REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CRIMINAL APPEAL 302 OF 2005

SIMON MATERU MUNIALU ……..…….. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

at Nairobi (Lesiit & Ochieng, JJ)

dated 12th December, 2005

in

H.C. Cr. Appeal No. 562 of 2002)

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JUDGMENT OF THE COURT

On and immediately before 13th March 2002, Peter Kinyanjui Gichuhi (PW 4) (Kinyanjui) was the landlord of a residential plot situated at Kawangware, bordering Mathiora Road in Nairobi. The father of both Kizito Ashimola Luvembe (PW 1) (Kizito) and Josephat Matindu Tindi (PW 2) (Tindi) was a tenant in part of that plot. His two sons lived in their father's house in that plot. On 13th March, 2002 at night Kizito and Tindi were asleep. At about 1.30 a.m., they heard people break open the door leading to the store. The door broke open and the two started screaming for help. Those people entered the store and wheeled out their bicycle. The thugs then went to the room where the two were sleeping through the door which they had also broken. These people were four in number and were armed with pangas and rungus. They ordered the two brothers to lie down and to keep quiet. They had three powerful torches. They took from the house two wall clocks, a radio, make Sony, and a jacket which contained a wallet which in turn had Ksh.1,000/= inside it. While they were still in the house, neighbours responded to the screams of the brothers and also started screaming for help. Kinyanjui, who was one of the neighbours, switched on the security lights and pressed the security alarm as well, and upon the security lights being switched on, the robbers fled. Kizito, Tindi and Kinyanjui, all said they clearly identified the appellant in this case, Simon Materu Munialu, as one of the robbers who attacked them and were fleeing away after the security lights were switched on. Kizito said he saw the appellant in the house and as he (the appellant) was running away from the house. He stated that he knew the appellant well and said the appellant was called Simon in the village. Tindi also saw the appellant whom he knew very well and was known in the area by his nick name of "*Saimo*". Kinyanjui described the security light as bright. He called the name of the appellant, which he knew as Simon and asked the appellant who was running away why he (the appellant) was burgling his tenants. Kinyanjui further said he knew the appellant well as the appellant was earlier

on employed by his (Kinyanjui's) son as a barber in the nearby barber-shop which was belonging to Kinyanjui but was used by his son. The thieves then threw stones at Kinyanjui's lorry parked at Kinyanjui's compound, breaking the windscreen and side window of the lorry completely. The robbers fled with their loot and nothing was recovered. At the day-break, the three, Kizito, Tindi and Kinyanjui reported the incident at Muthangari Police Station. They each told the police they recognised one of the robbers and knew where he lived. They took the police to the appellant's house, but he was not there when the police made their first visit to his house; sometimes later, he appeared and was arrested by Pc Musa Gikuyu (PW 3) (Pc Musa) together with Cpl. Mbogori after Kinyanjui, Kizito and Tindi had identified him to the police officers as one of the robbers. On 25th March 2002, he was taken to the Chief Magistrate's Court at Kibera and charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and malicious damage to property contrary to **section 339(1)** of the Penal Code. The particulars of the first count were as follows:

"**On the night of 13th day (sic) of March 2002 at Kawangware Muslim within Nairobi area province, jointly with others not before court and while armed with offensive or dangerous weapon namely pangas robbed Kizito Ashimole Luvembe of a bicycle make Hero Jet, two wall clocks, one radio cassette, a jacket and cash Kshs.1,000/= all valued at Kshs.10,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kizito Ashimole Luvembe.**

And the particulars of the second count were:

"**On the night of the 13th day of March 2002 at Kawangware Muslim within Nairobi area province, jointly with others not before court willfully and unlawfully damaged the front windscreen and drivers windscreen of motor vehicle KWF 351 make Isuzu blue in colour the property of Peter Kinyanjui Gichuhi."**

The appellant pleaded not guilty to both counts and at his trial before the Senior Resident Magistrate (Ms Siganga) his defence was that he lived at Kawangware Muslim Village. He was a barber by profession. On 15th March 2002, he woke up at 5.00 a.m. and took his children to hospital. He returned at 6.30 a.m. to do his work. At 6.45 police officers together with one person approached him. They asked for a bribe because he was a bhang seller – a fact which was known to the police and was true. He told the police he had stopped selling bhang. They left but shortly thereafter returned with two men; went to his house and carried out a search in his house and business premises. They later identified him to Kizito and Tindi. He was then arrested. He claimed that Kinyanjui, who was earlier on his employer, is the one who "framed" him in the case. We understand that defence to be that the appellant was pleading *alibi*. The learned Senior Resident Magistrate considered the entire case and found him guilty, convicted him and sentenced him to death on first count of robbery with violence contrary to **section 296(2)** and on second count of malicious damage to property, he was sentenced to serve one year imprisonment but that sentence was rightly ordered to be held in abeyance. The appellant was not satisfied with the convictions and sentences and appealed to the superior court which court dismissed the appeal stating:

"**Having considered this appeal and having analysed the entire evidence adduced before the trial court we see no basis upon which to disagree with the learned trial magistrate's finding in this case. We find that the conviction entered by the trial magistrate was safe. We uphold the conviction and confirm the sentences imposed. The upshot of this appeal is that the same is dismissed for lack of merit."**

Undeterred by that decision, the appellant has now come before us on a second appeal citing six grounds of appeal in the supplementary memorandum of appeal filed by A.O Oyalo & Company, the advocates on record for him. The other two supplementary memoranda of appeal dated 19th October, 2006 and 6th November, 2007 together with parts of the appellants own memorandum of appeal filed on 25th April 2005 were abandoned when this appeal came up for hearing. Mr. Oyalo argued the grounds of identification in the appellant's own memorandum of appeal. The grounds of appeal in the supplementary memorandum of appeal before us are in a summary that inadmissible evidence was

allowed during the trial; that the learned trial magistrate failed in her consideration of the evidence before her to balance the same evidence but that she first considered the prosecution evidence, formed a view of it and then rejected the defence case; that the learned Magistrate failed to find that the prosecution witnesses' evidence was so full of contradictions that it should have been rejected; that the learned Magistrate shifted the burden of proof in the case; that there was no evidence to show that the learned Magistrate conducted the trial in a language the appellant understood and that the charge was defective as it was not drawn in compliance with **section 137 (a)** of the Criminal Procedure Code. He alleged that despite all the foregoing, the first appellate court namely the superior court, confirmed the conviction and that was in each case an error both in fact and in law.

In his address to us, Mr. Oyalo argued that the appellant's character was wrongly introduced into the proceedings when the learned Magistrate allowed answers showing that the appellant was a bhang seller. This was contrary to **section 57** of the Evidence Act. He also maintained that the charge was defective as the section cited was that for the punishment whereas the section which should have been cited was **section 295** which was the section creating the offence. He further attacked the conviction on grounds that there were, according to him, numerous material contradictions that should have seen the dismissal of the case the appellant faced and that the learned Magistrate shifted the burden of proof to the appellant contrary to the settled law. Lastly, Mr. Oyalo raised the issue of identity and contended that the evidence on record did not prove that the appellant was one of the robbers that attacked Kizito and Tindi and smashed Kinyanjui's vehicle's windscreen and the driver's windscreen. He abandoned the fifth ground in his subject supplementary memorandum of appeal. Mrs. Murungi, the learned Senior State Counsel, on the other hand supported the conviction and stated that there was enough evidence upon which the conviction could be based as the appellant was recognised at the time of the offence by three witnesses and one of them, Kinyanjui, even talked to the appellant as the appellant was fleeing from the scene. According to her, the correct provision was cited in the charge sheet; the burden of proof was not shifted; there were no contradictions and no inadmissible evidence of the appellant's character was admitted as the evidence admitted of the appellant's character was received as a response to the appellant's own questions in cross-examination of the witnesses.

As we have stated, this is a second appeal. By dint of **section 361(1)** of the Criminal Procedure Code, the appeal should be on matters of law as indeed, in our view, the trial court and the first appellate court have made concurrent findings on matters of fact. The first point we need to consider is whether or not the appellant's bad character was admitted during the trial contrary to the provisions of **section 57** of the Evidence Act. **Section 57(1) (aa)** states as follows:

"**57 (1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged or is of bad character, is inadmissible unless:-**

(aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue."

In this case, Pc Musa gave his evidence in chief and never referred to the appellant's character. The appellant who was unrepresented cross-examined him and during that cross-examination, his answers were, *inter alia*, as follows:

"**I have arrested you severally prior to this incident. One (sic) one occasion I found you in possession of bhang and you were charged in court and jailed for 7 months."**

Again Kinyanjui gave evidence in chief and did not refer to the appellant's character but in cross examination by the appellant he said:

"**I later on learnt that you sell bhang for a living."**

These answers were given by the prosecution witnesses in response not to the prosecution questions but to the appellant's questions in cross-examination. It would not have been proper for the court to reject

them as at that time the court was as yet not aware of the defence case. When the appellant eventually gave his defence he said:

"**At 6.45 a.m. two police officers came with one person. The police asked for a bribe because I am a bhang seller. It is true I am a bhang peddler and the police know this. I told the police I had stopped selling bhang. The police left and returned shortly thereafter."**

And he stated further that the police demanded money from him but he had no money. Thus, the appellant's defence to this case was that he was not involved in the robbery but the police arrested him on false charges merely because he was a bhang peddler who had refused to give them a bribe and as they had searched his house and found nothing, so they decided to charge him with a framed up case. Thus, the evidence of his being a bhang seller was introduced by the appellant in his cross-examination of the witnesses as a basis for his being framed in the case and he was thus laying the foundation for his defence when he introduced that evidence in his cross-examination of the witnesses. That evidence of character was thus evidence of a fact in issue or a matter directly relevant to the fact in issue. If the learned Magistrate had refused to admit that evidence, she could have been blamed for blocking defence case. We see no merit in that ground of appeal.

The appellant also complained that the learned Magistrate in her judgment shifted the burden of proof on to the defence. The part of the learned Magistrate's judgment Mr. Oyalo found offensive reads as follows:

"**Accused in his defence merely talked of the events surrounding his arrest. He gave no explanation of his whereabouts on the night the robbery occurred."**

Mr. Oyalo says that comment was made after the trial court had analysed, evaluated and accepted the prosecution case and that was not proper. It would not be improper if she had done so. But in our view, upon reading the entire evidence carefully, that is not correct. The learned Senior Resident Magistrate considered the entire evidence together such that even after that remark, she went further to consider and analyse other evidence such as whether the appellant had any grudges with Kinyanjui and evidence of Pc Moses and the allegation by the appellant of grudge. All we understand the learned Magistrate to be stating by that comment is that the *alibi* raised by the appellant could not be investigated for it was not specific and directly connected with the day and time in question when the incident happened. She never convicted the appellant on grounds that the appellant failed to specifically explain his whereabouts on the night the robbery took place. Nothing turns on that complaint.

The third matter raised which we need to consider is that the charge was defective as it did not cite the section that created the offence but only cited the punishment section. We do agree with Mrs. Murungi, that much as **section 295** creates the offence of robbery, the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is **section 296(2)** of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in **section 295** which creates the offence of robbery. In short, **section 296(2)** is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under **section 295** as read with **section 296(2)** of the Penal Code as that would not contain the ingredients that are in **section 296(2)** of the Penal Code and might create confusion. In our considered view, **section 137** of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under **section 296(2)** because that **section 137** requires one to be charged under the section creating the offence and in the case of robbery with violence under **section 296(2),** that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal.

That leaves us with the grounds of appeal alleging that the appellant was convicted of the offence as charged despite several material contradictions in the prosecution case and that the appellant was

improperly convicted as he was not properly identified to have taken part in the robbery against Kizito.

We will consider the question of whether or not there were material contradictions in the prosecution case that would have created sufficient doubts in favour of the appellant. The main discrepancy raised was that whereas Kizito said Kinyanjui drove after the robbers who threw stones at the landlord's motor vehicle breaking the windscreen in the process and the broken pieces of glass were the ones in the court, Kinyanjui on the other hand stated that his lorry was parked when the robbers hit its windscreen and side window. We do not see to what extent those aspects of the case were material to the entire case. Those contradictions did not go to the substratum of the case at all. Whether Kinyanjui was driving his vehicle or whether it was stationary, the fact remains that robbery was at the house where Kizito and Tindi were and the appellant was one of the people seen running away from the scene of robbery as a result of screams of victims and other people, electric light and the alarm put on by the landlord. The other fact is that the robbers threw stones. Again, whether Kinyanjui told Pc Musa that robbers broke his electric light or not, it does not change the main question of whether robbery took place or not and who were involved in the robbery. In any event, the trial court and the first appellate court considered those aspects which are purely matters of fact and we do not consider them as falling within our powers to decide on them particularly as they are not material contradictions that would raise legal issues.

The last point is that of identification. The offence took place at night. Kizito, Tindi and Kinyanjui all agree that it took place at 1.30 a.m. Kizito and Tindi were sleeping in one house. The thugs first broke open the door to the store where a bicycle was and took the bicycle out. By that time, Kizito and Tindi were awake but there is no evidence that there was any light in the house to enable them see the thugs. They started screaming. At the time they were screaming the robbers broke open the door to the sitting room. The robbers opened the curtain separating the sitting room and where they were. That in effect meant Kizito and Tindi could see those in the sitting room as the curtain was separating them and the sitting room was opened which to us meant the curtain was no longer blocking Kizito and Tindi from seeing who had entered the house except there was still no light for them to do so. As they were screaming and while the attackers were still in the house, Kinyanjui switched on security lights and the alarm. Kinyanjui described the security light as bright. Once switched on, Kizito and Tindi said the light enabled them to see the appellant while still in the house. They also saw him as he was fleeing the scene. They said the appellant was a person they knew well as he had worked as a barber in the same area. Kinyanjui also said in evidence that as the appellant was running away, he saw him as he was in his house looking out through his window. He saw the appellant as the appellant was emerging from the house where Kizito and Tindi were. The appellant was one of the four people Kinyanjui saw coming out of that house. Kinyanjui also recognized the appellant who had worked for his son in a building belonging to Kinyanjui. Kinyanjui went further and talked to the appellant asking him why he (the appellant) was burgling his tenants' house but the appellant did not respond. He called out the appellant by his nick name of Saimo. All the three witnesses gave the name of either Simon or Saimo as the name the appellant was commonly known by in the estate. Early that morning, they reported the incident to the police and mentioned the appellant's name. They also took the police to the appellant's house. Notwithstanding all that, the appellant still maintained that he was not properly identified.

In law, it is well settled that a conviction resting entirely on identity of an accused person which he disputes invariably causes uneasiness even when the case is that of recognition as opposed to that of identification of a stranger. That uneasiness is particularly real when identification is at night or under difficult conditions - see the case of **Roria v. R. (1967) EA 583** and particularly at pages 584. In the case of **R vs Turnbull [1976] 3 ALL ER 549**, it was stated by the Lord Chief Justice of England and Wales as follows:

"**First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.**

Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed (sic) between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

The principles enunciated in this case have been applied in Kenya in several cases. In the well known case of **Cleophus Otieno Wamunga vs. Republic (1989) KLR 424**, it was applied by this Court and a part of it not reproduced above was specifically reproduced namely:

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

With the above legal principles in mind, we have anxiously perused the record in this appeal. We have set out the facts above. The learned Senior Resident Magistrate, in our opinion, properly analysed and evaluated the evidence that was before her. It is clear to us that she had in mind the above legal principles applicable in case of identification of a stranger and recognition of people known to witnesses. The superior court, likewise, was aware of its duty as a first appellate court of analysing and evaluating afresh the evidence on record and coming to its own conclusion, being aware at the same time that it did not have the advantage of hearing and seeing the demeanour of witnesses and giving allowance for the same – see the case of **Okeno vs. R. (1972) EA 32**. It considered, in our view, all aspects required in law for proper identification of the appellant and came to the inevitable conclusion that the appellant was guilty of the offence as charged in the first count. We feel the superior court was plainly right. We have no reason to interfere with that decision on the first count. It stands.

On the second count, the evidence shows that Kinyanjui's vehicle was hit with stones immediately after the robbery was committed in the house occupied by Kizito and Tindi. The robbers threw stones at the vehicle in the course of their escaping from the scene of robbery with violence. In our view, that act of throwing stones at the vehicle was part of the robbery with violence with which the appellant was already charged. That second charge was misplaced as it exposed the appellant to an offence with which he was already charged. In view of the above, we allow the appeal on the second count, quash the conviction and set aside the sentence imposed on that count.

The sum total is that the appeal on the first count of robbery with violence contrary to **section 296(2)** is dismissed. The appeal on the second count of malicious damage to property contrary to **section 339(1)** of the Penal Code is allowed as stated hereinabove.

Dated and delivered at Nairobi this 14th day of December, 2007.

R.S.C OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR