



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 184 of 2004

BETWEEN

DAVID IRUNGU MURAGE

ANTHONY KARIUKI KARERI..... APPELLANTS

AND

REPUBLICRESPONDENT

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

Nakuru (M. Apondi & L. Kimaru, JJ) dated 5th August, 2004

in

H.C.C.R.A. NO. 70 & 79 OF 2000)

JUDGMENT OF THE COURT

DAVID IRUNGU MURAGE and **ANTHONY KARIUKI KAREGI**, the appellants, were after a lengthy trial spanning a period of about a year convicted of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. Their first appeals to the High Court of Kenya at Nakuru (Muga Apondi and Kimaru JJ) were dismissed on 5th August, 2004 and hence this second appeal.

The particulars of the charge preferred against the two appellant's read as follows: On the 6th November, 1998 at Veterinary cash office, Nakuru Township in Nakuru District of the Rift Valley Province, jointly with others not before the court being armed with dangerous weapons namely two pistols, robbed Moses Mugambi Kanjagua of cash Kshs.284,225/= and at or immediately before or immediately after the time of such robbery used personal violence to the said **MOSES MOGAMBI KANJAGUA**.

At about 3.30 p.m. on 6th November, 1998 the staff of the District Veterinary Department at Nakuru were at work in their office. They were, among others, Dr. Ambaka (**PW2**), Moses

Kanjagua (**PW1**) the cashier and Purity Mutuku (**PW3**). Suddenly two people, one of them armed with a pistol, stormed the office and ordered PW1 to lie down or otherwise he would be shot. **PW1** did so without a struggle. They got hold of **PW2** and escorted him to an adjacent office where they forced him to open a safe from which the gang scooped a total of cash over Shs. 280,000/=.

On 28th December, 1998, Cpl. Mayeko and other police officers of Dondori Police Station received certain information that there were suspicious strangers in a local bar called Chania. The police went there and arrested the second appellant Anthony Kariuki Kareri in a group of other three persons who were armed with a revolver and a toy pistol and took them to the police station. On 8th January, 1999, an identification parade was conducted by Inspector Mate in respect of the second appellant. **PW1** and **PW2** easily and without any hesitation picked him out and identified him as one of the robbers the subject of the trial. We note from the Identification Parade Form Police 156 that the second appellant expressed satisfaction with the conduct of the parade. Earlier on 7th January, 1999, Inspector Chepkwony (**PW6**) had recorded a charge and caution statement from the second appellant. In the statement, the second appellant confessed committing the crime charged. He narrated how he and others planned the robbery and how they shared the cash money stolen from the Veterinary Office. However, during the trial he retracted the statement but a trial within a trial was conducted and the statement was accepted in evidence.

In their defence the two appellants denied committing the offence charged but the Principal Magistrate, Nakuru, convicted them and accordingly sentenced each to death as by law mandated. In the first appellate court, the following main points were canvassed by the appellants:-

- (a) *that identification was not water tight to justify the conviction – and that no descriptions were given by the two witnesses prior to the identification parade;*
- (b) *that the identification parade was not properly carried out since the participants (that is members) were of different sizes, height and complexions;*
- (c) *that the PW1 and PW2 had given contradictory evidence that should have been clinically scrutinized to avoid prejudice;*
- (d) *that the prosecution had failed to avail the investigating officer who was vital to clear the shadow of doubts by the prosecution case.*

and

- (e) *That the learned magistrate had erred in fact by admitting in evidence the retracted statement of the second appellant.*

In the first appeal the appellants were represented by counsel who submitted at length on each of the abovementioned grounds of appeal. But in a reserved judgment the first appellate court upheld the conviction and the sentence and dismissed the appeal.

The first ground of appeal taken before us by Mr. Cheche for the two appellants is that the entire proceedings before the trial court and subsequent appeals were a nullity in that no pleas were taken before the trial begun. He referred to **section 207(1)** of the Criminal Procedure Code which provides as follows:-

“207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.”

We agree with Mr. Cheche that compliance with the section entails the explanation of the

charge and all its essential ingredients to the accused in his vernacular or in some other language he understands and that the accused's own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission, a plea of guilty should be recorded. See ***Adan v Republic*** [1973] EA 445 and ***Baya v Republic*** [1984] KLR 658. If the accused person does not admit the truth of the charge, the court shall proceed to hear the case – **section 207(2)** of the Criminal Procedure Code.

The record of the trial court shows that the two appellants were not asked to plead to the charge. When they first appeared before the Principal Magistrate a hearing date was taken straight away. It is worthy of note that though the appellants were represented by counsel throughout the trial which lasted more than a year, the question of the appellants not having pleaded to the charge was never raised. We also note that the appellants in their respective defences categorically denied the charge. It is manifestly clear, therefore, that the appellants were tried with the false notion that they had pleaded not guilty. It is also clear that the omission to plead was never raised before the first appellate court, though the appellants had representation by counsel.

The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under **section 382** of the Criminal Procedure Code.

We now pause to consider the appeal of the first appellant David Irungu. On which evidence was he convicted?

The witnesses, **PW1** and **PW2**, only identified the first appellant in court as one of the robbers who attacked them in their office. This was therefore a dock identification. No identification parade was held on him. The trial court in convicting the first appellant only took into account his identification in the dock in court by the witnesses. Such identification is worthless without an earlier identification parade. See ***Kiarie v Republic*** [1984] KLR 740. In these circumstances, therefore, the conviction of the first appellant in the absence of any other evidence is unsafe and his appeal must be allowed. His conviction is quashed, the sentence is set aside and the first appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

PW1 and **PW2** testified that they identified the second appellant during the robbery which took place during daylight (3.30p.m) and also owing to the length of time taken to commit it. Again the same witnesses identified him in an identification parade. Mr Cheche complains that the parade was flawed, but with respect, we do not agree with him. We have checked the record and we have been unable to detect any irregularities. In our view, the identification of the second appellant was positive and free from error. We are satisfied also that the parade had been conducted in accordance with Police Force Standing Orders.

Further to the above evidence, there is the confession of the second appellant, though retracted. This taken together with the evidence of **PW1** and **PW2** demonstrates amply that there is sufficient evidence to sustain the conviction of the second appellant. His conviction is therefore safe and we uphold it. His appeal is accordingly dismissed.

ORDER

1st appellant – Appeal allowed

2nd Appeal – Appeal dismissed

Dated and delivered at Nakuru this 3rd day of March, 2006

P.K TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR