REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL CASE NO. 29 OF 2015

ISAIAH WANGAI NGARI...……..……………………………APPELLANT

AND

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

Being an appeal from the judgment of the Principal Magistrate's Court (S. Jalang'o), Baricho Criminal Case Number 401 of 2013 delivered on 30th June, 2015)

JUDGMENT

1. **Isaiah Wangai Ngari** the appellant herein was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** before Baricho Principal Magistrate's Court vide Criminal Case No. 401 of 2013. The particulars of the offence were that on 3rd May, 2013 at Muragara Village, within Kirinyaga County jointly with another not before court and, while being armed with dangerous weapon namely panga, robbed CHARLES GITHAE (the complainant) of his mobile phone (of Samsung make) and cash of Kshs.510 all valued at Kshs.3,000 and at or immediately before or after the robbery wounded the said Charles Githae.

2. The prosecution called a total of seven witnesses while the appellant gave a sworn defence and called no witness in his defence. At the conclusion of the trial, the learned trial magistrate found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant handing him the mandatory death penalty.

3. The Appellant felt dissatisfied with the conviction and preferred this appeal but before I look at the grounds upon which this appeal is made, it is more convenient to consider the evidence relied upon by the trial court to find a conviction against the Appellant.

4. The trial court was told by the complainant Charles Githae Karani (P.W.1) that while he was on his way home on 3rd May, 2013 at around 9 p.m. he was attacked by two men among them was the Appellant who was armed with a panga. The witness gave the trial court the account of how he was attacked and robbed of a mobile phone (of Samsung make) and seriously injured in the process with his screams attracting the attention of the neighbours who came to the rescue and later arrested the appellant with the help of dogs. This evidence was corroborated by the evidence of Thomas Macharia Mwangi (P.W.2) and Morris Stephen Murimi (P.W.3) who told the trial court that they were attracted by the screams from the complainant and upon rushing to the scene they saw two people running away and P.W.3's dogs gave chase and caught the Appellant herein who screamed and was found with a blood stained panga that had been used to cause grievous harm to the complainant. The Appellant was then arrested and later handed over to the Police. In the meantime the complainant was taken to A.C.K. Mt Kenya Hospital and later Kerugoya District Hospital by his father WILSON KARANI MURIMI (p.w.4) who had also rushed to the

rescue of his son when he heard screams from the road nearby. Thomas Macharia Mwangi (P.W.2) also gave corroborating evidence as did AP Isaac Kanene (P.W.5) and the investigating officer P.C. LUKE ROTICH (p.w.7) who tendered the weapon used (panga) as Prosecution Exhibit 2. Hezron Macharia Maina (P.W.6) the clinical officer gave medical evidence (P3 Prosecution Exhibit 1a and treatment chit Prosecution Exhibit 1b) detailing the serious nature of the injuries suffered by the complainant as noted on the reports tendered in evidence. In summary the nature of the injuries were classified as grievous harm.

5. When placed on his defence, the Appellant gave sworn statement of defence and denied committing the offence. He told the trial court that on the material date and time he was accosted by two people he knew as Stephen Murimi and Tobias Macharia who cut twice with a panga and broke his hands in the process. When pressed in cross-examination he apparently could not recall where and when he went to hospital for treatment. He could not produce any treatment chit or any medical record to back up his claims. The trial court dismissed this defence as an afterthought and found that based on the evidence tendered, the prosecution had proved the Appellant's guilt beyond reasonable doubt.

6. The Appellant was aggrieved by the above finding as indicated above and listed the 7 grounds below in his petition of appeal as follows:

> ***(i) That he pleaded not guilty.***
>
> ***(ii) That the learned trial magistrate erred in law and fact by not considering the contradictions by the prosecution witnesses.***
>
> ***(iii) That the learned trail magistrate erred in law and fact by not considering that the complainant did not prove ownership of the phone.***
>
> ***(iv) That the trial magistrate erred in law and fact by not considering that the stolen phone was not produced as an exhibit.***
>
> ***(v) That the trial magistrate erred in law and fact by not considering that the prosecution did not produce an inventory form showing the person whom they recovered the panga from.***
>
> ***(vi) That the trial court erred in law and fact by not considering the light used to identify the accused and distance involved.***
>
> ***(vii) That the trial magistrate erred by not considering that there was no proof that the panga produced in court was actually the weapon used to attack the complainant.***
>
> ***(viii) That the learned magistrate erred by denying the appellant his constitutional right under Article 50 (2) (m) and that he also failed to comply with Section 192 and 198 of the Criminal Procedure Code.***
>
> ***(ix) That the trial magistrate lacked the jurisdiction to hear the case.***
>
> ***(x) That the learned magistrate erred by not considering his defence.***

7. The Appellant chose to proceed in his appeal through written submissions which were responded to by the Respondent in the same way. This Court shall consider the grounds of appeal one by one as raised in the written submissions. The Respondent through the Office of the Director of Public Prosecutions for the record opposed this appeal and supported both the conviction and sentence submitting that the evidence adduced by the prosecution supported the same.

8. The Appellant in his submissions has raised that the trial court denied him his constitutional right under ***Article 50 (2) (m)*** by conducting the trial in English language when he had indicated at the plea stage that he only understood Kikuyu language. He contended that under ***Section 198*** of the **Criminal Procedure**

Code the trial court should have gotten an interpreter to enable him understand and follow the proceedings. In this respect he cited two decisions to support his contention:

(i) Dennis Chomba Nyawira alias Muchoki -Vs- The Republic (Kerugoya High Court Criminal Appeal No. 222 of 2012).

(ii) Katikeya -Vs R (2007) E.A. 133.

9. In response to this ground of appeal, the state has denied that the Appellant's constitutional rights were denied at the trial. Mr. Omayo, learned counsel for the State has pointed out that the proceedings indicate that interpretation was done from English to Kiswahili and that the Appellant understood Kiswahili well as he fully participated in the proceedings by cross examining prosecution witnesses and giving his defence in court. In his view, the Appellant cannot now claim that he was denied his right as he did not suffer any prejudice. Mr. Omayo has distinguished the decision by Lady Justice Ongundi in the cited case of DENNIS CHOMBA NYAWIRA alias MUCHOKI arguing that the facts in the cited case are distinguishable as in the cited case, no interpretation whatsoever was ever done as required under **Section 198** of the **Criminal Procedure Code.**

10. It is true that a trial must be conducted in a language of the court and where an accused person or a witness does not understand the language, an interpreter as a matter of law under **Section 198** of the **Criminal Procedure Code** and as provided in the Constitution under ***Article 50 (2) (m)*** has to be sought. Courts therefore have a legal duty to ensure that an accused person is able to follow the proceedings in a language he or she understands. In cases where an accused actively participates in the proceedings a presumption is made that he must have understood the language used at the trial (see the decision in the case of **Mwendwa Kilonzo –Vs- R [2013] eKLR).** In that case the appellant raised the issue of language used and stated that the trial court never noted the language used in court and therefore he urged the court to assume that the language used was English language which he stated that was foreign to him but the court overruled the contention noting that despite the omission by the trial court, the appellant was able to follow the proceedings as he cross-examined witnesses and gave unsworn defence.

In this case, I have looked at the proceedings at trial court carefully and noted that though in some instances the trial learned magistrate noted that the interpretation was done from English to Kiswahili, in some instances, the court did not note it on record that the interpretation was done. However, the appellant participated fully by cross-examining the witnesses called by the prosecution. He was able to elect to give sw3orn statement of defence when he was put to his defence pursuant to Section 211 of the Criminal Procedure Code. The question posed is how was he able to do all these if he truly did not understand the language used in court. How did he understand that he had been found guilty and convicted and given 14 days right of appeal? The appellant must have clearly understood the language used in court otherwise he would not have participated as he did. This Court therefore finds no merit on this claim as the record of the proceedings clearly shows that the appellant followed the proceedings. The ground raised is clearly an afterthought and therefore I agree with the Respondent in that respect. (see the observations made in the decision of **Court of Appeal in the case of M. M. -Vs- R [2014] eKLR**.

11. The Appellant has also raised an issue on jurisdiction contending that as an acting Senior Resident Magistrate the learned trial magistrate Hon. S. Jalang'o lacked jurisdiction to try the case as he was not a confirmed Senior Resident Magistrate as required by law. The Respondent disputed this contention pointing out that the provisions stipulated under the **1st Schedule** of the **Criminal Procedure Code** were not violated as the learned trial magistrate was acting at the time of trial and by the time the trial was concluded, he was already confirmed as Senior Resident Magistrate.

12. I have considered the provisions under the First Schedule of the **Criminal Procedure Code** and it is true that Robbery with violence under ***Section 296(2)*** of the **Penal Code** should be heard by a magistrate holding the position of Senior Resident Magistrate and above. The learned trial magistrate hon. S. Jalang'o was acting Senior Resident Magistrate and therefore by law he was empowered to act and discharge judicial duties as a Senior Resident Magistrate. In my view he was competent in law to hear and determine the case. In the case of **STEPHEN MUTINDA MWANZIA –VS- REPUBLIC [2014]**

eKLR the Court of Appeal made the following observations which I consider relevant and guiding in this appeal;

> ***"The first issue in this appeal is on jurisdiction of the trial magistrate to hear the evidence of P.W.1, P.W.2 AND P.W.3 between 4th January, 2007 and 8th March, 2007. The magistrate in question was Hon. J. K. Ngarngar Ag. S.R.M. Mwingi District Eastern Province. The original record which we have perused shows that the said magistrate was an acting S.R.M. As an acting S.R.M. he was competent and had jurisdiction to try the case and hence to take the evidence of the said witnesses he did. The competence of an acting S.R.M. is the same as that of a S.R.M. This ground of appeal has no merit."***

This Court in the light of the above decision finds no merit in the ground raised by the Appellant herein.

13. On identification, it is contended that the trial magistrate only relied on evidence of a single witness on the basis of visual identification and recognition. The Appellant has submitted that the learned trial magistrate ought to have cautioned himself before relying on this type of evidence and contended that it was not enough for the magistrate to find that because the Appellant had been arrested with a blood stained panga at the scene of crime, he must have committed the offence. He faulted the trial magistrate for not addressing himself on the source of the light that helped in the visual identification and submitted that the source and the intensity of the light was not disclosed. He further submitted that the only evidence concerning light was that it emanated from a tea buying centre but that the distance from the buying centre to where the complainant (P.W.1) was attacked was not given. In his view the lack of clarity on this point made it unsafe to convict him and that the trial magistrate should have found so.

14. The Respondent on the other hand has submitted that the Appellant was positively identified and recognized as he was known to the complainant (P.W.1) having grown up together and knew him even by voice. Mr. Omayo pointed out that the identification could not have been just because the Appellant was arrested immediately with the blood stained panga following the robbery but in his view other circumstantial evidence tendered was strong.

15. I have re-evaluated the evidence tendered on the issue of identification. The Complainant (P.W.1) told the trial court that it was the appellant who shouted;

> "toa pesa na simu!"

and proceeded to cut the complainant on his hand and head in order to subdue him. The said witness further told the trial court that he was able to identify the Appellant with the help of light emanating from Kiahungu Tea buying centre and although I agree with the Appellant that the distance between the buying centre and the crime scene was not interrogated or intensity of the light was not interrogated well at the trial, I find that the light was sufficient enough as the complainant was able to recognize the green jacket that the Appellant wore and which he had earlier seen during the day prior to the material time and place. The complainant appeared to be well acquainted with the Appellant as he stated that they are both from the same area and in fact knew him by nickname "bundi" or "fundi" as put by P.W.4 (WILSON KARANI MURIMI). Although P.W. 1 referred to the Appellant as "bundi" and P.W. 4 (his father) referred to him as "fundi" the discrepancy in my considered view is insignificant as I take judicial notice of the fact that in this region letter 'b' and 'f' especially when followed by a vowel is mostly pronounced the same way and is often used interchangeably. What is important and relevant in my view is the fact that the Appellant was well known by the complainant and the other witnesses to wit Thomas Macharia Mwangi (P.W.2), Moris Stephen Murimi (P.W.3) and P.W. 4 (Wilson Karani Murimi).

16. Another factor considered by the trial magistrate which helped in positively identifying the Appellant was the fact that he was caught by the dogs belonging to Morris Stephen Murimi (P.W. 3) when they gave chase to the two assailants who were running away as the neighbours came to the rescue of the complainant when he shouted for help. P.W.2, P.W.3 and P.W. 4 were all positive on this fact. They were also positive that when they arrested him he was still in possession of a blood stained panga. The trial learned magistrate in his assessment of evidence presented found that the complainant and his

witnesses were able to place the accused at the scene of crime and positively identified him as one of the assailants that attacked and robbed the complainant of a mobile phone and Kshs.510 which is what he had at the time. This Court finds that the learned trial magistrate was correct in his assessment and the conclusion made that the Appellant had been identified. The voice recognition made by the complainant was supported by the fact that he had known the appellant for long as they grew up together. I have also looked at the defence put forward by the Appellant at the trial and he clearly placed himself at the scene of crime though he denied committing the offence. In the celebrated case of R –Vs Turnbull (1976) 3 ALL ER the court stated as follows:

> ***"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

This Court is in the light of the above decision aware that mistakes in visual or voice recognition can happen. I am however, satisfied that identification of the Appellant was coupled with other positive circumstances which I have pointed out above which in my view established beyond reasonable doubt that the Appellant was positively identified. He was caught almost immediately after the robbery and found still in possession of a blood stained panga which was tendered in evidence at the trial as Prosecution Exhibit 2 by P.C. Luke Rotich (P.W.7 and the investigation officer in the case).

17. The Appellant has submitted that there were contradictions and inconsistencies on the manner in which he was arrested but I have considered the evidence tendered by prosecution and find the evidence in this regard quite consistent. I have not noted any material contradiction on the version of events given by the witnesses.

18. On the ground that there was no evidence tendered to prove ownership of the mobile phone stolen, I agree with the Respondent's counsel that what was material or relevant to be considered at the trial was that all the ingredients of the offence had been established and proved. I do find that the learned trial magistrate in his judgment listed all the ingredients of the offence and assessed each ingredient and found that all the ingredients of the offence facing the Appellant had been proved and he cannot be faulted because I find that he was correct in his assessment.

19. In my view the prosecution proved its case beyond reasonable doubt. I do not find merit in the allegation that the Appellant's defence was not considered. He told the trial magistrate that he was injured by two assailants Stephen Murimi and Tobias Macharia but he could not recall where and when he went to hospital for treatment if at all. He did not tender any evidence to support his allegations and therefore the trial magistrate was correct to assess the weight of his defence and to find that the same was an afterthought. That does not mean that the defence was not considered because it was considered by the trial court. He did not state the motive of the attack or the reason why he was attacked by the two named people. It is also true that he did not raise the issue when he was cross-examining P.W.2 or P.W.3. So the conclusion by the trial magistrate that the claim of an attack was an afterthought was well founded.

20. This Court finds that the entire evidence adduced at the trial as per the record of proceedings left no doubt as found by the trial court that the Appellant robbed the complainant (P.W.1) in the manner described. The trial court considered all the evidence presented by the prosecution and correctly came to the conclusion that the evidence against the Appellant was overwhelming and hence the finding of guilt and the conviction. In the light of the above, this Court finds no merit in this appeal. The same is dismissed and the conviction and the sentence is upheld.

Dated and delivered at Kerugoya this 27th day of September, 2016.

R. K. LIMO

JUDGE

27.9.2016

Before Hon. Justice R. K. Limo J.,

State Counsel Mr. Omayo

Court Assistant – Naomi Murage

Appellant present

Interpretation: English/Kikuyu

Omayo for State present

Appellant in person present.

COURT: Judgment signed, dated and delivered in the open court in presence of Isaiah Wangai Ngari the appellant in person and Omayo for State.

R. K. LIMO

JUDGE

27.9.2016