REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 35 OF 2007

ISAAC KARANJA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 99 of 2006 of the Chief Magistrate's Court at Kibera by H.Wasilwa – Principal Magistrate)

JUDGMENT

The appellant, **ISAAC KARANJA MWANGI**, was convicted for the offence of robbery with violence contrary **to section 296 (2) of the Penal Code**. Thereafter, he was sentenced to suffer death as by law prescribed.

The learned advocate for the appellant, Mr. Ongwae, submitted that there was a fatal omission in the record of the proceedings before the trial court; the said omission was the failure to indicate the language in which the plea was taken.

First and foremost, we note that that issue was never cited in the "Memorandum of Appeal" lodged by the appellant.

By dint of the provisions of **section 350 (2) of the Criminal Procedure Code,** an appellant shall not be permitted to rely on any ground of appeal other than those set forth in the petition of appeal.

Secondly, the appellant did not amend the original grounds of appeal. Therefore, it was not open to the appellant to canvass an issue that was not properly placed before the court.

In any event, a perusal of the original hand-written record of the proceedings reveals that the plea was taken in the Kiswahili language, and that there was interpretation into English.

The second issue raised by the appellant was that the particulars of the offence, as spelt out in the charge sheet, were at

variance with the evidence tendered by the prosecution.

In particular, the appellant pointed out that whereas the charge sheet indicated that the robbers were armed with pistols, the complainant **(PW 1)** testified that he did not see any pistols.

Therefore, the appellant submitted that it was wrong to have convicted him for the offence of robbery with violence. In his view, the most serious offence that he could possibly have been convicted for was simple robbery.

The third issue canvassed by the appellant was that the prosecution had failed to call essential witnesses. Those witnesses were said to include the two women who had allegedly witnessed the complainant being robbed, and the many other members of the public who witnessed the arrest of the appellant.

Other persons deemed to be essential witnesses were the occupants of the vehicle which took the complainant to the police.

Following the failure of the said essential witnesses' to give evidence, the appellant submitted that there only remained circumstantial evidence.

The fourth issue raised by the appellant was that the prosecution failed to provide the trial court with an un-broken chain of events leading from the commission of the offence, to the arrest of the appellant.

He therefore submitted that there was a high probability that he was victim of mistaken identity. He said that the police arrested the wrong person, from amongst a large crowd of people.

The fifth issue was in relation to Identification. In that respect, the appellant submitted that his alleged identification was not safe as the complainant did not describe him to the police.

Meanwhile, with regard to the Identification Parade, the appellant pointed out that it was not free from error, as the complainant, who had not known him prior to the robbery incident, was called upon to identify him some 2 weeks after the incident.

Finally, the appellant urged this court to find that the police cannot have shot, as they said in their evidence, because the arrest of the appellant was within a crowded market place. We understand that submission to constitute an invitation to this court to find that the evidence of the police officers was not truthful.

In determining the appeal, we will give due consideration to the submissions made by both the appellant and the respondent. We will also re-evaluate all the evidence on record, and draw therefrom our own conclusions.

PW 1, PETER KURIA IRUNGU, was the complainant. He operated a taxi in Nairobi. The vehicle he operates belongs to Times Car Company, and it is a Toyota Saloon, Registration Number KAR 935U.

On 14th December 2005, at 3.00p.m. he was approached by a customer who wanted to go to Senate Estate, Uthiru.

The customer told **PW 1** that he was going to pick up something from that estate.

PW 1 negotiated the hire charges with the customer after he was given directions to the intended destination.

When PW 1 reached Uthiru, the customer told him to turn onto Muhuro road. At that point, there was a sign post indicating that Senate Estate was 2 ½ kilometers from Waiyaki Way. **PW 1** drove along Muhuro Road towards a stream.

Besides the stream, **PW 1** saw two women talking, whilst seated. He drove on, past the stream. He then noted 2 men seated beside the road. At that juncture, the customer instructed **PW 1** to stop and carry the 2 men, but **PW 1** refused.

The customer struggled with **PW 1**, whilst telling **PW 1** that if he did not stop the car, the customer would kill him. **PW 1** opened the door of the car, and the customer threw him out.

When he landed on the ground, **PW 1** noted that the 2 men who had been seated by the road-side, were running towards him, whilst ordering him to stop. **PW 1** jumped across the stream.

The 2 men then abandoned their pursuit, and got into **PW 1's** car.

When the vehicle drove-off, **PW 1** approached the 2 women, and they helped him with a phone, which he used to call.

The 2 women also stopped a pick-up vehicle and persuaded the occupants to give to **PW 1**, a lift to Kabete Police Station.

After **PW 1** reported the incident, he went to Walaso Medical Centre, Githurai, where he was treated.

Later that night, at about 8.30p.m., **PW 1** received a call from the police, who told him that the vehicle had been recovered.

On 5th January 2006, **PW 1** identified the appellant at an Identification Parade, held at the Kabete Police Station. **PW 1** identified him as the person who had hired his taxi on 14th December 2005.

PW 1 explained that he was able to identify the appellant because the two of them had negotiated the hire-charges, and thereafter, they were together in the car, for about 40 minutes. During the said 40 minutes, the appellant sat in the front passenger seat, next to **PW 1**.

PW 2, PC LIVINGSTONE LEHANA's role in this case was the taking of photographs of the vehicle KAR 935U. Those photos were produced in evidence.

PW 3, SAMSON GICHURU NDERITU, was the employee of Tack-it (K) Ltd, who was in-charge of tracking.

On 14th December 2005, at 5.15p.m, he received information that a vehicle KAR 935 had been stolen. The said vehicle had been fitted with a tracking device.

PW 3 and two police officers were directed by the control room of Track-it (K) Ltd, towards Naivasha. They tracked down the vehicle to Mai Mahiu.

And when they were about 100 metres away from the said vehicle, **PW 3** immobilized it, using a portable device.

As soon as the vehicle was immobilized, two of its occupants came out. They then opened the bonnet. Meanwhile, the 2 police officers who were with **PW 3**, started approaching the vehicle.

One of the 2 occupants of that vehicle returned to the driver's seat, whilst the other one sought and obtained the help of members of the public, to push the vehicle.

When the police reached near the vehicle, the original 2 occupants ran-off. However, as the appellant had been in the driver's seat, he did not manage to escape. He was arrested about 10-20 metres from the car.

The person who arrested the appellant was **PW 4, PC CHARLES MAINA.**

PW 4 testified that he did fire into the air before he arrested the appellant. He also said that although there were many people at the scene of arrest, he did not confuse the appellant with the "real culprits".

PW 5, IP RONALD SIMIYU, conducted the Identification Parade on 5th January 2006. He said that the eight (8) members of the parade were of similar appearance and size as the appellant.

According to **PW 5**, the appellant was picked-out by **PW 1**, without much hesitation. Thereafter, the appellant signed the parade form.

PW 6, CPL. PETER INDECHE, was the Investigating Officer. His investigations verified the information provided by **PW 1, PW 2, PW 3, PW 4** and **PW 5.**

PW 6 also said that **PW 1** had told him that he saw a pistol with those who robbed him. However, the person who was armed is the one who escaped arrest, at Mai Mahiu.

When the appellant was put on his defence, he confirmed that on 14th December 2005, he was at Mai Mahiu. He was there to sell shoes at the market.

He says that he was arrested because he was new to that area.

He also said that **PW 1** only picked him out in the Identification Parade because he and **PW 1** had been together in the OCS's office immediately prior to the parade.

Having re-evaluated the evidence, we are satisfied that the complainant first encountered the appellant in circumstances which were calm. The appellant wanted to hire **PW 1's** taxi. The two negotiated the hire-charges. And when they had agreed, the appellant got onto the front passenger seat, next to **PW 1**. **PW 1** then drove from Wabera Street upto Uthiru, when the appellant gave him further directions, leading to Senate Estate.

It is only when **PW 1** refused to pick-up the 2 men beside the road, that a struggle ensured. To our minds, the length of time that **PW 1** was with the appellant, after they had negotiated the hire-charges, was long enough for **PW 1** to have positively identified the appellant.

Meanwhile, by the time **PW 1** drove past the 2 women seated next to the stream, the appellant had not yet commenced the robbery. Therefore, we do not accept the appellant's contention, that the said 2 women witnessed the robbery.

Indeed, **PW 1** testified that after he was thrown out of the car, he went towards where the 2 women were, and he asked them to

assist him with a phone, because he had been robbed. In other words, it was **PW 1** who told the two women that he had been robbed.

Thereafter, the 2 women explained to the 3 people in a pick-up vehicle, what had happened to **PW 1**. They did so, whilst asking the said 3 people to help take **PW 1** to the police station.

To our minds, the said 3 people could not be described as eye-witnesses to the incident. They arrived after the complainant was robbed.

Meanwhile, as regards the many people who were at Mai Mahiu when the appellant was arrested, it is clear, from the evidence of **PW 4**, that they all ran-off when **PW 4** fired into the air. That would explain why none of them testified at the trial.

Meanwhile, because both **PW 3** and **PW 4** started observing the stolen vehicle from about 100 metres away, when they first spotted it, after being guided by the tracking device; and because the 2 occupants came out of the vehicle after **PW 3** immobilised it, that means that both **PW 3** and **PW 4** had ample opportunity of identifying and distinguishing the occupants of the vehicle, from the other members of the public.

PW 3 and **PW 4** saw the two occupants get out of the car, and open the bonnet. They also saw the appellant get back into the driver's seat, whilst his colleague was assisted by members of the public, to push the vehicle.

And when **PW 4** and his fellow police officer were close to the vehicle, the appellant jumped out and started running away.

Although there were many people running away, the appellant had already been sufficiently marked, so that there was absolutely no room for the arrest of the wrong person.

Three weeks later**, PW 1** picked out the appellant from the Identification parade. And the appellant did not ask either **PW 1** or the officer who mounted the parade any questions which could suggest any lack of propriety in the manner in which the parade was conducted. To our minds, it is nothing more than an afterthought, for the appellant to assert, in his defence, that the identifying witness had seen him just before the parade.

Although the police did not follow the appellant from the scene of crime right up to the time of his arrest, that does not imply, as the appellant has suggested, that the police arrested the wrong person.

There is no requirement in law that an accused can only be deemed to have been properly identified if there was an un-broken chain of events from the time he committed an offence upto the time of his arrest.

Of course, where a suspect is pursued and arrested, without the person arresting him having lost sight of him, the case for the prosecution is very much more clearer. But there are many cases where a suspect may even go into hiding for some period of time, after the incident. That would not imply that if he is later arrested, he can escape conviction simply because the arrest happened after sometime. Provided that there is some appropriate nexus between him and the offence, the suspect can still be convicted.

In this case, the nexus is in the positive identification by **PW 1**, at the Identification Parade.

Finally, although **PW 1** did not see any pistol at the time he was being robbed, the fact is that he was pushed-off a moving vehicle, resulting in him suffering injuries. As the learned trial magistrate held, that fact alone, even in the absence of a pistol, is sufficient proof of the offence of robbery with violence contrary to **section 296 (2) of the Penal Code.**

In the result, we find no merit in the appeal. It is dismissed; and we uphold both the conviction and sentence.

Dated, Signed and Delivered at Nairobi this 2nd day of June, 2011

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FRED A. OCHIENG	**MOHAMED WARSAME**
JUDGE	**JUDGE**