REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 321 OF 2013

(Originally Nairobi Criminal Appeal No. 498 of 2010)

GEORGE WAINAINA NDUNGU.....APPELLANT

v

REPUBLIC.....RESPONDENT

consolidated with

HIGH COURT CRIMINAL APPEAL NO. 322 OF 2013

(Originally Nairobi Criminal Appeal No. 496 of 2010)

GODFREY GITANGA KARITE.....APPELLANT

v

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence by L.W. Gicheha, Principal Magistrate in Thika Magistrates Court Criminal Case No. 4354 of 2009 on 10 September 2010)

JUDGMENT

1. George Wainaina Ndungu (1st Appellant) and Godfrey Gitanga Karite (2nd Appellant) were jointly charged with robbery with violence contrary to section 296(2) of the Penal Code on 16 September 2009.
2. After trial spreading over about a year both Appellants were convicted as charged and sentenced to death.
3. On 16th September 2010 the 1st Appellant filed a Memorandum of Appeal and the grounds listed were challenging the identification and recognition of the Appellant, contradictory and uncorroborated evidence and failing to consider the appellant's defence.
4. At the hearing the 1st Appellant relied on Amended Grounds of Appeal and the new grounds were that the 1st Appellant was not informed of the offence in a language he understood, reliance by the trial court on extraneous and inadmissible evidence, shifting the burden of proof and that the death sentence is unconstitutional
5. The 2nd Appellant also filed his Memorandum of Appeal on 16th September 2010 listing some five grounds which essentially were similar to those put forward by the 1st Appellant.
6. The 2nd Appellant relied also the on Amended Grounds of Appeal and a new ground of appeal

was introduced to the effect that the charges were defective.

7. Both Appellants filed written submissions and when the appeals came up for hearing on 14th October 2010 we ordered that they be consolidated.
8. The Court will deal with the grounds of appeal as urged separately.

Language

9. The 1st Appellant in his written submissions stated that he was not informed of the nature of the offence and charge in a language he understood.
10. The record of proceedings in the lower court indicate that on 16th September 2009 when the Appellants were arraigned before the Magistrate

> *the substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s)* stated *it is not true.*

11. The record of proceedings is in English language but does not indicate in which languages interpretation took place. Parts of the proceedings indicate that the interpretation was English/Swahili. It is also not clear which language the Appellant was comfortable with.
12. During plea, none of the accused was represented by counsel and the record does not explain which language the 1st Appellant understood. The charge sheet indicates that the Appellants were Kikuyus.
13. Nonetheless both Appellants were represented by a Mr. Mutahi who cross examined the witnesses proffered by the prosecution.
14. Section 198 of the Criminal Procedure Code requires that when evidence is given in a language not understood by the accused it shall be interpreted to him in a language he understands. I would understand the same principle to apply at the stage of plea.
15. The issue is whether the 1st appellant's right was infringed and whether such an infringement led to a miscarriage of justice.
16. The Court of Appeal in *Joseph Kamau v R* (2013) eKLR examined and analysed the question of failure to indicate the language used in plea taking process and earlier decisions and referred to its decision in *Mugo and 2 Others v R* (2008) eKLR that

> *it was not every case where language was not shown which would make an appellant to successfully raise the issue of language before the court. Each case had to be considered in the light of its peculiar facts and circumstances.*

17. Considering that the 1st Appellant did not raise the language issue before the trial court, the subsequent indication that there was interpretation from English/Swahili and representation by legal counsel mean that the Appellant suffered no miscarriage of justice or prejudice. The 1st Appellant understood the nature of the charges against him and this ground must fail.

Identification/recognition

18. Both Appellants challenged their identification. The complainant, PW 1 Simon Karanja testified that,

> I was able to identify the people who attacked me. I identified them with the help of a security light from the Kenya Railway they were people I knew. After reporting I went to hospital. After treatment I went back to police station and I was told to go home. I went and met with the robbers again. The first time I saw them, they had pangas and knife. The 2nd accused had a panga. The person who was not arrested had the knife and 1st accused had a stick…… I was able to identify you. I know you before the incidence so I recognized you. After the attack I reported. When I reported I told the police I had recognized the people who attacked me.

19. The 1st Appellant challenges his identification on the ground that PW 1 did not give any names or descriptions of the persons who attacked him to the police when he made a report. The robbery, it was testified took place at about 4.00 am and the Appellants were arrested about two hours later at about 7.00 am.
20. The arrests were triggered when PW 1 met the 2nd Appellant on his way from hospital after making a report to the police.
21. Identification of the Appellants was through recognition. According to PW 3, PC Patrick Kibere (arresting officer) when the complainant made a report to the police station he stated that he had been attacked by people he could identify. After the report was made, PW 3 testified that the complainant returned to the station and reported he had seen the robbers. PW 1 led the police to where the 2nd Appellant was drinking. It is the 2nd accused who led the police to where the 1st accused was found and arrested.
22. The crucial evidence on identification was that of PW 1, PW 2 PC Leonard Gikoi (Investigating Officer) and PW 3. Regarding the circumstances surrounding the identification PW 1 stated that the robbery took place at around 4.00 am for about 10 minutes around a railway crossing and that there was light from security lights. PW 2 confirmed that he visited the scene of the robbery and that there were security lights.
23. The evidence on the security light or its adequacy to enable identification was not challenged during trial.
24. On the issue of identification through recognition, PW 1 testified that he was robbed by people he was able to identify and indeed he made a report to the police while on the way from hospital that he had seen the robbers.
25. It was his further evidence that he knew the Appellants before the robbery though he did not know their names. PW 3 who took the initial report from PW 1 confirmed that he stated that he could identify the people who robbed him.
26. After the arrest of the 2nd Appellant he is the one who led the police to the 1st Appellant. The circumstances and what led the 2nd Appellant to lead the police to the 1st appellant are not clear from the record.
27. The law on identification has been discussed in several authorities. In *Anthony Muchai Kubuika v R* (2013) eKLR the Court of Appeal made reference to its decision in *Waithaka Chege v R (1979) EA 271 that*

> *One* ***always needs to approach the issue of visual identification with great care and caution…*** *and the guiding principles laid in* ***Simiyu and another versus Republic (2005) 1KLR 192 that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given"***

28. *In the instant case, no clear descriptions were given to the police about the attackers except that the complainant could identify the attackers. This is corroborated by the testimony of PW 3. The 2nd Appellant is the one who led the police to arrest the 1st Appellant.*
29. *After re-evaluating and analyzing the evidence regarding identification and considering the circumstances prevailing in the case at hand, we are satisfied that the trial Court reached a correct finding on the evidence that the complainant was able to identify his attackers and there was no miscarriage of justice. This ground of appeal must also fail.*

Extraneous/inadmissible evidence

30. The Appellants did not clearly state what extraneous or inadmissible evidence was considered or admitted. But in the written submissions reference was made to the fact that the P3 medical form was produced by a person incompetent to produce the same. The medical report was produced by PW 4 a Clinical Officer. It was submitted this was contrary to section 48 of the Criminal Procedure Code. We believe this was meant to be section 48 of the Evidence Act.

31. PW 4 is a Clinical Officer at Thika sub district hospital, a government institution. He is the one who examined and treated the complainant. His evidence was not challenged. This ground of appeal cannot stand.

Defective charge sheet

32. 1st Appellant submitted that the charge was defective. He made reference to testimony of PW 1 that the attack took place on 6 September 2009 at 4.00 am and testimony of PW 2 that the robbery took place at 5.00 am.
33. To our mind, the discrepancy as to the exact time that the attack took place is not of such materiality as to affect the trial in the circumstances of this case.
34. The discrepancy is one of just about one hour and in any case robberies are not timed by the victims such that they are expected to give a precise time as to when a robbery took place. This ground must also fail.

Unconstitutionality of death sentence

35. The constitutionality of the death sentence has been the subject of a very recent unanimous decision of the Court of Appeal in *Joseph Njuguna Mwaura & 2 others v R*, Nairobi Criminal Appeal No. 5 of 2008. The decision stated that the earlier decision in *Mutiso v R* (2010) eKLR was per incuriam and that the offences of murder,treason,administering oaths to commit a capital offence, robbery with violence and attempted robbery with violence carry a mandatory death sentence

Conclusion and Orders

36. In our view, after re-evaluating and analyzing the evidence tendered in the lower court and the respective parties' submissions it is our considered view that the conviction and sentence should be upheld.
37. The upshot of the foregoing is that we order the consolidated appeals be dismissed and conviction and sentence are confirmed.

Delivered, dated and signed in Muranga in open Court on this 28th day of November 2013.

Mbogholi Msagha

Judge

Radido Stephen

Judge

Appearances

Appellants in person

Mr. Solomon Naulikha, State Counsel for Republic