**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 400 of 2006**

**YOHANA HAMISI KYADO …..………………………………APPELLANT**

**VERSUS**

**REPUBLIC……………………………...…………………RESPONDENT**

***(From the original conviction and sentence in Criminal Case No. 13009 of 2001 of***

***the Chief Magistrate's Court at Makadara by G. L. Nzioka – Principal Magistrate)***

**JUDGEMENT**

The appellant Yohana Hamisi Kyado was charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. He was also charged with the offence of being in possession of an imitation of a firearm contrary to section 34(1) of the Firearms Act Cap 114 Laws of Kenya. The facts in the first count are that on the 17th day of June 2001 at Komarock Estate within Nairobi area jointly with another not before court while armed with a pistol robbed one Paul Nzomo Mbaluka his motor vehicle Registration No. KAK 322K Toyota Corolla grey in colour, one mobile phone make Erickson, one shirt, one pair of shoes, one wedding ring and cash Kshs.32,000/= all valued at Kshs.732,000/= and immediately at or immediately after such acts used actual violence to the said Paul Nzomo Mbaluka. The facts in the second count are that on the 17th day of June, 2001 at Komarock Estate within Nairobi area jointly with another not before court while armed with a pistol robbed one Stephen M. Makau of one trouser, one shirt, a pair of shoes, cash Kshs.4,500/= all valued at 7,800/= and immediately before or immediately after such acts used actual violence to the said Stephen M. Makau. On the third count the facts are that on 17th day of June 2001 at Komarock Estate within Nairobi area was found in possession of an imitation of a firearm namely home made gun.

On 16th June 2001 PW1 Paul Nzomo Mbaluka was driving motor vehicle reg. KAK 322K to his home at Komarock. He stopped outside the studio of his friend one Stephen Mutua, PW2. As he was talking to his friend PW2, he saw two men pass by the studio who did not make any inquiry but left after a short while. After few minutes the strangers returned to the studio and asked for a cigarette from Stephen Mutua. PW2 Stephen Mutua who was talking to his friend informed the two persons that he does not sell cigarette but he directed them to a nearby shop or kiosk. They again returned to where PW1 and PW2 were talking and one of them drew a pistol and directed PW1 and PW2 to the rear of the car. The attackers took control of the motor vehicle and drove the two victims to Kayole, Komarock and eventually to a scene within Umoja area where the two complainants were ordered to give out all their belongings. PW1 gave out the items mentioned in the charge sheet. After a while PW1 and PW2 were taken to Embakasi and put in the boot of the car. They were again ordered out and after removing all

their clothes, one of the attackers went with the complainant in count two. PW2 was told to make his last prayers before he could be killed. He was told to lie down and after a while he realized the attackers had driven off leaving him in the bush. He crawled out from his hiding place and encountered wild animals who were grazing in the bush. Eventually he was taken to some police officers who gave him a T-shirt. He was later directed to Ruai police station where he learned that his motor vehicle had been recovered and some people arrested. PW1 says that he reported the matter to Kayole and Ruai Police stations and narrated how the incident took place. Later he was taken to an identification parade but he was unable to identify any of the suspects. It is the evidence of PW1 that he learnt that a Tanzanian driving licence was recovered from the seat of his motor vehicle.

PW2 Stephen Makau gave similar evidence to that of PW1 save that he was able to pick the appellant in an identification parade that was conducted by PW5 on 18th June 2001. He confirmed that he was robbed of items and money amounting to Kshs.4,800/=. He was equally abandoned naked and got assistance from a watchman who showed him the way to Nyayo police post. He later learnt the vehicle had been recovered. He also learnt that his cell phones and socks were recovered inside the same motor vehicle. It was also his testimony that he saw a driving licence recovered from the said motor vehicle and it had the photograph of the appellant. In an identification parade carried out by PW5 the witness identified the appellant as the one who attacked him and as the one whom he saw at the time he was standing in front of his studio with PW1. PW2's evidence is that he is the one who recovered the appellant's driving licence from PW1's car, that was allegedly found with the appellant.

PW3 PC Abel Mwarania who was attached to Muthaiga police station stated that on the material night he was on duty at Huruma with PC Dahir, PC Ndirangu, PC Musyoka and PC Njagi when they were called through the pocket phone to assist car track personnel who were chasing a motor vehicle along Thika road. He says he found the vehicle at a club along Thika road and it was motor vehicle reg. No.KAK 322K Toyota corolla grey in colour. He says he found two people inside one on the driver's seat and the other on passenger's seat. The two persons were hooting as if they were waiting for a third person. After a while the two tried to drive the motor vehicle away but they were ordered to surrender by the said officers. A search was conducted and a pistol was recovered from the person who was on the driver's seat. Again under the seat of the motor vehicle a wallet and a driving licence of Tanzania was recovered. The two suspects and the motor vehicle were then taken to Kasarani police station for investigation. According to PW3 the driving licence recovered had the photo and the name of the appellant herein.

PW4 PC George Okero attended to the stolen vehicle and confirmed that the colour, chassis number and the engine were in confirmation with the log book that was held by PW1.

PW5 on his part conducted identification parade where PW2 identified the appellant but PW1 could not identify the appellant.

At the close of the prosecution case, the appellant gave sworn testimony and stated that he left Tanzania on 16th June 2001 and arrived in Nairobi at about 10.30 p.m. the same day. He hired a taxi that took him to Leon's club in order to link up with a lady employee who was his friend. He says he was received by the lady and his luggage were placed in her office store. They drank together until 2.00 a.m. and as they were talking in the parking outside the bar one person came and alighted from a motor vehicle. He says the said person went into the bar. Again another person came and opened the boot of the car and then two people approached that person and started talking to him. The appellant says that the person on the driver's seat took off and he then realized that the two persons talking to the man were police officers. One of the officers shouted that he should be arrested. He was arrested but he could not explain his position at the time. He says he was searched and his personal items were recovered from him. It is the evidence of the appellant that nothing was recovered from him and that he was not connected to the vehicle that was allegedly found with incriminating evidence.

After considering the evidence on record the trial court held;

"The accused had denied all the three counts. However I find that first and foremost the arresting officers

have corroborated each others evidence that he was found driving the stolen motor vehicle. Secondly all the witnesses have confirmed his driving licence, bearing his photograph in a wallet was found in the stolen vehicle. And thirdly a toy pistol was found on his body…...I am satisfied that the prosecution has proved its case on the required standard of beyond reasonable doubt and I find accused's defence a mere denial tainted with untruth and not convincing".

The appellant is therefore aggrieved by the decision of the trial court and has come before us so that we can overturn the decision of the said court. His appeal was argued before us by Mr. Ondieki who relied on the supplementary grounds of appeal filed on 30th April 2008. The first ground that was argued before us is the issue of proceedings. Mr. Ondieki referred to us the proceedings of 27th June 2001 stating that the appellant being a foreigner did not understand the language of the court because the trial court did not indicate the language that was being used. Mr. Ondieki further submitted that the failure by the trial court to indicate the language of the court did vitiate the whole proceedings and therefore that alone should determine the appeal in favour of the appellant. We agree that it is incumbent upon every court to ensure that persons who appear before it ordinarily understand the language of communication. And that proceedings must be conducted in a language that the accused person ordinarily understands and/or is conversant with.

We have considered that point in order to satisfy ourselves whether the trial court committed any gross violation of the rights of the appellant and secondly whether the appellant was prejudiced in any manner by the failure of the trial court to indicate the language. The arguments of the appellant by Mr. Ondieki appear to involve the proposition that for a court to comply as to the requirement to the language, evidence must be found on record that the appellant was able to follow and communicate during proceedings. It is clear to us that the appellant was first taken to court on 27th June 2001. It is also clear to us that on that day the trial court read the charge and explained the same to the appellant who pleaded not guilty in all counts. However, it is clear why the trial court did not indicate the language that was used on that occasion. The point for determination is whether that failure did prejudice and/or occasion a miscarriage of justice to the case of the appellant. It is clear that the case of the appellant was conducted by several magistrates between 2001 and 2006. What is important to us is that on 11th November, 2004 when the trial court ordered that the case to start afresh in the presence of the appellant on that date the language is stated to be Kiswahili. The case first commenced started on 6th December 2004 when the charge was read and explained to the accused in Kiswahili and he denied all the counts. The evidence of PW1 and PW2 was taken and the appellant extensively cross examined the two witnesses in detail. Again the case was adjourned and on 24th March 2005 when the evidence of PW3 was taken. On that day the appellant also extensively cross-examined the said witness. Further on 21st April 2005 the evidence of PW4 was taken and the appellant put the necessary questions to that witness. It is also clear that on 23rd December 2005 the evidence of PW5 was taken and according to the record the appellant cross-examined that witness. After the close of the prosecution case, the appellant on 22nd February 2006 gave his defence by way of sworn testimony and according to the record it shows that he was extensively examined by the prosecution. In our consideration we think that the appellant was given adequate opportunity to cross examine all prosecution witnesses at great details and could not be said from the cross examination mounted that he did not understand the language of the court. It suffices to say that there must be evidence to show that the appellant was prejudiced or did not participate in the trial in a manner likely to suggest that he did not follow the proceedings before court. To the contrary there is ample evidence to show that the appellant was conversant with language that was used by the trial court and secondly that he was given adequate opportunity to cross examine all the prosecution witnesses.

It is also our finding that there was no prejudice that was occasioned to the appellant by the failure of the trial court to indicate the language of the court on few occasions. The said omissions is not fundamental to the case of the appellant. We think the trial court considered the circumstances in all material occasions and at no time did the trial court violate the rights of the appellant in any manner to warrant our intervention. It is therefore our decision that we have not found any useful meaning in Mr. Ondieki advocate submissions along those lines. We too reject the contention that the trial court committed a miscarriage of justice by failure to indicate the language, when no proceedings took place on the dates referred to us by Mr. Ondieki Advocate. We also reject the argument that the issue of language should

result in this appeal being allowed.

It was also the submission of Mr. Ondieki that the appellant had been tortured by the police. On our part there was no medical evidence that was placed before us to make us appreciate and determine on that issue. We think that in the absence of cogent and credible evidence that it would be difficult for us to determine that point. We reject the same as misplaced.

Mr. Ondieki advocate further contended that the charges against the appellant were defective because of the dates. It is clear in our mind that the offence took place on the nights of 16th and 17th June 2001. And we did not find any variance in the evidence tendered by the prosecution as to when the offence was committed. There is no doubt that robbery with violence was perpetrated against PW1 and PW2. In our consideration we did not find any contradiction in the evidence tendered by the prosecution witnesses and the charge sheet as framed by the police, hence that argument is too rejected.

Further Mr. Ondieki contended that the prosecution had not proved the case against the appellant to the required standards and that critical witnesses were not called to testify. He also contended there exists gaps in the evidence tendered by the prosecution. He also contended that the appellant was not properly identified by the prosecution witnesses. And that the defence of the appellant was not considered.

We find that there is no dispute that PW1 and PW2 were robbed of their personal effects on the nights of 16th and 17th June 2001. There is no doubt that the persons who robbed PW1 and PW2 were armed with dangerous weapons and in the process of carrying out their acts of robbery, gravely injured the two complainants. Indeed it is clear that PW1 and PW2 were stripped naked and even threatened to be killed by the robbers. Further the evidence on record shows that the two complainants suffered injuries that was occasioned by the robbers. And as was rightly pointed out by the trial court the provisions of section 296(2) of the Penal code clearly and expressly applies to the facts put before us. In Johana Ndungu vs Republic Criminal appeal No.116 of 1995 the Court of Appeal held;

"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is <u>use of</u> or <u>threat to use</u> actual violence against <u>any</u> person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in 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.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in

company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly".

A point for our consideration is whether the appellant is one of the attackers who robbed PW1 and PW2 on the material night and whether the appellant's arrest arises from mistaken identity. First and foremost this is not a case of identification by a single witness in ill-lit premises at night but the evidence clearly shows that the appellant was connected to the robbery by the evidence of PW1, PW2, PW3 and PW5. The evidence of PW2 is that he recognized the appellant as the one who approached him at the time he was standing in front of his studio talking to PW1. He also states that the appellant approached him twice on a well lit area and he even directed him to a shop where he could buy cigarettes. This fact is further enhanced on the amount of time the appellant spent with PW1 and PW2 after taking them on their car to various areas.

The evidence of PW5 is that he conducted an identification parade where PW2 was able to pick the appellant from the other persons he arranged for the parade. We think the evidence of PW5 is credible because he was forthright in his evidence by stating that PW1 was not able to identify the appellant. In our view the identification of the appellant by PW2 leaves no doubt in our mind that the appellant was one of the attackers who robbed PW1 and PW2. It is not the case of the appellant that the identification parade conducted by PW5 was in any manner prejudicial to his case. Under cross examination mounted by the appellant PW5 said and we quote;

"No one could see the place I conducted the parade from outside. One could not see you from office No.20. All members of the public were the same. I am the one who went to get the parade members. I did not show anyone your photo before the parade".

From our analysis, it is clear that PW5 correctly mounted an identification parade that was proper and in conjunction with the relevant rules. There is no evidence to show that PW5 did not follow the correct procedure in conducting the parade wherein the appellant was properly and sufficiently identified by PW2. We think PW5 followed the relevant laws and police standing orders to the letter in conducting the parade.

It is also our position that the method and mode used by PW5 is legitimate. This finding was further, properly and sufficiently reinforced by the recovery of the stolen motor vehicle with items belonging to the appellant's inside a few hours after the robbery. The appellant himself confirmed that he was arrested at the scene where the motor vehicle earlier stolen was recovered from. We do not see any reason that would make us to believe that the appellant was implicated in this case. In our view, the identification by PW2 should be admissible, especially as is supported by the recent possession by the appellant of property stolen during the robbery. The fact that the appellant was found in possession of the items stolen from the complainants in the same car that was robbed from PW1 some few hours earlier, would by itself be sufficient to found a conviction unless the appellant was able to give a plausible explanation for his possession. He did not do so. In the case of Isaac Nanga Kahiga alias Peter Nganga Kahiga v. Republic Criminal Appeal No.272 of 2005 (*unreported*) the Court of Appeal held;

"It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses".

In our view there is no doubt that the appellant was among the people who attacked PW1 and PW2 on the

fateful night.

The evidence of PW1 and PW2 shows that they were subjected to extreme cruelty, violence and inhuman treatment during their ordeal with the robbers. This court therefore does not have any basis to doubt the evidence of the prosecution with regard to the items found in possession of the appellant. He was found inside a motor vehicle stolen from PW1 together with some items robbed from PW2. Inside the said motor vehicle the appellant's driving licence was also found giving a strong indication that he was involved in the material robbery.

It is our position that the learned Principal Magistrate Mrs. Nzioka correctly analyzed all the evidence in detail and came to the firm conclusion that the appellant was one of the persons who was involved in the robbery against PW1 and PW2. The evidence before her was compelling, leaving the trial court in no doubt of the involvement of the appellant in the said robbery. As was correctly stated by the trial court, the evidence against the appellant was entirely direct and incriminating and that he was clearly and properly identified by PW2 after he was found in possession of items stolen from the complainants. The circumstances leading to his arrest was clearly and accurately narrated by PW3 who we think was a credible witness. The totality of the evidence on record entitles us to agree with the trial court, that it was the appellant together with two others not before court who committed the offence which is the subject of this appeal. It is therefore our decision that the charges against the appellant was proved beyond reasonable doubt. And this court is minded to agree and confirm the decision by the trial court. As stated earlier the appellant through his advocate Mr. Ondieki puts several grounds in an attempt to show the offences were not proved and that there was no evidence to support his conviction. In our mind and despite the spirited courage, energy and determination of Mr. Ondieki advocate to make a valid case for his client, we think with respect that there is no substance in his arguments. We do not consider the points raised by Mr. Ondieki to be of any substance to the case of the appellant.

Having considered the whole and the circumstances of this case very carefully, we have no doubt that the appellant was involved in the offences charged and we do not see any reason why all the prosecution witnesses would implicate him. We come to firm conclusion that he was directly and primarily involved in the commission of the offences charged. We refuse to allow his appeal, we dismiss the same as having no merit. Lastly we have noted that the appellant was sentenced to suffer death on count 1 and count 2. We think that was an error on the part of the trial court since a person cannot suffer death twice. We substitute with an order that the appellant shall suffer death in count 1 while the sentence in count 2 and 3 shall remain in abeyance. In regards to count 3 we also state that a person cannot serve a sentence of 5 years when he has a death penalty hanging over him. In short the appeal is dismissed, sentence confirmed as indicated hereinabove.

Dated, signed and delivered at Nairobi this 28th day of January 2009.

**J. B. OJWANG** **M. WARSAME**

**JUDGE** **JUDGE**