REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 112 OF 2010

MICHEAL KERUE WANJIRU..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF MRS KASERA SRM IN CRIMINAL CASE NO. 1768 OF 2009 DELIVERED ON 15TH FEBRUARY 2010 IN THE CHIEF MAGISTRATE'S COURT AT KIBERA)

JUDGMENT

The Appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 5th day of February 2009 at Ngando village in Karen within Nairobi Area Province, jointly with two others not before the court and while armed with offensive weapons namely knives and a Somali sword, he robbed Stephen Kogi Mwangi of a mobile telephone make TV200, cash of Ksh 25,000/=, an Equity Bank ATM card, a Climax Coach card and a green jacket all valued as Kshs 36,600/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Stephen Kogi Mwangi.

The Appellant was arraigned in the trial court on 24th April 2009 and he pleaded not guilty to the charge against him. He was tried, convicted of the offence of robbery with violence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. He relied on written and oral submissions made to the court. His main grounds of appeal were firstly that there was non-compliance with section 207 of the Criminal Procedure Code and Article 50(2) (b) of the Constitution, as the record of the proceedings shows that the elements and particulars of the charge were not read to him with sufficient detail as required by law, and that he was thereby prejudiced.

The second ground of appeal was that there was no evidence of his positive identification, and he submitted in this respect that the court relied on the evidence of a single identifying witness, the source and intensity of light at the place the assailants were identified was not established, that it took 4 months for the Appellant to be arrested even after PW1 had recognised him as a nephew of his landlord, and lastly that no identification parade was conducted

The Appellants last ground of appeal was that he was convicted of the offence on the basis of insufficient and contradictory evidence, and he submitted in this respect that a crucial witness who gave PWI his identity card and told PW1 that it is the Appellant who stole from him was not called to testify, and that PWI gave contradictory evidence when he later stated that he found his identity card at the place where the robbery took place. Further, that no P3 form was produced as evidence to prove violence and that his defence was dismissed for no cogent reason.

Mr Karuri for the State opposed the appeal and submitted that the Appellant was known to the complainant who had lived for seven years on the Appellant's uncle's plot. Further, that on the night of the robbery the complainant had just passed the Appellant and that there was light where the Appellant was standing, and that as the complainant was opening the door to his house the Appellant put a sword on his neck and robbed him of the items specified in the charge sheet. Mr. Karuri stated that the complainant clearly stated in the Occurrence Book that he knew one of the attackers namely the Appellant, and that the complainant called the Appellant the next day and informed him of his participation in the robbery, upon which the Appellant threatened the complainant with death.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called three witnesses. PW1 was Stephen Kogi Mwangi the complainant, who testified that he lives in Ngando and that on 5/2/2009 at about 9.30 pm he was coming from work and on his way to his house when he met the Appellant with other men. He stated that he knew the Appellant because PW1 lived in the Appellant's uncle's plot. He further stated that he had known the Appellant since 2002, and that there was light where they were standing. He testified that as he was opening his door, the Appellant put a sword on his neck and flashed a torch on his face while the other men held him from behind. They then proceeded to rob him of his phone a TV 200, Kshs 25,500, his Equity ATM card and his national Identity card.

PW1 further testified that he got the Appellant's phone number and called him, and told him that he knew that it was the Appellant who had stolen from him. PW1 stated that the Appellant threatened him that if he made a report to the police he would kill him. PWI later saw the Appellant after two months in a club and informed the police who arrested him. He stated that his identity card was recovered the next day in a dustbin and that the other stolen items were not recovered.

PW2 was PC Vincent Talaam Cherop of Karen Police Station who testified that on 22/4/2009 at 9.30pm he with another officer were on patrol at Ngando village, when PW1 informed him that the Appellant who had stolen from him on 5/2/2009 was in a club. PW2 testified that they went to the club and arrested the Appellant.

PW3 was Corporal Richard Matoke of Karen Police Station who was the investigating officer, and he testified that the complainant made a report at the police station on 5/2/2009 that he had been robbed of the items described in the charge sheet, and stated that he knew one of the people who stole from him by appearance and described him as being black. PW3 testified that PW1 later identified the Appellant who was arrested. Further, that at the time of arrest the Appellant did not have the complainant's property nor was any weapon found on him. PW3 produced the receipt of the phone make TV 200 as an exhibit.

After the close of the prosecution case, the trial magistrate found that a *prima facie* case had been established against the Appellant and he was placed on his defence. The Appellant gave unsworn evidence and did not call any witnesses. He stated that he did not commit the offence he was charged with. He testified that he worked as a waiter at a hotel in Ngando, and that on 5/2/2009 he went to work until 11.00 pm and then went to a bar near the hotel. He stated that on 22/2/2009 he was in a bar and off duty when he was taken to the police station and charged with the offence.

We have considered the arguments made by the Appellant and the State. We will first deal with the issue of whether the provisions of section 207 of the Criminal Procedure Code and Article 50(2)(b) of the Constitution were complied with.

We find that Article 50 (2) (b) of the Constitution is not applicable to this appeal as the Constitution of 2010 had not been promulgated when the plea was taken by the Appellant on 24/2/2009. Section 207 of the Criminal Procedure Code which is applicable provides for the procedure to be followed in the taking of pleas as follows:

> **"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement**

his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads -

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence,

the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

We are guided by the decision by the Court of Appeal on the manner in which a plea should be recorded in **Adan v. Republic [1973] E.A. 445**, wherein it was stated that it is a requirement that the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands, and the accused's own words should then be recorded.

In the present appeal, the taking of the plea in the trial court before Mr Maundu SRM on 24/4/2009 is recorded as follows in the proceedings:

"Interpretation: English/Kiswahili:

Accused: Not true

Court: Plea of not guilty entered"

It is evident from the proceedings the language that was used, and what the Appellant response was to the charge against him. A plea of not guilty was also taken and recorded. What is required to be recorded under section 207 of the Criminal Procedure Code is the plea entered, and we therefore find that this requirement was complied with by the trial magistrate. In any event the Appellant thereafter participated in the trial and cross-examined all witnesses called by the prosecution to give evidence, and cannot therefore claim to have been prejudiced.

On the issue of the positive identification of the Appellant, we are guided by the Court of Appeal decision in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger, because it depends upon some personal knowledge of the assailant in some form or other. PW1 stated that he knew the Appellant from before, and that he had known him since 2002, and that he even called him after the robbery. He also stated when reporting the robbery that he knew the Appellant. There was thus no need for a description of the Appellant or identification parade as this was a case of recognition, and we accordingly find that the Appellant was positively identified.

Lastly, on the issue as to whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, we are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. We are in this respect also guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

We have already found that the Appellant was identified at the scene of the robbery and as having participated in the robbery attack by PW1, who also testified that he was in the company of other persons during the robbery. PWI further testified that the Appellant had a sword which he put against PW1's neck. It is thus our finding that from the evidence adduced in the trial court the ingredients of the offence of robbery with violence were proved with respect to the Appellant, and there was sufficient evidence to convict him of the offence. It was not necessary in this respect that the complainant be injured during the robbery, and the offence of robbery with violence will be committed so long as violence in any form is used. The act of putting the sword to PW1's neck was in our opinion use of violence.

We accordingly uphold the conviction of the Appellant for the charge of robbery with violence contrary to section 296(2) of the Penal Code, and the sentences for these convictions are found to be legal.

Orders accordingly.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE