



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL**  
**AT MOMBASA**

**CORAM: TUNOI, O'KUBASU & DEVERELL, J.J.A.**  
**Criminal Appeal 48 of 2005**

**BETWEEN**

**MATHEKA KITHOME ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

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

**Mombasa (Khaminwa & Maraga, JJ) dated 20th January, 2005**  
**in**  
**H.C.C.R.A. NO. 29 OF 2003)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This second appeal arises from the conviction by the Senior Resident Magistrate's Court at Mombasa in Criminal Appeal No. 29 of 2003 of *Matheka Kithome* of the offence of robbery with violence contrary to section 296(2) of the Penal Code which conviction was upheld by the superior court (Khaminwa and Maraga JJ) in a judgment dated 20th January 2005 being the judgment appealed against.

The grounds of appeal relied upon by learned Counsel for the appellant (Mr. P.M. Munyao) can be summarised as follows:-

- 1. The evidence on record on recognition and identification of the appellant was inconsistent and by no means up to the required standard.**
- 2. The evidence relating to the alleged recent possession by the appellant of the stolen property was fatally defective.**
- 3. Section 214 of the Criminal Procedure Code was abused.** Serious issues were raised as to the dates of the offence, of the arrest and of the recovery of the goods said to be recovered with the result that the charge sheet should have been amended in accordance with section 214(1) and the accused person should have been called upon to plead to the altered charge in accordance with proviso (i) to that sub section and the accused should have been given the opportunity to demand recall of witnesses etc in accordance with proviso (ii).

It was wrong, Mr. Munyao submitted, for the superior court to find that confusion existed as to dates and then explain the position in the judgment rather than have the charge sheet amended.

Mr. Munyao submitted that this rendered the trial defective.

We will deal with this latter submission first as it goes to the root of the case and will, if successful, render it unnecessary to consider the rest of the submissions.

Section 214 of the Criminal Procedure Code reads as follows:-

***“214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***

Provided that-

***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***

***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***

***(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”***

The superior court dealt with the issue by expressing itself thus:-

***“There is confusion as to dates in the evidence of PW2 who said he was sitting outside the mosque on 18.8.2002 at 8 a.m. when he was approached by one Musembe who said appellant had goods to sell. This must have been the morning of 19.8.2002. PW3 the employee of the complainant also witnessed that he reported to work on 18.8.2002 at 7.30 a.m. This must have been 19.8.2002. The appellant himself in his unsworn statement said he met PW2 and PW3 on 18.8.2002 this must have been on 19.8.2002. He confirmed telling them that he did not live in that house. He confirmed that police officers came to the area and talked to him. He said they recovered a radio and some other items and that he was arrested at that time in presence of PW2.***

***It is our finding that the confusion as to dates was not fatal to the prosecution case as the evidence is clear on the date of offence and arrest.”***

In our view the conclusion reached by the superior court as to the effect of the confusion in dates was correct. In reaching this conclusion we have taken into account section 214(2) set out above which provides that variance with respect to the time at which the alleged offence was committed is not material. We consider that errors as to dates fall within “*variance with respect to time.*” We would have also if it were necessary, relied on section 382 of the Criminal Procedure Code as we do not consider that in this case, any failure of justice has been occasioned by the procedure adopted. We will now turn to the issue of recognition and identification of the appellant. Mr. Munyao’s submission on this issue was that there was a contradiction between the evidence of the complainant and that of the complainant’s manager Titus Mutonga Nyale.

The complainant Simon Mutua Kitulya described the robbery which occurred on the night of the 18th – 19th of August, 2002 at his house at 1.00 a.m. There were a total of over ten robbers of which four entered the house. The house door was broken by the robbers using big stones. They were armed with pangas and metal bars.

The complainant said:-

***“I had also identified the accused in the dock at the time of the incident. When I found opened the window to check on the side I saw the accused outside the window armed with iron bar. I saw accused at a distance of one foot from my window. I saw the accused as the verandah light was on. Which light was on the verandah wall where the accused was standing.”***

In cross-examination by the appellant the complainant said “I also recognised you as I had known you prior to the incident. I used to see you drink in my bar at Sweet Water. I had seen the accused for almost one year. I identified you at the time of the robbery.”

Titus M. Kitulya, the complainant’s manager said that when he reported on duty at 7.30 a.m. on the morning of the incident the complainant said to him that he had been attacked on the previous night by “unknown people” who stole his radio cassette, speakers, watch and mobile.

Mr. Munyao made the point that if the attackers were known to the complainant how could he have seen and recognised the appellant one of the attackers. We have come to the conclusion that in the aftermath of the night’s events involving an attack by ten or more robbers of which he only recognised one he could have referred to the robbers as unknown to him or alternatively his manager may have misheard him.

We have taken all the evidence into account particularly that relating to the discovery of the stolen goods in the house of the appellant on the morning after the robbery. We consider that the evidence of the complainant as to his having recognised the appellant holding an iron bar on the verandah of the complainant’s house at the time of the attack can safely be relied upon as valid evidence of identification. The next issue raised by the appellant is the evidence relating to the recent possession by the accused of the stolen goods.

There were concurrent findings of the trial court and the superior court that the stolen goods belonging to the complainant were found at the house of the accused on the morning after the robbery and there are in our view no valid legal grounds why we should not be bound by these findings of fact.

For the above reasons we dismiss this appeal and uphold the conviction and sentence of the superior court.

**Dated and delivered at Mombasa this 29th day of July, 2005.**

**P. K. TUNOI**

.....

**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**