REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & DULU, JJ.)

CRIMINAL APPEAL NO. 223 OF 2005

BETWEEN

PHILIP MBONDO KIOKO.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Principal Magistrate Ms. Mwangi dated 3rd May, 2004 in Criminal Case No. 3444 of 2004 at the Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant herein, ***Philip Mbondo Kioko,*** was charged in counts 1 and 2 with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63). The two counts had an alternative charge: handling stolen property contrary to s.322(2) of the Penal Code. In count 3 the appellant was charged with the offence of causing grievous harm contrary to s.234 of the Penal Code; and in count 4 he was charged with the offence of causing actual bodily harm contrary to s.251 of the Penal Code.

It was PW1's (***Jessica Nduku Kioko***) testimony that, on 6th May, 2004 at 8.00 p.m., she was in her supermarket with four workers and two customers, when four men invaded the shop and one of them, brandishing a pistol, ordered those in the shop to lie down uttering the words: "*Mlale chini, ama kila mtu akule mbili mbili*!" (which translates as "Lie down, or two for each of you!" PW1 who was in the cash office, was ordered to open up the cash box, even as one of the robbers grabbed her handbag. The robbers rook PW1's mobile phone, ATM card, identity card, and money in coins. After she opened the cash box, the robbers grabbed Kshs.3000/=. One of the robbers decamped with PW1's handbag even as the others grabbed drinks, particularly *richots* and red wines, from the counter. The robbers then took off, thus allowing PW1 an opportunity to alert other shop-owners in the neighbourhood of the supermarket. In the meantime, the guards had caught a suspect outside, and they asked PW1 to look at the said suspect. This suspect, PW1 realised, was the one who had been brandishing a gun in her supermarket; and now, this same suspect was found still holding the red wine bearing the label of PW1's supermarket. The Police were called to the scene, and they recorded statements. PW1 at that time identified both the labelled wine from her supermarket, found with the suspect, and the gun which this particular suspect had had while in the supermarket. PW1 testified that she had believed the said gun, which turned out to have been a toy gun, to be real. PW1 testified that a guard who had gone to help those in the supermarket who had been tyrannised on that occasion, had had his hand fractured by the robbers. PW1 had not met these robbers before. She said she had been able to see the appellant herein clearly, when he ordered her to rise

from the floor where she lay, and to open the cash box.

PW2, ***Everlyn Fridah Mbithe***, was helping PW1 in the supermarket, especially with the packing of shop-goods, on 6th may, 2004 and was at the material moment speaking on her mobile phone when somebody who she first mistook for a customer came hissing at her: "*Wee, wee, leta hii kwanza*!" (which translates as: "Hey, you; hand over that item to me straightaway!" One of the robbers then ordered everyone to lie down; and an order was then issued to PW1 to stand up and open the till. The robbers grabbed cellphones and wines, and took off. A guard who was a native of Maasailand, came into the shop and, when told of the robbery, he alerted the other guards and they gave chase. PW2 who was following behind the guards heard one guard cry out in Kiswahili, "*Ndiyo hawa!"* (meaning, "Here they are!") PW2 ran back into the shop; and shortly thereafter, one of the guards came back into the shop, and reported that one of the robbers had been arrested. The guards soon brought back the appellant herein, and PW1 there-and-then identified him as the one among the four robbers who had been brandishing a gun. It was only some two minutes after PW2 returned into the shop, that the appellant had been nabbed by the guards. The guards had found the said gun on the appellant herein; they also found him with a bottle of wine in his hands. PW2 identified the pistol in question when it was shown to her in Court. One of the guards returned from the chase with an injury on his arm.

PW3, ***Jane Rose Kambua*** was a customer in the said supermarket and had just purchased candles and was leaving, when she saw four men marching into the shop – three of them with their heads covered. Two of the intruders moved towards the counter; one of them confronted PW3, and showed her a gun, saying in Kiswahili "*hatu-cheki*!" (which translates to "It's not a joke!"; PW3 and the others in the shop were ordered to sit down; and since they continued to look at the intruders, they were now ordered to lie down. It was at night, but the lights were on; and PW3 testified that she had seen all the four robbers. After PW3 and her colleagues lay down, one of the robbers came to her and demanded money and cellphones; but she didn't have. They grabbed PW3's cousin's cellphone and handbag. After some five minutes, when the robbers were now gone, PW3 stood up and left; but soon thereafter there was shouting around; and PW3 and her cousin returned to the supermarket. They found the appellant herein seated, surrounded by a crowd of people. PW3 saw the appellant herein being arrested. This appellant, PW3 testified, is the one who during the shop robbery had warned: "*Hatu-cheki na watu*!" , which in the context translates to: "We are not here to laugh with anyone!", it is this appellant who at the material time, was brandishing a gun; it was precisely this appellant who was keeping watch to ensure everyone in the shop had heeded the order to lie down; and this appellant, when caught and returned to the shop, had in his possession a bottle of wine. PW3 identified the gun and the bottle of wine, when these were shown to her in Court.

PW4, ***Samuel Ole Leisuye***, a guard at Funguo Estate, testified that on 6th May, 2004 at 8.30 p.m. he had gone to the complainant's supermarket and learned that thieves had just invaded the shop. He, with his fellow-guards, gave chase; and the appellant herein after being overwhelmed as he ran away, declaimed he was going to shoot PW4. At that moment another guard mentioned to PW4 that the threat was an empty one as the appellant herein was unarmed; which led to PW4 contriving to physically catch and arrest the appellant, and the appellant, at this moment, hit and fractured PW4's hand. The appellant also hit another guard; but the guards overpowered him and frogmarched him back to the supermarket. The guards recovered from the appellant herein a gun and a bottle of wine. The appellant's fellow-robbers managed to escape. This testimony was confirmed by another guard, PW5 (***Francis Ole Lekesi***) who was injured on the elbow as he participated in the arrest of the appellant herein.

PW6, ***Ruth Wangui Kibathi*** who runs a fast-foods outfit close to the complainant's supermarket, testified that she had earlier-on seen the appellant herein, just before the robbery, as the appellant and a companion of his took tea at her own premises. Indeed, the appellant had taken tea at PW6's premises on the previous day as well.

PW7, Force No. 63630 ***Police Constable Martin Wasike*** re-arrested the appellant herein following the robbery; he produced in Court the recovered bottle of wine and toy pistol, as exhibits. PW8, ***Dr. Zephania Kamau***, the Police surgeon, had examined the harm caused to PW4 during the chase of the robbers, and he classified the injury sustained by PW4 as grievous harm.

The appellant herein, in his sworn testimony, said that on 9th May, 2004 he had woken up and gone to take tea at a café adjoining a supermarket in the Madaraka Estate area. Thereafter he went to do his hawking work, and proceeded to sell clothes up to 6.00 p.m. The appellant then returned to the same café, took tea and had a meal, at about 7.00 p.m. on the same day. He then left to go to his house; and after walking for some 250 m he saw some five people in chase. He ducked, and took a side cover to enable those chasing to proceed with their pursuit; but as the group in chase approached him, they asked who he was, and hit him with clubs unconscious. Only at 1.00 a.m., the appellant testified, did he regain consciousness, only to find himself in a Police station. On cross-examination, the appellant said he had left the café at 8.30 p.m., and soon thereafter he was at the Police station. The appellant said he had been found with no bottle of wine, and he had had no weapon in his custody. He said he knew the lady who ran the café where he had taken tea, but he did not know if the said lady knew him.

The learned Magistrate considered such a state of the evidence, and found as follows:

> ***"Having gone… through the evidence on record…as adduced…by both the prosecution and the accused…I do take note that PW1, PW2 and PW3 were all victims of this robbery. They said clearly when the accused and his colleagues got inside the supermarket the lights were all on and they were all able to identify the accused as the one who had the gun. The Court was told that PW4 soon got into the supermarket and after learning what had taken place in the supermarket he raised alarm and they all followed the accused and his colleagues and they were able to arrest the accused who [had] in his possession a bottle of wine stolen from PW1's supermarket and still [bearing] the price label of the supermarket. The same was shown to the Court. The accused in the process hit and injured both PW4 and PW7. There is no doubt that the accused was properly identified upon arrest by all the three witnesses and also [by] PW5 who had seen him earlier having tea with another at her kiosk…earlier."***

The trial Court found the accused guilty of the offence of robbery with violence as charged, convicted him, and sentenced him to death as provided by law.

In his appeal the appellant contended that:

> (1) the trial Court had erred in law in finding that he had been properly identified as a suspect, at a time when visibility was poor;
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> (2) no evidence had been given on the reason for his arrest;
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> (3) due weight had not been attached to his defence;
>
> (4) The language used in Court during trial was uncertain.

The appellant who canvassed his own appeal, had filed written submissions; and he asked that learned State Counsel ***Mrs. Kagiri*** do proceed first, after which he would have the last say.

Learned counsel opposed the appeal, and urged the Court to uphold conviction and affirm sentence; she also asked that the Court should, besides, also enter convictions and sentences for the other counts of the charge, which the trial Magistrate had not addressed.

By s.*77(2) (b) and (f) of the Constitution*, the trial rights of an accused person are protected by requiring that the charge be communicated and tried in a language that the accused understands. That principle is then elaborated in s.198 of the *Criminal Procedure Code* (Cap.75). S.198(1) of the CPC stipulates:

> ***"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language which he understands."***

The language of the Subordinate Courts is stated (s.198(4) of the CPC) as English or Kiswahili.

Mrs. Kagiri noted that it is shown on the very first page of the record that this matter came up before the trial Magistrate on 12th May, 2004, and interpretation English/Kiswahili was done during plea-taking. Counsel submitted that even though the record had not always indicated expressly in what language a witness had testified, it ought to be understood that the trial Court had proceeded in the same manner in which it had begun – by interpreting into Kiswahili. On the occasion of plea-taking, and on the question of language, the trial Court had thus recorded:

> "The substance of the charges and every element thereof [has] been stated by the Court to the accused person, in the language that he understands…"

It is on that basis that the appellant had pleaded guilty to each one of the several counts of the charge.

Mrs. Kagiri submitted that, had there been a language issue, for there being any departure from the language situation recorded for the day of plea-taking, then at an early stage the appellant would have raised the matter; but now at this stage of appeal, it would be only an afterthought to raise such a complaint.

Learned counsel submitted that the prosecution had adduced sufficient evidence to show that the appellant and three others (not before the Court) were armed with a dangerous weapon, a pistol, as they robbed PW1 of her personal property; and that the appellant and his companions had threatened violence during the act of robbery. The victims of the robbery attack, PW1, PW2 and PW3 had given testimony on how they were robbed, at about 8.00 p.m. on the material date, in the supermarket. These three witnesses had seen the robbers, in well-lit conditions then prevailing, in the supermarket. Counsel urged that PW1's testimony that she had spent some time with the appellant as he pointed a gun at her, and so she clearly saw the appellant, had not been shaken in cross-examination; and that the Court should find PW1's testimony to have been clear, consistent and credible. She urged that PW1's testimony had been corroborated in every detail by PW2 and PW3; and that the evidence of both PW4 and PW5 holds the appellant squarely as a participant in the robbery which took place on the material date; PW4 and PW5 are the ones who had given chase after the robbers, and in their testimony, fleeing appellant came to a dead end in his run, and was promptly arrested. PW1 had testified that one of the robbers had taken off with a bottle; and it is that same wine- bottle that was used by the appellant to hit PW5 in the elbow; and it turned out to be a bottle from the supermarket; and hence count 4 on assault causing actual bodily harm was proved.

Learned counsel submitted that the trial Court had erred, by awarding sentence only for robbery under s.296(2) of the Penal Code; the other counts were also proved, and conviction should have been entered. PW4 had sustained a fracture, when hit by the appellant; and learned counsel urged that grievous harm was, in this respect, duly proved.

Counsel also urged that the arrest of the appellant while he had a recently stolen bottle of wine (indeed, within some two minutes of the theft, according to PW2) should lead to the application of the *doctrine of recent possession* to identify the appellant as the robber.

Counsel urged that the sworn testimony of the appellant had by no means shaken the proof adduced, that he was part of the gang of robbers who robbed the supermarket and caused injuries to various persons on the material date.

The appellant merely restated the story that is carried in his testimony before the trial Court.

The nature of the jurisdiction of this Court in this matter, as the first appellate Court, is well defined in recognised case law, and I will cite in this regard the decision of the Court of Appeal for Eastern Africa, in ***Dinkerrai Ramkrishan Pandya v. R [***1957] E.A. 336 which approved (at pp.337 – 338) the principle thus stated in the English case ***Coughlan v. Cumberland*** [1898] 1 Ch. 704:

> ***"Even where, as in this case, the appeal turns on a question of fact, the [appellate court] has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials***

before the [trial Court] with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgement is wrong…When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the [appellate court] always is, and must be, guided by the impression made on the [trial Court which] saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the [trial court], even on a question of fact turning on the credibility of witnesses whom the [appellate] court has not seen."

We have reviewed all the evidence recorded before the learned trial Magistrate, and have followed the manner in which she did her assessment of the same.

We find nothing improper in the manner in which the trial Court came to the conclusion that the appellant, certainly, had been in PW1's shop at the material time, brandishing what appeared to be a gun, ordering, threatening and terrifying those in the shop, and being in the company of his companions, staging a robbery of money, cellphones and shop-goods, and, when pursued and arrested while in flight, and only very shortly after the robbery, the appellant seriously assaulting and injuring his pursuers.

It is, in our view, not possible to doubt the truthfulness of the testimonies of PW1 (the owner of the supermarket), PW2 (PW1's assistant in the shop), PW3 (a customer in the shop at the time of robbery), PW4 (one of the guards who followed the appellant in hot-pursuit, and who was hit with an object and sustained grievous harm as a result), and PW5 (owner of a neighbouring kiosk) – all of who clearly saw the appellant, and did identify him in unimpaired conditions of visibility. We also believe the evidence tendered by prosecution witnesses, that the wine-bottle from PW1's supermarket, bearing the distinctive markings of that supermarket, was found in the possession of the appellant when he was arrested, only so shortly after the robbery. A toy-gun was the main instrument employed by the robbers to claim obedience over those in the supermarket, at the time of robbery. That very same toy-gun was found in the possession of the appellant when he was arrested just after the robbery, and credible evidence of identification for the said gun was tendered in Court. This gun, we believe, forms a vital chain linking the appellant to the staging of the robbery, just as does the bottle of wine which was found in his possession. The very short time-span (said to have been some two minutes only) between the robbery, the entry of PW4 into the supermarket, the hot-pursuit of the robbers, the arrest of the appellant, and his return to the precincts of the supermarket, we do hold, establishes an unshakable link between the appellant and the act of robbery on the material date; the clear and consistent testimonies of witnesses who perceived the appellant as he stole, terrorised, then decamped, speaks unanswerably to his participation in the robbery; the appellant's possession of articles identified to have been linked to the robbery, proves him to have been one of the robbers; the appellant's possession of a stolen item from the shop, only minutes after the robbery, is fit and proper evidence to lead to his conviction, by virtue of the doctrine of recent possession (***Fanwell v. R*** [1959] 1 R & N. 81).

Still more emphatically, all the several situations just described, when taken together, do provide ? we would hold ? a water-tight scheme of corroboration of the testimonies that show the appellant to have been one of the robbers on the material evening.

It follows, perforce, that we find the prosecution case to have been well-founded on the merits, and, indeed, such is the case firstly, in respect of count 2 of the charge (robbery with violence contrary to s.296(2) of the Penal Code); count 3 (causing grievous harm contrary to s.234 of the Penal Code); count 4 (assault causing actual bodily harm contrary to s.251 of the Penal Code.)

Given the *proximity in time* between the act of robbery and the moment of arrest of the appellant while he was in possession of a stolen bottle of wine from the supermarket, we would find that the charge of handling stolen property contrary to s.322(2) of the Penal Code was not well-based, in law. What was in progress at the time of arrest, on the part of the appellant, was the execution of the act of theft itself – part of the transaction of robbery – and it was as yet not the right time to charge him with the offence of

handling stolen properly.

Apart from the points of merit, the appellant had contended that there had been a trial-defect, regarding the mode of recording the language used in Court while he was being tried. We have already noted the details touching on the contention about language, in the course of this judgement.

We do not find any merit in the appellant's claim. Our clear understanding is that the language of the Court, throughout, was English/Kiswahili, as recorded on the occasion of plea-taking. On the occasion of hearing this appeal, on 24th May, 2007 the very first entry on our record is "Appellant: Kiswahili." He told this Court he was quite comfortable communicating in Kiswahili; we heard him throughout in that language; we are convinced that the use of Kiswahili in the trial Court and in this Court caused him no prejudice. Before the trial Court, the appellant had made no claim that languages other than English/Kiswahili was being used, or that he was suffering linguistic prejudice. We dismiss his complainant on the basis of language, and we hold that he had been properly tried, as contemplated in s.77(2)(b) and (f) of the Constitution.

The appellant's case fails, therefore, on the merits and on the technicality of procedure. On the merits, his defence made not one dent on the cohesive and overwhelming case laid before the Court by the prosecution. We, therefore, dismiss the appeal, and uphold the conviction. We however make specific orders as follows:

(1) We uphold the appellant's conviction on the second count, namely, robbery with violence contrary to s.296(2) of the Penal Code (Cap.63); and in this regard we affirm the sentence of death penalty meted out by the trial Court.

(2) We find the appellant guilty on the 3rd count, of causing grievous harm to PW4, *Samuel Ole Leisuye* on 6th May, 2004; and for this offence we sentence the appellant to imprisonment for a term of seven (7) years.

(3) We find the appellant guilty, on the 4th count, of causing actual bodily harm to PW5, *Francis Ole Lekesi* on 6th May, 2004; and for this offence we sentence the appellant to imprisonment for a term of three (3) years.

(4) On account of the death penalty which applies in respect of the second count of the charge, the two sentences in respect of the offence of causing grievous bodily harm, and causing actual bodily harm as specified in these orders, shall both be held in abeyance.

(5) We acquit the appellant in respect of the charge of handling stolen property contrary to s.322(2) of the Penal Code.

Orders accordingly.

DATED and DELIVERED at Nairobi this 31st day of July, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Mrs. Kagiri

Appellant in person