



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 319 of 2006

HENRY MAILU KARIUKIAPPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. Wasilwa dated 16th June, 2006 in Criminal Case No. 5279 of 2005 at Kibera Law Courts)

JUDGEMENT OF THE COURT

Henry Mailu Kariuki, the appellant herein, was charged with two counts, each with an alternative charge. In count 1 he was charged with robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya); and the particulars were that he, on 29th June, 2005 at Kenyatta National Hospital in Nairobi, robbed Prison Warden **David Ogeto Nyabera** of a G.3 rifle Serial No. 6741781 valued at Kshs.250,000/= the property of the Government of Kenya, and at or immediately before or immediately after the time of such robbery, used actual violence against the said **David Ogeto Nyabera**.

In the alternative, the appellant was charged with handling stolen property contrary to s. 322 (2) of the Penal code; the particulars being that on the said date and at the said place, he, otherwise than in the course of stealing, handled a G. 3 rifle Serial No. 6741781 having reason to believe it to be stolen or unlawfully obtained.

In the second count, the appellant was charged with robbery with violence contrary to s. 296 (2) of the Penal Code; the particulars being that on 29th June, 2005 at Kenyatta National Hospital, he robbed Prison Warden **David Ogeto Nyabera** of 20 rounds of 7.62mm live ammunition valued at Kshs.1,000/= the property of the Government of Kenya and, at or immediately before or immediately after the time of such robbery, used actual violence upon the said **David Ogeto Nyabera**.

In the alternative, the appellant was charged with handling stolen property, contrary to s. 322 (2) of the Penal Code; and the particulars were that he, on the material date and at the place aforementioned, otherwise than in the course of stealing, handled 20 rounds of 7.62mm calibre live ammunition, having reason to believe them to be stolen or unlawfully obtained.

It was the testimony of Pw1 (**David Ogeto Nyabera**) that he had, on the material date, been assigned the task of escorting a patient to hospital; and he escorted the patient, a condemned prisoner, one **Boniface Mungai**, to Kenyatta National Hospital on a stretcher. The time was 10.00 a.m. when PW1, accompanied a colleague **Cpl. Mutuma** and Prison Warder **Kepha Omboga** (PW2) took the patient into the Causality Ward at the Hospital. PW1 who was carrying G3 rifle No. 671781 with a magazine and 20 rounds of

7.62mm calibre ammunition had to take the patient to the x-Ray Department, and while there and was leaning on the wall, a man carrying polythene paper emerged from the ward, came and held PW1's gun. This unknown person hit PW1 on the face with his fist, injuring PW1; and he grabbed PW1's gun and positioned himself as if he would shoot PW1. A colleague, **Kibe** (PW3) responded to PW1's alarm, came and felled the stranger; and this gave PW1 a chance to retrieve his gun. The stranger, who is the appellant herein, was arrested and later charged.

Prison Warder **Kepha Omboga** (PW2) of Kamiti Maximum Security Prison had come with PW1 to Kenyatta National Hospital on the material day. PW2 had to check on other prisoner-patients, leaving PW1, who had a G3 rifle with a magazine, to guard a patient who had been brought on a stretcher. But PW2 soon heard a commotion behind; and he was informed that somebody was snatching PW1's gun. PW2 returned to find PW1 and **Kibe** (PW3) struggling with the appellant herein who had snatched PW1's gun. The three officers retrieved the gun, and handcuffed the appellant herein. The appellant had hit PW1 on the face, injuring PW1, before snatching PW1's gun. The appellant had at the material time a paper-bag containing a blue bed-sheet and a rope. The three officers after arresting the appellant herein, took him to Kilimani Police Station.

Michael Kibe (PW3) had gone into the cash office to pay x-Ray charges, leaving PW1 to guard the appellant herein, when he heard a commotion and heard it said somebody was snatching an officer's gun. When PW3 turned back, he saw the struggle between the appellant and PW1. PW3 went to rescue PW1 who was holding the appellant from behind, and the appellant had grabbed PW1's gun. PW3 hit the appellant on the leg and the appellant tumbled down; and with the additional help of PW2, the gun was retrieved from the appellant. The gun had a magazine with rounds of ammunition. PW3's colleagues took the appellant to the Police Station.

Caleb Isuben Odeyo (PW4), a patient-attendant at Kenyatta National Hospital, was on duty on the material date and was processing those taking the x-Ray services. Just as there was a power black-out affecting the x-Ray machine, and PW4 was assuring patients that normalcy would return, "one tall, hefty guy came asking me about the electricity"; "he then went to the left where there were prison warders with a patient on a stretcher"; "the warder had a gun"; "I saw the man slap the warder and snatch the gun and start running with it". Other warders came and helped to overpower the appellant herein, to arrest him, and to take him away to the Police station.

Hellen Kenere Engefi (PW5), a porter for wheeled patients was on duty at Kenyatta National Hospital on the material morning and in her testimony, she did witness what took place. She had taken a child to the X-Ray room, and she was going to take the result; "Then a man came [holding] a paper bag. He sat down appearing sick. Three prison warders came with a patient, and one had a gun ... [The man who had been appearing to be sick] moved with his paper bag towards the warder with a gun. He then slapped that officer and grabbed the gun." Other warders were alerted; they came along, and helped to overpower the attacker, who is the appellant herein.

Prisons Officer **James Koila** (PW7) of Kamiti Prison confirmed that on 29th June, 2005 he had issued a G3 rifle, Serial No. 6741781, with 20 rounds of ammunition calibre 7.62 mm to PW1, for the purpose of escorting a prisoner to hospital.

Cpl. William Sayanga (PW8) who was the Investigating Officer, began investigating the incident on the material date, and for that purpose he took into custody all the exhibits which were produced in Court. In addition to the gun, the magazine and the rounds of ammunition which were exhibited in Court, PW8 had also recovered an operation map from the appellant herein. This "map" was written in English, and showed that there was a robbery plan to be staged at a supermarket along Ngong Road in Nairobi, and it would last one-hour-and-a-half.

The appellant in sworn defence, said he had a dental problem and went to Kenyatta National Hospital on 26th June, 2005, for treatment. He said he did not find the doctor, so he sat with many other people watching television; but there was then an electric power black-out which annoyed many of the viewers; so he started making his way out, but "bumped into a prison warder"; and, he went on to say:

“The warder jumped on me asking where I was going. He held me and pulled me. He followed me abusing me. I decided to go on. He hit me with his gun ... As he hit me I held the gun. I fell down and other people also fell on me. I [stood] up after a few seconds. Other prison warders joined and came there alleging I was a thief. They were saying I wanted to steal a gun.”

The learned Magistrate considered all the foregoing evidence and found that PW2 and PW3 had given evidence which was similar and mutually corroborative, on the manner in which the appellant approached the complainant and snatched the complainant’s gun. The trial Court found that the testimonies of PW4 and PW5 further corroborated the evidence given by the complainant. The learned Magistrate noted in particular the probative force of the evidence of PW5, who “had seen how [the appellant] came in and sat, pretending to be sick, just to rise up and attack PW1, snatching the gun”.

The learned Magistrate came to the conclusion that the appellant’s defence could not stand, “against the prosecution evidence which I find overwhelming against the accused”. She found that the prosecution had established their case beyond reasonable doubt, and convicted him on both main counts, sentencing him to death as prescribed by law.

In his grounds of appeal, the appellant contended that there were “inconsistencies and doubts” in the prosecution evidence; that the allegations made by the prosecution had not been proved; that his defence had been unfairly rejected by the trial Court.

The appeal was canvassed by learned counsel **Mr. Chigiti**, who contended that there were omissions in the record, in certain cases, regarding the language used in Court; he said such was the case on pp. 1, 7, 8, 9, 17, and 19 of the proceedings; and he urged that such omissions stood in contradiction to s. 77 of the Constitution, and to s. 198 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). Counsel submitted that the defect in the proceedings, relating to language, rendered the trial a nullity, and so the appellant should be acquitted now.

Mr. Chigiti submitted that the charges brought against the appellant had not been proved, and that the trial as conducted was not fair to the appellant. Counsel contended that a identification parade should have been held to ascertain identity, since there had been many people in the corridors of Kenyatta National Hospital on the material morning.

Counsel called in aid of his client’s case the Court of Appeal decision in **David Waiganjo Wainaina v. Republic, Crim. Appeal No. 113 of 2005**, in which the following passage appears:

“On the whole, we are satisfied that the appellant was guilty as charged but we do not consider that the failure of the trial Magistrate to indicate the language used by various witnesses ... should be ignored”.

Counsel also cited the Court of Appeal decision in **Francis Koikai Katikenya v. Republic, Crim. Appeal No. 280 of 2006**, in which the following passage occurs:

“It is clear to us that the trial Magistrate was careless in the manner [in which] she handled the case. She did not indicate in what language or languages the proceedings were conducted. Nor did she indicate whether the appellant or witness understood the English language, which is the language of the Court. A careful reading of sections 197 and 198 [of the] Criminal Procedure Code, clearly shows that a failure to show demonstrably the language used in criminal proceedings will, in an appropriate case, vitiate the trial”.

Learned State Counsel **Ms. Gateru** contested the appeal, and submitted that proof of guilt had been conducted to the required standard. Counsel urged that there was cogent evidence on the record, linking the appellant to the robbery. Identification, counsel urged, was reliable, as the incident took place at 10.00 a.m., and PW1 was able to see the appellant clearly as he robbed PW1 of the gun and the ammunition; and the incident was witnessed by PW2, PW3 and PW4 who were close by the *locus in quo*; they saw the gun and ammunition being snatched, and PW1 being injured in the process.

On the point raised about language as recorded in the proceedings, learned counsel conceded that the typed proceedings bore certain omissions, even though she noted that the language used in Court was clearly recorded for PW1, PW2, PW3, PW4 and PW5. These witnesses had testified in Kiswahili; and Kiswahili was the appellant's language of choice, and indeed he gave his own testimony in Kiswahili; he cross-examined in Kiswahili; he understood the language: in the circumstances, learned counsel urged that the appellant was not at all prejudiced on account of the manner in which the trial Court had kept its record on language. **Ms. Gateru** urged that the authorities on language recording, which counsel for the appellant had relied on, were distinguishable in the instant case; in **David Waiganjo Wainaina** by contrast, a record on the language used during trial was missing altogether.

Mr. Chigiti had also contested the validity of the trial proceedings on account of an omission, in certain instances, to state the rank of the Police Officer appearing as the prosecutor; but **Ms. Gateru** stated on this question that the record showed clearly that during all days of hearing, only qualified prosecutors appeared in Court; and these were either **Inspector Waithaka**, or **Inspector Oyoo**.

Ms. Gateru urged that this case be considered on the merits; and the trial was not in any respect defective, quite apart from the fact that cogent evidence had been adduced in proof of guilt, on the part of the appellant.

We have carefully considered all the evidence, and come to the conclusion that *proof of guilt* on the part of the appellant, had been discharged beyond any reasonable doubt; there was absolutely no error in identification, as the time was in the mid-morning; and evidence that is several-times-corroborated, shows beyond any doubts that the appellant herein *was* The culprit.

We are only left with the question whether the quality of trial was undermined by any technical flaw, or by any appearance of unfairness, or prejudice to the appellant. We find that the record speaks for itself, to the effect that at no time was there a language-recording snag which occasioned prejudice to the appellant. Nor do we find any significant failing in the recording of prosecutor-rank in the *coram*, such as can be treated as constituting a defect in the trial.

It is our finding, after considering merits and procedure, that there is nothing to impugn the outcome of the case as conducted and determined by the learned Magistrate.

We dismiss the appeal; uphold the conviction; and affirm the sentences, save that the sentence in respect of the second count shall abide execution of the sentence on the 1st count.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 27th day of January, 2009.

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

JUDGE **JUDGE**

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Appellant: Mr. Chigiti

For the Respondent: Ms. Gateru