REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 286 of 2006

MURIITHI MWAI MUGO……………….....…………………….1ST APPELLANT

DANIEL WACHIRA KINYUA……….……………………….…..2ND APPELLANT

SAMUEL MUGO MUCHUGIA………….……………………….3RD APPELLANT

AND

REPUBLIC……………………………………………………….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Okwengu & Khamoni, JJ)

dated 26th September 2006

in

H.C.CR. A Nos. 7, 18 & 19 of 2000)

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JUDGMENT OF THE COURT

The three appellants, Muriithi Mwai Mugo (*1st appellant*), Daniel Wachira Kinyua (*2nd appellant*) and Samuel Mugo Muchugia (*3rd appellant*), having been dissatisfied with their conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code, appealed to the superior court. The 1st appellant in addition appealed against his conviction and sentence on the alternative count he faced of handling stolen property contrary to section 322 of the Penal Code.

In a considered judgment delivered on 26th September, 2006, the superior court (Khamoni and Okwengu, JJ.) allowed the 1st appellant's conviction in the alternative count, but dismissed all the appellants' respective appeals against both conviction and sentence for the robbery with violence counts. In allowing the appeal against conviction for the alternative count the superior court held that the 1st appellant having been convicted of the main count of robbery contrary to section 296(2) of the Penal Code, could not at the same time be properly convicted of the alternative count. With respect we agree with that court that the trial court fell into error when it found the 1st appellant guilty of both the main and alternative counts. It is quite elementary that an alternative count is charged as a matter of abundant caution. It is not open to the court to make a finding on it once it holds that there is ample evidence to support the main count. The conviction and sentence were therefore quite properly set aside.

As regards the robbery count, the superior court agreed with the trial court that the evidence in support of the charge was primarily the recognition of both appellants by prosecution witnesses. That court observed that the witnesses, who included the Mwangi Gathondu, (complainant) knew the appellants well before the date of the robbery, and although the complainant did not mention their names at the time an entry of the robbery was made in the police occurrence book (O.B.), the court was satisfied that he gave the names to the police later and on the basis of that information and the information he gave to his neighbours, the appellants were arrested.

The court also relied on evidence of recovery of the complainant's properties, allegedly with the appellants as a basis for affirming the appellants' respective convictions. Evidence was led at the trial that the first person to be arrested was the 2nd appellant. He led the complainant's neighbours to a tea plantation from where they recovered a Great Wall T.V. set and some plates, among other items. A search at his home by the police unearthed more plates and forks. Other items, to wit, a bed cover, a pair of jeans and a jacket were recovered from his house. The 2nd appellant pointed to the police the spot in the tea plantation where the items were hidden. All those items were identified by the complainant as part of the items which were stolen from his house during the robbery therein.

Evidence was also led to the effect that Gichobi Gitari Nyaga, who was jointly charged with these appellants was also suspected as having participated in the robbery. He was arrested by the area chief, and he was found in possession of a radio which he said had been sold to him by the 3rd appellant at Kshs.1,500/=. The radio was positively identified by the complainant as his. He produced a radio permit for it.

The 1st appellant was arrested separately by members of the public. A car battery which the complainant identified positively as one of the items stolen from him was recovered.

The superior court held that the evidence by the complainant regarding his identification of the appellants, was supported by the recovery of the aforementioned items and thus confirmed the correctness of his identification of each of the appellants. In addition that court relied on extra-judicial statements by the appellants to buttress its findings.

The appeal before us is against the decision of the superior court. The grounds of appeal other than the issue of identification are diametrically different from those which the appellants raised on first appeal. They are such that we do not know why they were not raised on first appeal. It is clear from the record that apart from the 1st appellant, none of the appellants had legal representation before the superior court. Mr. Mahan represented the 1st appellant before the superior court but he did not raise the grounds which are relied upon in this appeal. Mr. Mahan appeared for all the appellants before us.

The main grounds which were raised in all the memoranda of appeal were, firstly, the issue of language. Mr. Mahan submitted that the trial court did not indicate the language or languages which were used at the trial. Secondly, learned counsel submitted that there was delay in presenting the appellants to the court upon arrest. It was his submission that the delay violated the provisions of section 72(3) of the Constitution. Thirdly, he submitted that the superior court failed to re-evaluate the evidence presented at the trial. He submitted, in particular, that the superior court should have but did not re-evaluate the evidence with regard to sufficiency of light at the scene of the robbery which would have facilitated a correct identification or recognition of the appellants. Learned counsel also raised an issue concerning recovery of the stolen items, the alleged failure of the superior court to consider the appellants' defences and the court's handling of the appellants' extra-judicial statements.

It cannot be gainsaid that the trial court did not note down the language the trial proceedings were conducted. Both s.77(2)(b) of the Constitution and s.198(1) of the Criminal Procedure Code in effect provide that in criminal proceedings if proceedings are conducted in a language an accused does not understand he should be provided with an interpreter. On the face of the record it cannot be said that the appellants did not follow the proceedings. Each of the appellants is shown to have cross-examined all witnesses and asked questions which were relevant to the charges. On account of this fact, Mr. Orinda, the Principal State Counsel, submitted that the appellants understood the proceedings.

It is not every case where language is not shown which will make an appellant to successfully raise the issue of language before this Court. Each case has to be considered in light of its peculiar facts and circumstances. For instance in this appeal while it is conceded that the appellants acted in person and could not possibly know their rights as to interpretation, in the High Court on first appeal the 1st appellant

had legal counsel. His counsel filed the petition of appeal, although he does not seem to have been present at the hearing of the appeal. As we stated earlier one would have expected the issue of language to be raised then. The appellants had the earliest opportunity to raise the issue but they did not. When counsel appears in an appeal, he is presumed to know the law and particularly the need for interpretation of proceedings where the proceedings are conducted in a language the accused is not familiar with. We are satisfied that the issue of language has been raised as an afterthought.

The other ground raised is with regard to delay in presenting the appellants to the court. Section 72(3) of the Constitution, as material, provides as follows:

"(3) A person who is arrested or detained –

(a) …………………….

(b) …………………….

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his or from the commencement of his detention, or within fourteen days of his arrest….. the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

As happened regarding the issue of language, the appellants have raised this issue for the first time before us. The wording of section 72(3) above, presupposes a hearing to ascertain whether or not an accused person was taken to court "as soon as is reasonably practicable." At the stage of a second appeal, it may not be possible to conduct an inquiry on the issue, in view of the fact that under section 361 of the Criminal Procedure Code, the court's jurisdiction is confined to considering only legal issues, unless upon application pursuant to the provisions of rule 29, of the Rules of this Court an order has been made for the adduction of additional evidence.

We think that like in the case of language, an appellant does also have an obligation to raise the issue of delay at the earliest possible time in the proceedings. It is of course important to point out that each case has to be considered in light of its peculiar facts and circumstances. Where as here counsel was involved at some stage in the proceedings and did not raise the issue promptly, this Court will have the liberty of assuming that the Constitutional provisions were not violated.

We reiterate that while it is the duty of the prosecution to ensure compliance with the Constitutional provisions relating to prosecutions, an accused person has the reciprocal obligation to point out violations of Constitutional or other legal provisions, to obviate injustice to him. That does not of course minimize the duty of the court of ensuring observance of the Constitutional and other legal provisions.

Regarding identification, both the trial and first appellate courts made specific findings of fact, notably, that the complainant recognized all the appellants using reflected torch light from a Wardrobe Mirror, that on the basis of that recognition the appellants were arrested at different times, that each of the appellants was found in possession of properties which had recently been stolen from the complainant, a fact which confirmed the recognition and that the appellants confessed to having participated in the robbery complained of. Although the confession statements were retracted or repudiated, the recovery of the stolen items supplied the corroborative evidence required in law.

In the circumstances the appellants' respective appeals lack merit. We find no basis for dealing with the other issues raised, which we think are of little, if any, significance.

In the result, we dismiss the appellants' respective appeals. It is so ordered.

Dated and delivered at NYERI this 7th day of November 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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