REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 246 OF 2011

SAMUEL MUNIU WAINAINA ……..APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From original conviction and sentence in criminal case Number 2359 of 2010 in the Chief Magistrate's Court at Thika – L. Wachira (SRM) on 15/09/2011)

JUDGEMENT

1. The appellant filed an appeal following his conviction by Mrs. L. Wachira, Senior Resident Magistrate, for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Thika CM Cr. Case no. 2359 of 2008**. He was sentenced to death in accordance with the law.

2. The particulars of the offence were that on the 31st day of May 2010, at Kamito village Ruiru location within Thika District of Central Province, being armed with a dangerous weapon namely a metal bar, robbed Rasto Mandu Asembo of motor cycle make Hangya Registration No. KMCA 797 W valued at Kshs.75, 000 and at, immediately before or immediately after the time of such robbery they threatened to use actual violence against the said Rasto Mandu Asembo.

3. He filed an amended memorandum of appeal in which he relied on 9 grounds. He argued only some of them. We have condensed the grounds as follows:
    a. **That the Identification evidence was insufficient to prove the appellants guilt.**
    b. **That the trial court failed to summon crucial witnesses to testify.**
    c. **That the Trial magistrate convicted on the basis of conflicting evidence.**
    d. **That there was a variance in the charge and the particulars**

4. The appellant filed written submissions which he relied on and argued that the prosecution case was not proved beyond reasonable doubt. That **PW5** the Investigating Officer told the court that he went to the "boda boda" stage and could not get witnesses who witnessed the ordeal" and on that basis the court should allow his appeal. On identification, his argument was that **PW2** had said that he identified him at the Identification parade yet **PW5** and the Investigation Officer disagreed. He also opposed the state counsel's prayer for retrial.
5. Learned state counsel Miss Maina conceded the appeal for reasons that **Section 200** of the **Criminal Procedure Code** was not complied with. She however sought a retrial urging that the evidence on record was sufficient to sustain a conviction, and that the state would avail the witnesses since they were well known to the appellant and some of them were his relatives.

6. In sum therefore, the state prayed for an order of retrial because of failure on the part of the state to comply with **Section 200** of the **Criminal Procedure Code**, while the appellant on the other hand, prayed for the quashing of the conviction and the setting aside of the sentence, on the ground that the prosecution evidence was insufficient, conflicting and at variance with the particulars of the charge sheet.

7. In considering what the fair and just thing to do in the circumstances of the case before us would be, we had recourse to the words of Lord Taylor in the case of **R v Smurthinaite [1994]1 All ER 898 at page 903** in which he posited that fairness of the proceedings involves a consideration not only of fairness to the accused but also, as has been said before, fairness to the public.
8. The case of **Fatehali Manji v The Republic [1966] 1 EA 343** set out succinctly the factors to be considered in deciding whether or not to order a re-trial as follows:

> **"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial…Each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it".**

We therefore perused the lower court record and considered the submissions of both parties to establish whether the prosecution had discharged the burden of proof, apart from the failure of the court to comply with **Section 200 Criminal Procedure Code**. On the first ground that the Identification evidence was insufficient to prove the appellants guilt, the appellant submitted that the complainant (PW1) failed to give any description to the police in the initial report. We have examined the record and confirm that during cross examination **PWI** admitted that he did not give a description of the appellant to the police.

9. **PW2** also did not give a description of the appellant to the police although from the record, he seems to have interacted with him to some extent on the date of the offence. The only evidence relied on by the court was that one Baba Joe, Joe himself, **PW2**'s grandmother and some taxi operators in the area, knew the appellant. Those witnesses were not summoned to testify in court. The trial magistrate however opined in her Judgment that:

> "***In any event, the complainant saw the accused person in broad daylight, had even the time to talk to him twice on that day and the arrest was on the same day. It is unlikely that the complainant would have forgotten the facial appearance of the accused person. I find that identification of the suspect was without a doubt***"

From the complainant's account of the attack we note that he did not refer to the attacker by way of his appearance or any of his physical features.

10. *We are mindful of the fact that whenever the case against an accused depends wholly or to a great extent on the correctness of the identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.* - **Wamunga versus Republic KSMCA. No.20 of 1989 (UR**).

11. We have considered the principles in the aforementioned case and the rival arguments herein on visual identification, and find that the complainant's identification of the appellant in connection with the commission of the offence of robbery with violence of 31st May 2010 is insufficient. The reasons are that the victim and the alleged assailant were strangers to each other, and the appellant was identified by persons who did not witness the robbery nor testified in court.

12. The second main ground raised and argued by the appellant is that the Prosecution failed to summon crucial witnesses who were named by **PW1** and **PW2.** These were said to be the father of one Joe, Joe himself and the "boda boda" operators who saw the appellant taking on **PW1** as a passenger. It is clear from the record that **PW1** relied on the evidence of these witnesses who did

not testify, to confirm the identity if the appellant. **PW2** testified that his father and grandmother knew the assailant who was a cousin to his father. He himself did not however know him. In our assessment, the failure to summon them to testify, while placing reliance on their evidence was prejudicial to the appellant.

13. The third ground of appeal was that the trial magistrate convicted the appellant on the basis of conflicting evidence. The appellant submitted that **PW1**, **PW2**, **PW4** and **PW5** gave conflicting evidence particularly on the mode of the appellant's arrest and the recoveries that were made. The evidence of arrest and recovery according to **PW1,** was that the appellant was arrested at a relative's place where a metal bar wrapped in a newspaper was recovered. **PW2** also testified that when he saw the appellant he had a green polythene bag with something folded in a newspaper.

14. **PW4** testified of arresting the appellant in the room where he resided and recovering a metal rod from him. **PW5** did not arrest the appellant but only received instructions to investigate him. He also received the recovered metal bar and helmet. From the above, we do not see any conflict worth noting in the evidence. This ground therefore fails.

15. The fourth ground was that there was variance in the charge and the particulars and specifically the registration of the stolen motorcycle. The conflict between the evidence and the charge in the instant case was that whereas the charge refers to motor cycle make Hangya Registration Number **KMCA 797W**, of which **PW1** also testified, **PW4** on the other hand testified of a motorcycle bearing registration number **KMCA 795W**, while **PW5** testified of a motorcycle registration number **KMCA 979W**.

16. The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction, especially where conflicts are minor or of such a nature that no discernable prejudice is caused to the accused person. See - the case of **KIMEU vs. REPUBLIC (2002) 1 KAR 757**.

17. Section 382 states that:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice"**.

The question is therefore whether the discrepancy in the particulars of the charge sheet and the evidence is curable or not under **Section 382** of the **Criminal Procedure Code**.

18. In her judgment the learned trial magistrate oscillated between the various registration numbers mentioned in paragraph 15 above. When setting out the particulars of the charge at the beginning of the judgment she referred to motorcycle registration number **KMCA 797**. In her closing remarks however she stated as follows:

> **"From the prosecution evidence it is clear that motorcycle registration KMCA 979W was with the complainant and the same was robbed from him".**

Our view is that in the circumstances of this case, the charge being robbery with violence, and the appellant having not been arrested in the act or found in possession of the stolen motorcycle at the time of arrest, the registration number of the stolen motorcycle was material. The variation in the evidence and the charge sheet was material and remained unresolved in the judgment. We therefore find that the defect was incurable under **Section 382** of the **Criminal Procedure Code**.

19. Having carefully analysed, and re-assessed the evidence tendered in the trial court as expected of

us as a court of first appeal, we find that there are many gaps in the prosecution case and that all in all, it will not be in the interest of justice to order a retrial. Accordingly we allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **27th** day of **May 2014.**

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A. **MBOGHOLI MSAGHA** **L. A. ACHODE**

JUDGE **JUDGE**