**Mwaura v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 10 June 2004

**Case Number:** 1390/99

**Before:** Ochieng AJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Criminal law – Appeal – Identification – Whether identification was sufficient.*

*[2] Criminal procedure – Prosecution conducted partly by police constable – Offence of robbery with*

*violence – Whether trial a nullity – Whether retrial would be ordered.*

**JUDGMENT**

**Ochieng AJ:** The Appellant John Kamau Mwaura had been charged jointly with one James Oduor Obel, with the offence of robbery with violence contrary to section 296(2) of the Penal Code (Chapter 63). After their trial, the Learned trial Magistrate convicted them and sentenced both of them to suffer death, as by law prescribed. Both persons appealed against their conviction and sentence, and their appeals were consolidated. However, before the appeals could be heard, the First Appellant, James Oduor Obel, is reported to have passed away. Consequently by the time this appeal was canvassed before us, the only Appellant was John Kamau Mwaura. In a nutshell, the appeal is founded on three grounds, namely: (i) Identification ( ii) Insufficient evidence (iii) Disregard of the defence. At the hearing of his appeal, the Appellant relied on both his written as well as oral submissions. We will look at each of the grounds in turn.

**Identification**

It was the Appellant’s contention that the identification was in very difficult circumstances. He said that whilst the robbery took place during day time, the victims did not nonetheless identify their attackers. The reason for that contention was that the said victims of the attack did not specify the particulars of the attackers, when the matter was first reported to the police. The Appellant noted that during cross-examination PW1 did confirm to the trial court that he was shocked. We have verified from the record of the proceedings before the lower court that PW1 did say that he was shocked by the fact of the attack. However, we do not think that the mere fact that the robbery had shocked PW1 was reason enough to conclude that the witness was therefore unable to identify his attackers. From the evidence-in-chief, PW1 is recorded as having detailed the sequence of the attack. He explained that the attackers had at first presented themselves as customers. The said “customers” asked if they could buy beer without crates. When they had received an affirmative response, the said “customers” pushed PW1’s colleague, Mr Kiarie. The first accused then told PW1 to open the inner door, at the depot. At that point, the Appellant pointed a pistol. The attackers then took some KShs 30 400 from the victims, before pushing PW1 and his colleague to the stores. Once inside the stores, PW1 and his colleague were told to lie down. We therefore believe that PW1 had ample opportunity to enable him to identify the Appellant and his co-accused, as well as the third gang member, before the gangsters made him lie down. It is also significant that when PW1 had been recalled to testify, at the instance of the Appellant, he was very emphatic about having identified the Appellant. He stated, *inter alia* that: “Even two seconds is enough for proper identification. I looked at you”. When PW1 was pressed further, he still reiterated as follows: “I was able to identify you. I am not lying to court”. Having observed PW1 when he was testifying, the Learned trial Magistrate believed him. On our part, having re-evaluated the evidence on record, in relation to identification, we find no reason to fault the Learned trial Magistrate, on that score. The Appellant also contended that the identification parade from which he was picked by witnesses, was irregular. He submitted that the parade officer failed to comply with the rules for such parades. It was said that the parade members were not the same size contrary to section 46(4) of the standing orders. The parade officer was also criticised for failing to change the members of the parade after witnesses picked the first accused, so that it should have been different from when the witnesses were picking the second accused. We have perused the identification parade forms in the case file. It is clear that the seven persons in each of the two parades conducted in respect of the Appellant and the deceased were exactly the same. However, we also note that the Appellant did endorse the form, indicating that he was satisfied with the parade. He also signed the said form. The form also shows that the two witnesses were in different offices, within the police station, prior to their being called upon, one at a time, to identify the accused person. In his evidence PW5 said that the Appellant was allowed to choose his position on the parade. And during cross-examination by the Appellant, PW5 told the court that the members of the parade were people who were similar. PW5 also denied the Appellant’s suggestion that he was dirty, and therefore different from the other parade members. We do note that the parade had seven members, instead of the required minimum of nine persons. That deviation from the numbers stipulated in the Rules has caused us a lot of concern. We find that the use of seven, instead of nine persons in the parade did not invalidate the identification parade. But by merely replacing one person from the second parade which was conducted an hour after the first one, would have certainly been prejudicial to the Appellant.

**Insufficient evidence** The Appellant submitted that the arresting officer, PW3, could have mistakenly arrested the wrong person. PW3 had testified that he had found the robbers’ footprints, and then followed the said prints up to the river. He later linked up with some regular policemen who were also conducting a search for the robbers. Together they crossed the river, onto the Kiganjo side. The Appellant said that the witness had not told the court that the footprints emanated from the scene of the crime. He also contended that the arresting officer could not have realistically followed footprints through a river. To that extent, the Appellant would have a point. It is obviously difficult for this Court to envisage anybody following footprints through a river. However, upon further reading of PW5’s evidence, we note that he did not purport to follow the footprints through the river. His evidence was that he (and the other police officers) crossed the river. By that time, the footprints had disappeared, said PW5. Therefore, PW5 and the other police officers searched the maize plantation, and finally found the accused persons sitting down. At that stage the Appellant and his colleague pleaded with the police not to shoot them as they had the money and the gun. The investigating team then recovered a toy pistol and money from the deceased. From the Appellant, PW5 recovered a jacket, which had been stolen from PW1’s colleague, during the robbery. From the foregoing, it is clear to us that the criticisms directed at the arresting officer are not well founded. Once the arresting officer had arrested the Appellant, the victims identified them and also identified one of the stolen items recovered from them. In particular, the jacket definitely linked the Appellant to the robbery, which had occurred only about 30 minutes previously. Therefore, in our considered view, the Learned trial Magistrate did have sufficient evidence upon which he could properly make a finding of guilt, on the part of the Appellant. Accordingly we reject this ground of appeal.

**Witness not sworn** The Appellant submitted that when PW1 was recalled to testify, he was not sworn. He however proceeded to give evidence. A perusal of the record reveals that the trial court first heard the evidence of PW1 on 1 February 1999. PW1 was recalled on 13 August 1999. On that latter date there is nothing to show that the witness was sworn again, before he gave evidence. That was clearly a very serious omission on the part of the Learned trial Magistrate. Pursuant to the provisions of section 151 of the Criminal Procedure Code (Chapter 75), every witness in a criminal case is to be examined upon oath. Thus the failure to have PW1 sworn before he was re-examined renders all his evidence, on re-examination, valueless. The said evidence therefore has to be disregarded. However, even though the evidence recorded during the re-examination is disregarded, we find that it has no impact on the prosecution case. Finally, the Appellant submitted that part of the proceedings were conducted by an unqualified public prosecutor. The record shows that on 8 July 1999, a Police Corporal Gatimu was cited as the prosecutor. Pursuant to the provisions of section 85(2), as read together with section 88 of the Criminal Procedure Code, the Attorney-General is only empowered to appoint public prosecutors from either advocates or police officers of the rank of assistant inspector or higher. A police corporal is therefore an unqualified public prosecutor. The Learned State Counsel submitted that Corporal Gatimu did not prosecute any part of the proceedings. He was only cited on the record as the prosecutor during a mention of the case. No witnesses were called on that day, and no evidence was received by the trial court. On the other hand the Appellant insists that Corporal Gatimu was the prosecutor between 8 July and 14 August 1999. During that period PW1 was recalled and he testified. A look at the court record shows that Corporal Gatimu was the prosecutor on 8 July 1999. On that date, the case was adjourned to 22 July 1999, for mention. After the case was mentioned on 22 July and 5 August 1999, the trial resumed on 13 August 1999. The court record shows that from 8 July 1999 when Corporal Gatimu was the prosecutor, the Learned trial Magistrate did not name the prosecutor right up to 13 August 1999. The record just indicated “coram as before”. To our minds that is a most unsatisfactory manner of keeping a record that spans court attendances over more than a day. The record does not tell us exactly who the prosecutor was. But the only assumption we can draw is that Corporal Gatimu was the prosecutor as the phrase “coram as before” implies. The Learned State Counsel has urged us to dismiss the appeal. He has also submitted that if this Court were to hold that the appearance of Corporal Gatimu as prosecutor, during a mention of the case would vitiate the trial, we should order a retrial. We note that the State did not appear to appreciate the fact that Corporal Gatimu did actually conduct part of the proceedings. However, we believe that it is nonetheless incumbent upon us to ask ourselves whether or not a retrial ought to be ordered, if the trial were a nullity, on the ground that Corporal Gatimu did prosecute part of the trial. But as the Learned State Counsel did not place any material before us, from which we could assess whether or not a retrial should be ordered, we would not have had a basis for ordering a retrial. The court had failed to have PW1 sworn before he was recalled to give further evidence. That evidence has to be disregarded. The said evidence is the only part of the trial which was conducted by the unqualified public prosecutor. Having thus disregarded that part of the trial which was conducted by the unqualified public prosecutor, we nonetheless have to declare the trial a nullity. In the case of *Elirema and another v Republic* [2003] 1 EA 50, the Court of Appeal held as follows: “But if a police corporal does not, in law, have authority to prosecute as a public prosecutor, as was submitted before us, we cannot see that we can separate one part of the trial and hold it valid (ie the part conducted by Inspector Wambua) while at the same time holding that the other parts (ie the parts conducted by Corporals Kamotho and Gitau) are valid. There was only one trial and if any part of it was materially defective the whole trial must be invalidated”

**The defence case** The Appellant submitted that the Learned trial Magistrate failed to give due consideration to his defence. He contends that the jacket he was found with was his own. However, we note that when he cross-examined PW1 the Appellant did not raise any issue as to the ownership of the jacket. By omitting questions about ownership, the Appellant did not give the two witnesses an opportunity of telling the court the reasons why they had said that the jacket belonged to PW4. That omission is significant when it is noted that when cross-examining both PW3 and PW4 he raised the issue of ownership. PW3, Administration Police Constable Peter Kibe, could not have been expected to identify the owner of the jacket. But PW4, Anthony Kiarie testified that the jacket was his. And during cross-examination, he categorically stated that the jacket could not possibly belong to the Appellant. We also note that when the Appellant gave his sworn evidence, he reiterated that the jacket was his. It is therefore clear that the Appellant laid claim to the jacket. The ownership of the jacket was thus a contentious issue. However, it is not clear to us, how the Learned trial Magistrate arrived at the decision that the jacket belonged to PW4. In the judgment he does not state why he did not accept the Appellant’s claim to the jacket. In all the circumstances prevailing in this case, we find that the defence case raised some pertinent questions, which were not answered adequately and completely. Thus having held that the trial was a nullity, we decline to order a retrial. Consequently, we allow the appeal, and order that the Appellant be set at liberty unless his is otherwise lawfully held. For the Appellant:

*Information not available*

For the Respondent:

Attorney-General