint of ***section 361*** of the Criminal Procedure Code he can only appeal to this Court on matters of law only.

It was alleged in the charge sheet before the Magistrate's Court that on 3rd day of July 2003 at Mutituni Market Mutituni Location Machakos District within Eastern Province with two (2) others who were acquitted, jointly robbed Anthony Muli Mutata, the complainant, of one pair of shoes, one pair of long trousers, one coat and cash Kshs.2,500/= all valued at Kshs.6,050/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Anthony Muli Mutata.

Before the Magistrate the complainant stated that on the date in question, he set to go home from Mutituni Market at 9.30 p.m. and as he walked home through a coffee garden he was confronted by the appellant and ***Patrick Kyalo Mutinda*** the latter of whom placed a piece of timber around the complainant's neck and knocked him to the ground. In the process the appellant removed the complainant's pair of shoes, pair of trousers, a coat and cash Kshs.2,500/=, then the two ran away in different directions. Since the appellant had, moments earlier, sought to know from him whether he was going home and with the aid of electric lighting from the shops nearby the complainant was able to identify the appellant.

Apart from this, after the complainant made a report of the incident to the police leading to the arrest of

the appellant and two (2) others, all the items the complainant was robbed of, except the cash, were recovered with the help of the appellant. He was then charged and convicted by the Senior Resident Magistrate as aforesaid.

In the superior court, after reviewing the entire evidence adduced before the subordinate court the learned Judges said:-

"***As required of us, we have re-evaluated the evidence before the trial court. The offence occurred about 9.30 p.m. I*** *(sic)* ***was behind the shops as PW1 walked towards the coffee plantation heading to his home. Both PW1 and 2 maintain that there were electricity lights from the shops. The court was not however told the intensity of the light, how far it was from the scene and how long the assailants were with PW1. It seems from PW2's sentence*** *(sic)* ***that he kept a distance between himself and the robbers and complainant. PW2's conduct during and after the robbery was questionable. He did not raise any alarm or tell anybody of the robbery. The reasons he gave for his failure to do so or report to the Administration Police Camp which was nearby could not hold any water. Notwithstanding PW2's conduct and evidence we find that PW1 was able to ably identify 1st appellant who talked to PW1 just before the robbery, they are related and know each other well and came to close contact. There is ample evidence on record that thereafter on the next morning when PW1 pointed him out to police*** *(PW5)* ***1st appellant led to recovery of all the stolen items save for cash, PW3 and 4 alleged was sold or left with them by 1st appellant."*** Emphasis provided.

These are concurrent findings of fact by the two courts below and this Court cannot interfere with them as we do not feel they were based on no evidence or a misapprehension of the evidence; nor that the two courts acted on wrong principles***, Kiarie v Republic [1984] KLR 739.*** The test to be applied is whether there was any evidence on which the two courts below found as they did – ***Reuben Karani s/o Karani v Republic (1950) 17 EACA 146.*** We are satisfied there was such evidence. In ***M'Riungu v Republic [1983] KLR 455*** this Court held:

"***Where a right of appeal is confined to questions of law the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (***Martin v. Glyneed***)."***

Though the appellant had filed his own Memorandum of Appeal which listed six (6) grounds of appeal, his counsel Miss Arati, filed a Supplementary Memorandum of Appeal which listed seven (7) grounds of appeal, namely:-

"1. ***That the superior court erred in law by failing to resolve that the appellant's rights under*** *section 77(2)(a)(b)(c)(d))(e)(f)* ***of the Constitution of Kenya as read with*** *section 198* ***of the Criminal Procedure Code*** *(Cap. 75 Laws of Kenya)* ***were violated to the prejudice of the appellant.***

2. That the trial court and the superior court erred in law by misapprehending the facts and applying wrong legal principles.

3. That the superior court and trial court erred in law by convicting on circumstantial evidence that did not meet the required legal standards and that there was no positive identification considering the time the crime was committed.

4. That the superior court erred in the *(sic)* ***law by confirming and convict*** *(sic)* ***on an exhibit that were never produced in accordance to the law.***

5. That the prosecution shifted the burden of proof to the appellant contrary to the provisions of the law.

6. That the superior court erred in law by failing to analyze the entire evidence and form their own conclusions.

7. That the superior court erred in law by failing to consider that there was no identification parade carried *(sic)."*

Before us on 7th October, 2008 learned counsel for the appellant dropped grounds 5 and 6 of the supplementary grounds of appeal and argued grounds 1 and 2 together as well as grounds 3 and 7 while ground 4 was argued alone. On grounds 1 and 2, learned counsel complained that proceedings in the subordinate court were conducted in a language the appellant did not understand. This is a constitutional issue which questions the validity of the entire trial owing to alleged transgression of section ***77(2)(b)*** and ***(f)*** of the Constitution of Kenya. It is an issue raised for the first time in this appeal but of course there is no impediment to the appellant raising issues of jurisdiction at any stage of the case. It was the gist of Miss Arati's submission that it is the duty of the court to confirm that the accused understands the language used therein.

The issue of '***Language***' in criminal trials has been severally examined by this Court and strong expressions made about compliance with the requirements of the law; See ***Degow Dagane Nunow v R. Criminal Appeal 223 of 2005*** (*unreported*):

Section 77(2) of the Constitution aforesaid provides that:

"***Every person who is 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 to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge."

The issue of interpretation in criminal trials is also provided for in ***section 198*** of the Criminal Procedure Code which states:

"*198(1)* ***Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."***

With these provisions in mind, we note that plea in the case before the subordinate court was taken on 10th July, 2003. The coram for that day was as follows:-

"***Name of Magistrate J. R. Karanja, S.P.M.***

Name of Prosecutor C.I. Wambua

Name of Interpreter: Mutisya

Accused present

Interpretation English/Kamba

The substance of the charge and every element of it read and explained to accused and understood. Accused in his own words replies (There were 3 accused persons)

Accused 1 I deny offence

Accused 2 I deny offence

Accused 3 I deny offence

Plea of not guilty."

The appellant was the 1st accused and the record of the day clearly shows he was "***informed as soon as reasonably practicable***" in a language he could understand of the nature of the offence with which he was charged. At the same time he was provided with a Kamba interpreter, and throughout the hearing before the Magistrate names of court clerks were recorded who included either a Mr. Mutiso or Mr. Mutisya both who are of the Kamba tribe. Given the record, we are convinced that relevant provisions of law as regards court language were followed and Miss Arati's complaint about any infringement are farfetched and not supported by the record. In fact the appellant fully participated in the trial and even cross-examined the witnesses at length. He did not raise such complaint before the superior court and we feel the complaint before us in this respect is an afterthought.

Next, learned counsel for the appellant complained about lack of or insufficient identification of the appellant. On this aspect we wish to reiterate what we stated earlier and also what the Judges of the superior court said in their judgment which we reproduced earlier.

We are satisfied the identification of the appellant in the circumstances was in form of positive recognition and no useful purpose would have been served by holding an identification parade as counsel for the appellant suggested in ground 7 of the Supplementary Memorandum of Appeal.

On the complaint by learned counsel for the appellant that PW1 was not sworn or reminded of the oath when recalled on 1st October 2003, we wish to point out that the evidence adduced by him on that day related only to him identifying the items he had been robbed of on 3rd July, 2003 and over which he had already testified earlier. It never went to the core of the case and in any case, the appellant suffered no prejudice nor was a failure of justice thereby occasioned as he was afforded ample opportunity by the court to cross-examine PW1 on that evidence – ***section 382 of the Criminal Procedure Code***.

Mrs. Murungi, learned Senior Principal State Counsel supported the appellant's conviction and sentence on behalf of the State on the grounds that the appellant was known to PW1 for 16 years and that he had led to the recovery of the stolen items. She also submitted that the language of the court was interpreted to the appellant by the Court Clerk. We agree with her submissions and are convinced this appeal has no merit. We dismiss it and confirm the appellant's conviction and sentence.

Dated and delivered at Nairobi this 14th day of November, 2008

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR