REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 5 of 2004

MUTHANGYA MUTEMBEI ……...……..……. APPELLANT

AND

REPUBLIC …….……..…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya Nairobi (Mbogholi & Mutitu, JJ) dated 14th August, 2003 In H.C. Cr. Appeal No. 457 of 2000)

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JUDGMENT OF THE COURT

Patrick Muendo Kioko (PW 1) (Patrick), Sammy Mumo Mwau (PW 2) (Sammy) and Norman Kioko Nzula (PW 3) (Norman) were traders at Wetaa Market in Mango Location of Machakos District. Nicholas Kimote Mutua (PW 4) (Nicholas) was a waiter in a hotel at the same market whereas Mutuku Wambua (PW 8) (Mutuku) was a cashier at O.B. Bar in the same building in the market. On the night of 26th/27th January between the hours of 11.00 p.m. and 3.00 a.m. each of them was asleep at his respective place of work. At 11.00 p.m. (wrongly recorded as 11.00 a.m.), Patrick heard a knock at his shop's door. He asked who was knocking and the answer was that they were police officers from Makutano. Those people ordered Patrick to open the door quickly as there was an inspection. Patrick got out of bed, lighted a hurricane lamp and opened the door. He saw several people outside the shop armed with pangas, knives, axes, bows and arrows and clubs. They were over 20 people. They hit him on the head with a club and also hit him on the hands and back. They demanded money. Patrick gave them Ksh.5,000/= in currency notes and coins denomination. Patrick was certain they were also having a sharp metal bar and a metal with several angles. When he gave them Ksh.5,000/=, they laughed and said that was too little. They demanded more money. When he told them he had no more money, they forced him to lie down and an axe was placed on his neck. He was then beaten on the back and head till he offered to give them more money. He was allowed to stand up and he did so and gave them Ksh.10,000/= more. They demanded cigarettes and he gave them cigarettes. They took torch batteries, razor blades and two old torches. They put all those into bags. They then tied Patrick's hands with ropes at the back and ordered him to take them to the shop of Sammy which was not far from that of Patrick. Outside Sammy's shop, they forced Patrick to lie down as they broke into Sammy's shop after Sammy had refused to open for them. Sammy says when he refused to open, a metal bar was inserted at the door and Sammy realised that the door would break. He opened the door. An axe was placed on his face and people entered the room where he was in his shop. They were many people. They started beating him and demanding money. He gave them Ksh.6,000/= but they were not satisfied and continued beating him while demanding more money. Some carried big bags which Sammy saw with the help of the torches they had. From his shop they took cigarettes, oils, his Northstar shoes, body lotion called care-plus, quencher, watch Omax, dozens of lotions in cartons, nice and lovely, venus, bow and seven arrows complete with

handles. Sammy was also taken out of his shop. He, together with Patrick, were taken to the hotel where Nicholas and others were and locked in a room in that building while the thugs continued breaking into other shops and buildings. One of the shops they broke into was that of Norman in the same market. They broke that shop after Norman had refused to open for them telling them that he had no money as he had just come from Eldoret that day and in any case, he had not carried out any business in the shop. They broke his shop using a metal bar. They went through many rooms in the shop; hit Norman with a panga, surrounded Norman and took his wife a few steps from him. The thugs had several torches they were flashing and through these torches, Norman saw the appellant who had a panga and who hit his wife with the flat side of the panga on the buttocks. The appellant hit his wife four times but another person told him to stop doing so. Norman's wife gave them Ksh.500/=. They took Norman's panga and other personal documents. Norman said that apart from the torches the thieves had, his wife also had lit a lantern and these sources of light made him see them. He maintained that he did see the thieves and could identify them if he saw them again. Each of them had a hat on. The appellant wore a black coat with stripes. Norman was attacked at 3.00 a.m. Earlier, at about 12 midnight, Nicholas and other two people were in a house behind the hotel where he worked. He heard a voice telling him to open the door. He did not open it but the people outside kicked the door open and several people entered the house. Those people beat up Nicholas and the others demanding whatever they (Nicholas and his colleagues) had. They asked Nicholas to show them the house of the chief and the house of the owner of the bar. They also demanded money as they continued beating Nicholas and the others. They took Ksh.200/= from the floor where Nicholas had kept it. They hit him with a metal bar resembling a metal bar exhibited in Court at the hearing of the case. They also broke the front door of the hotel and took Ksh.1,244/= which was kept there. They tied Nicholas and his other two colleagues and took his torch and they left them there. Later, as we have stated above, other people, i.e. Patrick, Sammy and others were taken to the same hotel. The attackers were not satisfied with the mayhem they had caused in Wetaa Market that night. They also went to the O.B. Bar where the cashier, Mutuku, was sleeping that night. Mutuku was sleeping at the back of O.B. Bar. He heard people calling out the name of Nicholas to open the doors to the hotel where the bar was. He had keys to the padlock of the hotel and bar. The attackers drank two crates of beer in the bar. Mutuku went and reported to the police. In the meanwhile, Patrick, Sammy and Nicholas who were tied and were locked in the hotel after staying there for about 20 minutes heard one person called John crying outside. They called him and he opened for them. They ran through a maize garden and went to Makutano Police Station where they reported the incidents to the police. Police came from Machakos Police Station and they all recorded their statements. Very early in the morning of 27th January 2000 at about 5.30 a.m. Lenson Mwaluko Dania (PW 6) (Lenson) a matatu conductor was in his matatu vehicle No. KAH 030M. He had come from Makutano and was on his way to Wamunyu. At a stage called Kwa Ngei, three people entered the matatu. One person sat at the front cabin with the driver while the other two sat at the back. Those people were strangers to Lenson as that matatu had plied that route several times previously and so its crew knew most of the travelers. The two who entered the back had a bag each. Lenson asked for fare from one of the two at the back and that person told him to ask for fare from the other man at the back. Lenson went to the other person who gave him Ksh.100/= being the fare for the two. There were few other passengers in the vehicle. When the matatu reached Makutano stage Pc Joseph Muthusi Wambua (PW 5) (Pc Joseph) entered the vehicle. Lenson knew Pc Joseph very well. Lenson told Pc Joseph that he suspected the three people who entered the matatu at Kwa Ngei stage. One of these three people was identified by Lenson as the appellant. Lenson said the appellant is the person he first asked for fare and who referred him to the other. The appellant and the other are the two people who had bags. When Pc Joseph looked at them, the two became uneasy and one of them ran to the door of the vehicle and banged it as if to instruct the driver to stop. When the vehicle stopped the other who sat with the driver ran away and the other one also jumped out of the vehicle but Pc Joseph rushed and held him. This was the appellant. Lenson assisted by conductor and other passengers overpowered the appellant. He was tied. On opening the bags, several things were found in the bags. These were body lotions, sheath, two torches, Northstar shoes, two purses, a jacket, a cap and other things. Pc Joseph arrested the appellant, and asked the driver to take him and the appellant to Machakos Police Station.

At 10.00 a.m. on that day, 27th January 2000, Policemen went to Wetaa Market and asked Patrick and the other victims to go to Machakos Police Station. They went. Patrick identified his arrow heads, Sammy identified his Northstar shoes which he said had many features confirming that they were his. He

also identified the lotion, and said the bag recovered resembled his bag. Norman identified the metal items as similar to the ones the robbers carried on the night of robbery. Nicholas also identified a torch as his. Mutuku identified the padlocks and keys to the padlocks. All these items identified by Patrick, Sammy, Norman, Nicholas and Mutuku were items found in the bags which Lenson said was carried by the appellant and two others when they entered the matatu at Kwa Ngei and which they left behind in their bid to escape being arrested by Pc Joseph and those in the matatu. The appellant was thereafter charged with four counts of robbery with violence contrary to **section 296(2)** of the Penal Code and one count of Bar breaking and committing a felony contrary to **section 306(a)** of the Penal Code. He pleaded not guilty to all counts. The case proceeded before the Senior Principal Magistrate at Machakos (J. S. Kaburu). On 3rd March 2000, Dr. Anthony Macharia of Machakos District Hospital (PW 7) examined Patrick, Sammy and Nicholas. They had been to hospital earlier on 27th January 2000, but as it was necessary that their P3 be filled, it necessitated their going for examination on 3rd March 2000. The degree of injuries suffered by each of them was assessed as harm.

In his defence in court, the appellant's defence was short and we reproduce it here below:

"**On the material day I left Mwingi going to Nairobi. I passed through Kitui. The I boarded (sic) a vehicle to come to Nairobi. I reached Wamunyu and the vehicle I was in broke down at 6.30 p.m. I spent the night there. Next day at 6.30 a.m. I boarded a vehicle. I was asked to pay and I gave the conductor 500/=. When he gave me change he alleged that I had given 200/=. We disagreed. The conductor went and talked to another person who came and tied me with ropes and took em (sic) to the police station. I don't know anything about this case."**

The learned Senior Principal Magistrate (Kaburu) after analysing the above evidence and evaluating it found the appellant guilty, convicted him and sentenced him to death in respect of counts 1, 2, 3 and 4, and to five years imprisonment and five strokes of the cane in respect of count 5. In finding him guilty, the learned trial Magistrate had this to say:

"**Although the robbery victims failed to identify their attackers that night, circumstantial evidence irresistibly points to the guilt of the accused. He was found with items which were stolen that night from Sammy Mumo. He was found with bow and arrows and metal bars. He attempted to jump out of a moving matatu. When he saw the conductor talking to Pc Wambua (sic). His colleagues ran away after trying to throw stones to rescue him. This is evidence which I believe. Accused (sic) defence that he disagreed with the conductor is quite untrue. Where did the conductor and Pc Wambua get these bags to plant on accused and why. Pc Wambua and PW 6 did not know at that time that there had been a robbery at Wetaa.**

It was just bad luck for the accused that he was caught after thinking that he had safely executed a robbery mission. On my part, I find this evidence overwhelming. I am satisfied beyond all reasonable doubt that accused was one of the people who raided Wetaa Market and robbed those people of that property. I find him guilty of robbery with violence c/s 296(2) Penal Code and convict him accordingly as charged in counts 1, 2, 3 and 4. I also convict him of count 5."

The appellant was dissatisfied with that conviction and naturally, he was also not satisfied with the sentence. He appealed to the superior court against both. The superior court (Mbogholi and Mutitu JJ.) after hearing the appeal arrived at the same conclusion and dismissed the appeal addressing itself thus:

"**We have considered the appellant's defence which was given in an unsworn defence statement. The appellant did not address his mind to the evidence adduced by PW 5 and PW 6. That appellant was having the bag containing the items stolen from the complainants herein at the time of his arrest. His statement was a mere denial of the offence and nothing more. The appellant had no good reasons to offer as to why PW 5 and PW 6 should have implicated him with the possession of property recently stolen from complainants herein. We have noted that the learned trial Magistrate was alive to these issues and that he actually rejected the appellant's defence after carefully analysing the evidence on record. We therefore reject the appellant's appeal and find that he was convicted on sound evidence."**

It is against the above two concurrent findings that this appeal before us was lodged. The appellant filed four grounds of appeal in person, but after a firm of advocates was instructed to appear for him, that firm of advocates Kerandi Manduku & Ondabu, filed a supplementary memorandum of appeal on 10th July 2007. Mr. Ondabu, the learned counsel for the appellant, applied for and was granted leave to file the same supplementary memorandum of appeal out of time. In his address to us he adopted the same supplementary memorandum of appeal and did not refer to the memorandum of appeal filed by the appellant in person. That supplementary memorandum of appeal cited four grounds of appeal which were:

"**1. That the learned Judges of the first appellate court erred in law by failing to find that the appellant was not provided with an interpreter contrary to section 198(1) of the Criminal Procedure Code and section 77(2) of the Constitution of Kenya.**

2. That the learned Judges of the first appellate court erred in law by failing to analyse and reevaluate the evidence on record exhaustively.

3. That the learned Judges of the first appellate court erred in law by failing to find that the appellant's constitutional rights to protection to liberty was infringed in that he was not taken to court within fourteen days from the date of arrest contrary to section 72(3) of the Constitution of Kenya.

4. That the learned Judges of the first appellate court erred in law in failing to find that the appellant was convicted on defective charges."

Mr. Ondabu contended before us that although an interpreter called Mutisya was recorded as being present in court during all the days the case was heard, there was no interpretation made to the appellant in a language he understood and in any case, the record does not show that interpretation was actually done. Secondly, the evidence that was before the trial court was contradictory but the learned Judges of the first appellate court did not revisit the same evidence afresh, analyse it and re-evaluate it as is required by law. On the third ground, he maintained that the appellant was not brought to court within fourteen days as is prescribed by the law and lastly, that the charges as were preferred to him clearly show that the offences took place in the night of 26th January 2000 and in the night of 27th January 2000 whereas the evidence adduced showed that the offences took place on one night which was the night of 26th January 2000. Thus, he argued the charges were defective as each was at variance with the evidence tendered before the court. Lastly, Mr. Ondabu stated that Pc Joseph was not sworn and so his evidence was improperly admitted as evidence. That viciated the entire trial.

Mr. Kivihya, the learned State Counsel, on the other hand submitted that the appellant was rightly convicted as he was found in possession of recently stolen properties in the morning only a few hours after theft that night. On interpretation, he submitted that at the time of the plea, it was indicated in the record that a court clerk, Mutisya, was present. The record showed that he was present at all times during the hearing and must have been there for purposes of interpretation. In any case, the appellant took part in the proceedings and he could not have taken part if he did not understand the language in which the proceedings were conducted. He agreed that the record shows that Pc Joseph was not sworn but clearly PC Joseph was cross-examined and that presupposed that he was sworn. He, lastly, submitted that the appellant was taken to court within 14 days prescribed by the law and so his constitutional rights were not infringed and the charges were not defective.

We have anxiously and carefully considered the entire case that was before the trial court and before the superior court as the first appellate court. We have also considered the concurrent findings on facts of the two courts below. It is clear to us and we have no hesitation in finding that the concurrent findings of the two courts below that the appellant was found with stolen properties only a few hours after the robberies on several shops, hotel and bar that took place at Wetaa Market on the night of 26th/27th January 2007 cannot be faulted. The appellant was in fact identified by Norman who said he identified the appellant as the person who hit his wife's buttocks with a flat side of a panga four times before another robber stopped the appellant from continuing to do so. This was dock identification and was

worthless as no identification parade was organised for proper identification by Norman. However, that evidence of identification by Norman corroborated the evidence that the same person who carried a metal bar during the robbery on him at 3.00 a.m., was at 6 a.m. that same morning found with a similar metal bar in a matatu and several stolen items that were stolen from Patrick, Sammy, Nicholas and Mutuku. The appellant in his defence did not explain his possession of the same items. The doctrine of recent possession caught up with him. He was in possession of items stolen between 5 hours (from those stolen at 11 p.m.) and 3 hours (for those stolen at 3.00 a.m.) from Wetaa Market.

This is a second appeal and we are enjoined to consider only matters of law. We agree that if it had been carefully demonstrated to us that the first appellate court failed to revisit the evidence afresh, analyse it and reevaluate it and come to its own independent conclusion giving allowance to the fact that the trial court had the advantage of hearing and seeing the demeanour of the witnesses, then we would interfere, for if such a failure is demonstrated, then it is a matter of law. However, in this case, though Mr. Ondabu mentions certain contradictions in the evidence, we are not persuaded that they were material contradictions, neither are we satisfied that the superior court did not properly analyse and re-evaluate the evidence afresh as Mr. Ondabu contends. For example, whether there was only one bag that the appellant had or two bags, the fact remains that the bag or bags contained stolen properties as identified by the victims and whether there were seven passengers in the vehicle or four at the relevant time, the fact remains that these strange passengers who entered the vehicle had bag or bags containing recently stolen properties. The appellant was one of the strangers with such a bag.

We are satisfied that this was in law a case mainly based on circumstantial evidence as the evidence of Norman on identification was a dock identification. The principles to be considered in a case based on circumstantial evidence are well demonstrated. In the case of **Rex vs. Kipkering Arap Koske and 2 others (1949) 16 EACA 135**, the predecessor to this Court stated:

"**As said in Wills on "Circumstantial Evidence" 6th edition p. 311, "in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt". The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

To the above principles, a third principle was introduced by the decision of the same Court in the case of **Simoni Musoke v. R (1958) EA 715** in which that court, quoting a judgment of the Privy Council in **Teper v. R**. **(1952) AC 480 at page 489** stated:

"**It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

In this case, as we have stated and as was the concurrent finding of the trial court and the superior court after each court had, in our view, fully analysed and evaluated the evidence, the robbery upon Patrick took place at about 12 midnight, among the things stolen was a metal bar and a metal with several angles. Those things were put into a bag by robbers. Robbery on Sammy took place at 11.00 p.m., his Northstar shoes were stolen that night. His lotions were taken as well. Robbery on Mutuku took place at 1.00 a.m., his padlocks were stolen. Robbery on Nicholas took place at 12 midnight and his torch was among the things stolen and robbery on Norman took place at 3.00 a.m. and he saw them with metal items. Those items stolen were found in the bag or bags which the appellant and his two colleagues carried when they entered the matatu at Kwa Ngei stage and which the appellant attempted to leave behind in his botched flight from a Matatu at 6.00 a.m. the same morning. As we have stated, the two courts below analysed the evidence and evaluated the same as is required in law. The second ground of appeal cannot stand. We dismiss it as it has no merit.

The first ground of appeal is that the appellant was not provided with an interpreter. That is a matter of fact. The record clearly shows that right from the plea stage, the interpreter was provided and his name

was Mutisya. The record shows that the interpretation was English/Kiswahili. It is true the record does not indicate that interpretation took place on every hearing date, but it clearly indicates that the interpreter (Mutisya) was on all occasions present in court and his presence on all occasions when the hearing proceeded was recorded. The record shows that the appellant cross-examined the witnesses, some at length. The presence of Mutisya, the interpreter, could not have been for nothing other than to do his work of interpretation and other duties as court clerk. We observe that he was recorded as "interpreter". We note that the appellant in his original memorandum of appeal and in his supplementary memorandum of appeal both filed by him in person and in his appeal to the superior court never raised this complaint. We have perused and fully considered the authorities to which we were referred by Mr. Ondabu. As we have said whether interpretation was provided or not is a matter of fact. We are not satisfied that there was no interpretation provided as alleged by Mr. Ondabu. This ground must therefore also fail.

As to the ground that the appellant was not taken to court within fourteen days as required by the law, the record shows that the appellant was arrested on 27th January 2000. He appeared in court for plea on 10th February 2000. **Section 72(3) (b)** of the Constitution of Kenya states that a person arrested or detained on suspicion of his having committed or about to commit an offence punishable by death shall be brought before court within 14 days of his arrest or detention. **Section 57 (a)** of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya states as follows on computation of time.

"**57. In computing time for the purposes of a written law, unless the contrary intention appears –**

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.""

Thus, if the appellant was arrested on 27th January 2000 and appeared in court on 10th February 2000, there could not have been any violation of his constitutional right under **section 72(3)** as he was indeed produced in court within 14 days as 27th January 2000 being the day the act of arresting him happened was not to be counted as indicated by the Interpretation and General Provisions Act (supra). That ground of appeal lacks merit as well.

As to whether or not the charges were defective, we have considered the charges that the appellant faced as well as the evidence. It was clear that the offences took place on one night and that was the night of 26th/27th January 2000. The appellant was arrested on 27th January 2000 early at 6.00 a.m. He could not by any stretch of imagination have mistaken the charges to have meant that he committed any offences on the night of 27th January 2000 long after he had been arrested. That the charges talked of the "nights" of 26th and 27th January 2000 as opposed to the "night" of 26th/27th January 2000 did not, in our considered view, occasion any injustice to the appellant, neither did the inclusion of the letter "s" on the word "night" in all charges prejudice the appellant in his defence at cross-examination or in the main defence.

Before we dismiss this appeal as we must do, Mr. Ondabu raised another matter which we want to deal with as though it was not in the memoranda of appeal filed by the appellant in person nor in the supplementary memorandum of appeal filed by his advocates, nonetheless we did not stop him from arguing it and so we are duty bound to respond to it. That was that the evidence of Pc Joseph should not have been considered as the record does not show that he was sworn when he gave his evidence. It is true the record does not show Pc Joseph was sworn. We observe that all other witnesses were sworn and we are not persuaded that Pc Joseph who is a police officer and fully knows the need to be sworn before giving evidence was not sworn. We think he was sworn but the court did not enter that fact in the proceedings. However, what is the effect of that omission? Even if we were to disregard Pc Joseph's evidence, there was still evidence that the appellant was apprehended by Lenson, the conductor of the matatu together with others as he (the appellant) together with his colleagues wanted to escape from the matatu. When he was so apprehended, he and his colleagues had a bag or bags with things recently stolen from Patrick, Sammy, Norman, Nicholas and Mutuku at Wetaa Market. He was taken to the police station and he was charged and brought to court. He himself says in his defence that he was arrested in a matatu, tied with ropes and taken to the police station. Thus, even if we agree that the evidence of Pc Joseph was not validly on record as it was not given after Pc Joseph was sworn, still nothing, in our view,

turns on that ground.

Lastly, we note that the appellant was sentenced to death in respect of each the four counts of robbery with violence and was also sentenced to five years imprisonment in respect of the offence of bar breaking and committing a felony therein. This Court has stated several times that where a person is found guilty of several capital offences and other offences, he should only be sentenced to death on the first such capital offence. The punishment for the other offences should be left in abeyance. What happened here was improper. A person cannot be hanged more than once nor can he serve other sentences after he is hanged. See the case of **Muiruri vs. R. (1980) KLR 70**, and **Samuel Waithaka Gachuru vs. R. - Cr. App. No. 261/2003 (unreported)**.

In the result, the appeal is dismissed. The sentence of death on the first count of robbery with violence contrary to **section 296(2)** will stand. The sentences on the other counts are to be held in abeyance. Judgment accordingly.

Dated and delivered at Nairobi this 5th day of October, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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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