**Murage and another v Republic**

**Division:** Court of Appeal of Kenya at Nakuru

**Date of judgment:** 3 March 2006

**Case Number:** 184/04

**Before:** Tunoi, O’kubasu and Deverell JJA

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Criminal procedure – Plea – Taking of plea – Failure by trial court to take plea from accused –*

*Whether failure rendered trial a nullity – Sections 207(1) and 382 – Criminal Procedure Code.*

*[2] Evidence – Identification – Dock identification – Identification parade a prerequisite for dock*

*identification to have any evidentiary value – Whether the appellants had been satisfactorily identified.*

**Editor’s Summary**

On 6 November 1998, two people, one armed with a pistol, stormed into the office of the District

Veterinary Department in Nakuru. They ordered the cashier to lie down, got hold of one of the veterinarians, escorted him to an adjacent office and forced him to open the safe. They then stole KShs 280 000 from the safe. On 28 December 1998, the police received a report that suspicious strangers had been seen at a local bar. The police went there and arrested the second appellant at the bar in a group of three others who were armed with a revolver and toy pistol. On 7 January 1999, a Police Inspector recorded a charge and caution statement from the second appellant in which he confessed to committing the robbery. The following day an identification parade was held at which the cashier and the veterinarian picked out and identified the second appellant as one of the robbers. The appellants were then charged on a count of robbery with violence contrary to section 296(2) of the Penal Code. At their trial, the second appellant retracted the statement. However, following a trial within a trial the statement was accepted in evidence. The defendants denied committing the offence but the Principal Magistrate found them guilty as charged and sentenced them to death. The appellants then appealed to the High Court on the grounds, *inter alia*, that the identification was faulty, that some of the witnesses gave contradictory evidence and that the trial magistrate erred in admitting the retracted statement. The appeals were dismissed. They now appealed to the Court of Appeal on the grounds that the entire trial proceedings were a nullity as no pleas had been taken before the trial began contrary to the provisions of section 207(1) of the Criminal Procedure Code.

**Held** – Compliance with section 207(1) of the Criminal Procedure Code entailed explanation of the charge and all its essential ingredients to the accused in his vernacular or a language he understood and the recording of the accused’s own words correctly translated into English. If the words were an admission, a plea of guilt was to be recorded and if the accused did not admit, then the court was to proceed to hear the case. In this instance, the record of the trial court showed that the two appellants had not been asked to plead to the charge. However, the appellants in their respective defences had categorically denied the charge. The question that therefore arose was whether the appellants had received a satisfactory trial. A careful scrutiny of the records of the courts below revealed that the irregularities had not occasioned a failure of justice. Moreover, whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code. From the record, no identification parade had been held in respect of the first appellant and he had only been identified in court as one of the robbers by the cashier and veterinarian. This was therefore an instance of dock identification and such identification was worthless without a prior identification parade; *Kiarie v Republic* applied. The conviction of the first appellant was therefore unsafe and his appeal would be allowed. Counsel for the appellants’ contention that the identification parade carried out in respect of the second appellant was flawed was not correct. The cashier and veterinarian testified that the robbery took place in broad daylight and that, together with the length of time taken to commit it, allowed them to identify him. His identification was therefore positive and free from error. In addition, there was the evidence of his confession, even though retracted. This evidence was sufficient to sustain the conviction of the second appellant.

Appeal of the first appellant allowed, appeal of the second appellant dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Adan v Republic* [1973] EA 445

*Baya v Republic* [1984] KLR 658

*Kiarie v Republic* [1984] KLR 740 – **AP**