REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 287 OF 2009

(From original conviction and sentence in criminal Case No. 4464 of 2006 of the Principal Magistrate's Court

at Nyahururu - M. T. Kariuki {Ag. SRM})

GEORGE NJOGU NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged on five counts of the offence of robbery with violence and was on the evidence found guilty on count I and III and was sentenced to the mandatory death sentence on those two counts.

He has appealed to this court against both his conviction and sentence on six grounds namely -

1. THAT, the learned trial magistrate erred in law and fact when he relied on the evidence of identification yet failed to find that there wasn't any reliable identification at the locus in quo.

2. THAT, the learned trial magistrate erred in law and fact when he applied the doctrine of recent possession of stolen property yet failed to find that he same wasn't conclusive.

3. THAT, the learned trial magistrate erred in law and fact when he relied on the evidence surrounding my mode of arrest yet failed to find that there wasn't any sound claim of the same.

4. THAT, the learned trial magistrate erred in law when he conducted an unfair trial in violation of Section 77(2) (b&f) of the Constitution and Section 198 CPC.

5. THAT, the learned trial magistrate erred in law and fact when he rejected my plausible defence contrary to Section 169(1) of the CPC.

Grounds 4 and 5 of the Petition of Appeal raise procedural issues concerning language of the proceedings, and the contents of judgment and we shall deal with these issues first.

Section 77(2) (b) & (f) of the repealed Constitution and Section 198 of the Criminal Procedure Code (Cap. 75, Laws of Kenya) are complementary. Section 77(2)(b) and (f) of the said Constitution required that every person charged with a criminal offence shall be informed as reasonably practicable in a language which he understands and in detail, the nature of the offence with which he is charged, and with an interpreter without payment during his trial. Section 198 of the Criminal Procedure Code provides that the language of the subordinate court is English or Kiswahili and that of the High Court is English.

We observe that the language in which the Appellant pleaded is not indicated in the record. The record is however clear that the substance of the charges and every element thereof was explained to the Appellant in the language he understood, and when asked to plead, he pleaded not guilty. Pleas of not guilty were entered in respect of all the five counts.

It is also obvious from the record that the Appellant understood well the language in which the proceedings were being conducted. For instance on 4th June 2008 the Appellant protested strongly as against the delay by the prosecution in commencing hearing of the case. The Appellant said:-

"This case has been here since 2006 - it has never taken off. I come from Nakuru. I am here because of sickness. Since it is hearing date - I am ready to proceed."

That was one incidence. Other incidences occur throughout the subsequent proceedings when he cross-examined all the prosecution witnesses.

Obviously if he id not understand the language of the court, or the proceedings were not interpreted to him in a language he understood, he would have protested that he did not understand the language of the court. The learned trial magistrate was careful to note - *"Clerk - Wanyoike."*

It is the duty of the court clerk to interpret the proceedings to the accused where the accused does not understand either language of the court. The Appellant's contention that he did understand the proceedings is a lame excuse when he cross-examined the prosecution witnesses and at the end of the prosecution's case, gave an unsworn statement and pleaded for leniency. That is not the image of an appellant who did not understand the language of the court. We reject this contention by the Appellant.

The other procedural issue raised by the Appellant was that the judgment by the trial magistrate did not comply with the requirements of Section 169(1) as to the contents of a judgment.

We are satisfied that the learned trial magistrates judgment is not only excellent, but it also contains the essential elements in a judgment, the points for determination, the decision thereon and the reasons for the decision. It was dated, and signed by the learned trial magistrate at the time of pronouncing it.

This ground too fails as lacking any basis at all.

Adverting to the other substantive evidential issues of identification and adequacy of evidence upon which the conviction of the Appellant was founded we are of the considered view that there was overwhelming evidence upon which the trial court found the Appellant guilty and convicted and sentenced him to death.

In a very well argued judgment, the trial court evaluated the evidence of the prosecution and acquitted the Appellant on three counts but convicted him on only two out of the five counts with which the Appellant was charged.

We have ourselves carefully examined and re-evaluated that evidence and cannot fault the trial magistrate on the points for determination, or the reasons for his findings. We therefore have no reason for repeating his analysis in this judgment except to say, we agree with the learned magistrates on acquitting the Appellant on the three counts, and for finding him guilty on two counts.

We would only reiterate here the evidence on the question of identification. The Appellant was clearly

seen by PW1 with the aid of electricity lights in the room. The Appellant was not masked. The Police came when the Appellant and his accomplices attempted to flee and received gunshots across the mouth and leg. One of his friends died later in hospital from gun-shot wound. The appellant was found with mobile cell-phones which were positively identified by the complainant.

We also agree with the trial court's finding that the Appellant's unsworn statement that he was shot by thugs at a night club not worth of belief. It is a bull and cock story. It is incredible that he had gone to buy cattle for Dagoretti Slaughter house, his hired lorry had broken down, a mechanic was unable to repair it, and he still ended up in a night club. From the evidence of PWI and PWVIII, it is quite clear that the Appellant and his accomplices were on a terror enterprise on the night of 24th September 2006, robbing and looting not less than four different houses at Kinamba Trading Centre.

The Appellant had had his lucky 40 days. The evidence by the prosecution was clear. He was clearly identified by PW1 and PW VIII recovered cell phones from his pockets stolen from PWI and his wife. The Appellant could not explain possession of those items - clearly demonstrating a case of recent stolen property and presumption that the Appellant was the thief.

Clearly this appeal has no merit, and we dismiss it. We confirm the sentence of death on Count I, but put in abeyance the sentence of death on Count III, as a convict can only die once.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 5th day of November 2010

M. J. ANYARA EMUKULE

JUDGE

W. OUKO

JUDGE