REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.288 OF 2008

STEPHEN MWANGI WANJOHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence made by the learned Ag. Principal Magistrate at Karatina court (Hon. L. Mbugua) in Karatina Senior Resident Magistrate's court criminal case No.363 of 2007 delivered on 10/11/2008)

JUDGMENT

STEPHEN MWANGI WANJOHI, the appellant herein, was tried and convicted for the offence of robbery with violence. The particulars of the offence were that on the 16th April, 2007 at Karatina township in Nyeri District, within Central Province, jointly with others not before the court while armed with dangerous weapons namely knives robbed **CHARLES NDEKERE KARUE** of a mobile phone make Nokia 1100 and a wrist watch make Seiko both valued at Kshs. 4,500 and cash Kshs.10,000 all to the total value of Kshs. 14,500 and after immediately before or immediately after the time of such robbery threatened to use actual violence to the said Charles Ndekere Karue. Upon conviction, the appellant was sentenced to suffer death. Being aggrieved, the appellant preferred this appeal.

On appeal, the appellant put forward the following grounds:

1. The learned Magistrate erred in law and facts in convicting the appellant on charges under Section 296 (2) PC and failed to note and consider that the appellant had not been arrested of the offence having been arrested on 21/4/2007 and the crime committed on 16/4/2007 the robber alleged caught on spot and taken to police station.

2. The learned Magistrate erred in law and facts clearly failing to find the alleged name the robber gave police at the station, entered in the OB dated 16/4/2007 was not the name appellant went on in the trial, name he first gave to police on 21/4/2007 on his arrest hence the two respective OB's tell it all that the appellant was not due to robbery crime, but on reason shown and recorded in the OB dated 21/4/2007, which I pray both OB's dated 16/4/2007 and 21/4/2007 for Karatina Police Station and respective register.

3. The learned Magistrate erred in law and fact in upholding the appellant was to be tried of the present charges, and the charge sheet did not indicate that the appellant's name as it appears in both OB No. of 21/4/07 was the same person bearing the name in the OB No. of 16/4/07 or any charges brought in court of appellant gave wrong information to police.

4. The learned Magistrate erred in law and in facts when finding the appellant was in possession of the recent stolen mobile phone or was part of the gang that committed the alleged crime, failing to note, the adduced evidence on how the recovery was made is contradictory and that some of the items/weapons/knife or clothing appellant was wearing never exhibited and that no where the appellant had been made mob justice as alleged by eye witnesses, the robber experienced.

5. The learned Magistrate erred in law and in facts in dismissing the defence of the appellant to the weakest of the defence of appellant where the burden rest on prosecution.

The appellant further filed the following amended grounds of appeal:

1. That the learned trial Magistrate erred in both points of law and facts by finding the current conviction based on a defective charge.

2. That the learned trial Magistrate erred in both points of law and facts by violating my constitutional right to a fair trial as enshrined under article 50, 2(b)(4) (3) & 5(a) respectively.

3. That the learned trial Magistrate erred in both point of law and facts, by failing to be as much observant as follows:-

(a)That prosecution evidence was uncolloborative, contradictive and doubtful.

(b) That key and essential witnesses were not availed i.e members of the public purported to have assisted complainant to arrest the appellant.

(c)That this matter was not investigated at all.

At this juncture, we wish to set out in brief the case that was before the trial court. The prosecution's case was supported by the testimonies of three witnesses. It is the prosecution's case that on 16th April, 2007 at about 8.00pm the complainant (P.W.1) was walking back home from his place of business at Karatina town. Upon reaching Tabanacle Church he was accosted by three people. He was held by the neck. P.W.1 fought back while screaming. A struggle ensued and the complainant held one of them as the others fled. Members of the public responded to the complainant's distress screams. In the process of the struggle, P.W.1 said he lost his mobile phone make Nokia 1100, wrist watch and cash Kshs.10,000. Members of the public beat up the appellant and in the process the appellant is said to have produced P.W.1's mobile phone from his pocket. Police arrived and arrested the appellant and thereafter charged him with the offence he was convicted for.

When placed on his defence, the appellant denied committing the offence claiming his case was that of mistaken identity. He claimed that the person who was arrested was Stephen Mwangi Maina but he was charged instead. The appellant challenged the police to produce the Occurence Book but none was availed. The learned trial Principal Magistrate concluded that the appellant was arrested at the scene of crime and that he was found in possession of the complainant's mobile phone. The learned Principal Magistrate further found that the evidence was direct and precise.

We now turn our attention to the substance of the appeal. When the appeal came up for hearing, the appellant was allowed to rely on written submissions while Miss. Maundu, learned State Counsel made oral submissions to oppose the appeal. It is the submission of the appellant that the prosecution had failed to tender evidence to prove that he was the one who was arrested on 16th April, 2007. He argued that despite his requests to have the Occurence Book to be produced in court, the prosecution failed to do so thus showing that his contention was valid. Miss. Maundu was of the view that there was credible evidence proving that the appellant was the person arrested at the scene of crime. We have re-evaluated the evidence on record over this issue.

It is the evidence of Charles Ndekere Karue (P.W.1), the complainant herein that he was attacked by three people at the material time. He stated he held one of the assailants while screaming thus attracting

members of the public who immediately responded by arriving at the scene of the robbery. P.W.1 stated that the appellant was senselessly beaten up and in the process, he removed from his pocket his mobile phone. The police also arrived at the scene and re-arrested the appellant. The question which has been left to this court to grapple with is whether or not the person who was arrested at the scene of the robbery was the appellant?

According to the complainant (P.W.1), the appellant pleaded with the members of public not to kill him. It is said he removed P.W.1's phone from his pocket and then the police picked it up and that he identified it himself. In cross-examination, P.W.1 said the appellant dropped the mobile phone on the grass. **P.C Obed Kosgei** (P.W.3), stated that when he arrived at the scene of crime, he took possession of a mobile phone from members of the public. The police did not summon the alleged member of the public to testify to show as to where the phone was recovered from. From the evidence presented there is doubt whether the possession of the mobile phone can be safely assigned to the appellant. The complainant says, the appellant dropped the phone on the grass. The incident took place at night and there was no evidence led to show how the complainant was able to see the appellant remove and drop the same on the grass. Of course, there was no evidence as to who took possession of the phone and handed over to P.W.3. Having discounted the application of the doctrine of recent possession, we now turn our attention as to whether or not the appellant was a case of mistaken identity?

The appellant has expressly stated that he was not arrested at the scene of crime. He said that the person who was arrested was Stephen Mwangi Maina. He challenged the police to produce the Occurence Book for 16/4/2007 and 21/4/2007. We have critically examined the record and it is apparent that the initial charge indicated the name of the accused to be Stephen Mwangi Maina. In his evidence in cross-examination, P.W.3 said that the appellant gave his name as Stephen Mwangi Maina but later when that name was called out during plea he kept quiet and thereafter told the trial court that he was called Stephen Mwangi Wanjohi. P.W.3 further averred that the trial Magistrate was prompted to amend the name in the charge sheet to read that of the appellant instead of Stephen Mwangi Maina. In three occasions the appellant applied for the Occurrence Book for 21/4/2007 and 16/4/2007 to be produced to prove that he was wrongly assigned the name of Stephen Mwangi Maina and was tried for an offence he did not commit. The trial court issued the order but the police did not deem it fit to comply with the order. In our view, we think the police were hiding something. We have also noted that the learned Principal Magistrate casually amended the charge sheet without noting the reasons for doing so on record. She even forgot to amend the name in the alternative charge.

We are convinced that the failure by the prosecution to produce the Occurrence Book is fatal. We think the appellant could have been mistaken for someone else. We find that the learned Principal Magistrate fell into error when she dismissed the appellant's contention that he was arrested on 21/4/2007 instead of 16/4/2007. The learned Magistrate basically believed the date of arrest as shown on the charge sheet to be the gospel truth. We wish to restate that the reliable evidence over the issue is the Police Occurrence Book, which in any case was not produced by the prosecution. In fact, P.W.3 conceded in cross-examination that the appellant was actually arrested on 23rd April, 2007.

We have come to the conclusion that his ground alone is enough to dispose of the appeal. We do not therefore see the need to consider the other grounds of appeal. We give the appellant the benefit of doubt. We allow the appeal. We quash the conviction and set aside the death sentence. The appellant is hereby set free forthwith unless lawfully held.

Dated, Signed and delivered this 20th day of February, 2014.

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J.K.SERGON

JUDGE

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J. WAKIAGA

JUDGE