REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 241 of 2005

ABDUL MOCHE BILAL ……....……..……APPELLANT

-AND-

REPUBLIC ……RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Ms. Muchira dated 29th April, 2005 in Criminal Case No. 1211 of 2005 at the Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with the offence or robbery contrary to s. 296(2) of the Penal Code (Cap. 63). The particulars were that, on 13th February, 2005 at Kibera Lindi, in Nairobi, the appellant jointly with another not before the Court, while armed with dangerous or offensive weapons namely a Somali sword and a *panga*, robbed *Peter Okumu Winga* of one mobile phone of make Motorola T191 and money, Kshs.1,400/=, being a total value of Kshs.5,600/=, and at, immediately before, or immediately after the time of such robbery, threatened to use actual violence upon the said *Peter Okumu Winga*.

At the end of the trial, the learned Magistrate found the appellant guilty, and sentenced him to death as prescribed by law. He appealed, contending that the trial Court had misdirected itself on the applicable law for robbery with violence; that the prosecution case had not been proved beyond reasonable doubt; that the prosecution evidence on identification was contradictory; that the Court failed to administer cautions attendant on the state of the evidence of identification; that the Court failed to take into account the accused person's testimony which exposed to doubt the standard of identification achieved by the prosecution; that the trial Court entered conviction on the basis of hearsay evidence; that the trial Court did not properly evaluate the evidence tendered before it.

Learned counsel *Mr. Kahonge* submitted that the evidence of identification was not "water-tight", and therefore, could not properly lead to conviction. He urged that, where visual evidence of identification was given, it had to be treated with the greatest identification, unless it was positive identification. It was counsel's contention that the evidence adduced had not shown positive identification.

Counsel submitted that two of the prosecution witness, PW1 and PW2 had given contradictory evidence: PW1 had said that the appellant, at the material time, was brandishing a *panga*, while his accomplice was frisking PW1 and taking his cellphone; but PW2 stated, in cross-examination, that it's the appellant who took the said cellphone. Counsel, on that basis, submitted: "Those were the chief identifying witnesses, yet they have inconsistent accounts; so it is to be concluded that there was no opportunity for proper identification of the appellant herein".

Counsel also doubted that PW2 did indeed, as he had testified, know the appellant by name, since he gave the name *Abdul Qafaya* which the appellant didn't go by; so PW2 must, counsel urged, have been

mistaken.

Mr. Kahonge urged that the trial Magistrate had been unduly influenced by the testimony that the complainants had been in a group of people who chased the appellant and his accomplice, immediately after the robbery incident. Counsel urged that the evidence on record suggested otherwise, and that this was not the typical chase-and-arrest situation. Counsel urged that there had been a break in the chain; the chase led to a certain house, even as the appellant fled; there was no evidence he was arrested in that particular house; yet the owner of that house was not called to testify. So counsel urged the Court to apply a presumption, by virtue of s. 119 of the Evidence Act (Cap. 80).

"*The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case*".

And the presumption proposed was that "*whatever evidence the owner of the [said] house had, would only have been adverse to the prosecution; so they did not call her to testify"*. Counsel attached importance to the fact that the lady-owner of the said house is the one who showed the appellant's father's house, where the appellant was arrested; and hence even the appellant's father should have been called as a witness. Counsel also submitted that a member of the arresting crowd, which had given chase after the appellant, should have been called as a witness. Counsel considered the failure to call those several witnesses to constitute *"a huge gap in the prosecution case*"

It was the appellant's case that he had been arrested on the basis of mistaken identity. Counsel submitted that the arrest scenario was *broken* and *intermittent*, and that while the offence had taken place at 3.00 p.m., the arrest was only effected in a certain house at Mashimoni in Kibera, at 8.00 p.m. It was urged that no *first report*, with a *description of the appellant*, had been made by the complainants prior to the arrest. Counsel submitted that there was conflicting testimony on time when the incident had been reported to the Police, and he urged that the same be resolved in favour of the appellant herein.

Still on identification, counsel submitted that it was fatal to the prosecution case, that the Police did not conduct an *identification parade,* to enable the complainants to pick out the appellant from a host of other persons.

Counsel submitted that the arresting persons, since they had not been at the *locus* of the alleged offence, could only act on information which they received from others – and so it was a state of hearsay and, even at the time the arrest was effected, the complainants were not present to witness the same. Counsel attached significance to the fact that the items said to have been stolen were not recovered, at the time of arrest.

Mr. Kahonge also impugned the trial Court proceedings on a procedural matter: the *coram* had not been properly recorded on the day of judgment: "*We are not told who the prosecutor is, or what rank he held. Was the Court properly constituted*?" Although it is indicated on the record that judgment should have been delivered on 15th April, 2005, it is not stated what took place in Court, on that day. These omissions, *Mr. Kahonge* submitted, are fatal to the trial in the Court below.

Learned counsel referred this Court to the persuasive authority in *Henry Karuku Karauni v. Republic*, Criminal Appeal No. 582 of 2003 in which the Court (*Lesiit & Makhandia, JJ*.) held:

"*We agree with the learned State Counsel that without proof that the person who stood in as the prosecutor on 30th April, 2000 was qualified to do so, the proceedings were a nullity and should be set aside. As stated in [Bernard Lolimo Ekimat v. Republic, Cr. App. No. 151 of 2004] … where the rank of the prosecutor is not disclosed in the coram [listing] …, it cannot be assumed that he was qualified to conduct the case on behalf of the State. Consequently we hold that the proceedings were a nullity with the result that we set aside both the conviction and sentence"*

Learned counsel urged that the appeal be allowed and the judgment be quashed, sentence set aside, and

an acquittal entered.

Learned State Counsel *Ms. Gakobo* contested the appeal, and urged that there could be no mistake in the identification of the appellant, at the time (3.00 p.m.) when the incident took place. Not only was the time "very favourable for identification", but PW2 in his testimony showed that he had known the appellant earlier. PW2 had known the appellant by the name *Abdul Qapaya*; and the appellant himself had not contested this fact, in cross-examination. Both PW1 and PW2 had followed the appellant after the offence took place, and they noted that he had entered a certain house; the two then identified the appellant to the youth-wingers (PW3 and PW4) who, relying on that information, made the arrest. Counsel urged that PW3 one of the youth-wingers who made the arrest, went out to arrest a person he had known, for he had been to school with the appellant; PW3 knew that the appellant was called *Bilal*. So, learned counsel urged, PW3 had a basis upon which he could arrest the appellant; he had information from PW2 who had identified the appellant to him (PW3). The youth wingers arrested and brought back the appellant, with whom PW2 also now went both to the local District Officer's Office and the Kilimani Police Station. PW2 had seen the appellant following his arrest, brought back to the *locus in quo* before being taken to the District Officer's Office and to the Police Station. This set of circumstances, counsel urged, showed a clear nexus between the appellant and the offence.

Ms. Gakobo urged that the appellant had not been mistakenly identified as one of the robbers, and his identification had been safe and, indeed, water-tight.

On the possibility of there being a contradiction in the evidence of PW1 and PW2, counsel urged that the subject of such possible inconsistency was not crucial, and any difference should not be held to affect the case against the appellant. In the words of counsel:

"The offence was committed by the appellant acting with another. Nothing else is material …"

Learned State Counsel urged that nothing really turned on the fact that the lady-owner of the house to which the appellant ran following the robbery incident, had not been called as witness. This fact alone could not be construed to mean that there was evidence adverse to the prosecution case, as sufficient evidence had been given by PW3 and PW4, by whom the arrest was effected.

Ms. Gakobo submitted that the trial Court had considered the appellant's objections on the issue of identification, and had rejected the appellant's position on the issue.

On the contention that the trial must be declared a nullity because of the manner in which *coram* had been recorded, learned State Counsel urged that failure to state the same at the time of *delivering judgment* was not a fatal omission and indeed, was curable under s. 382 of the Criminal Procedure Code (Cap. 75) which provides:

"*…no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice …"*

Learned counsel urged that there had been no failure of justice in the instant case, and the judgment was valid, duly signed, and had caused no prejudice to the appellant.

Learned counsel submitted that the decision in *Henry Karuku Karauni v. Republic,* Crim. App. No. 582 of 2003 was distinguishable from the circumstances of the instant matter, in that the failure to record *coram* in that case had been on the occasion of *defence hearing*: and this only showed the importance of *coram* statement "*when the prosecution case was being moved";* such was not the case here, as the prosecution case was no longer being moved, and it was the Court itself now pronouncing its judgement. *Ms. Gakobo* urged that the appellant's contention regarding *coram* had no merit.

Mr. Kahonge's response was that Court proceedings only come to an end when judgment is pronounced: *"you cannot distinguish pre-judgment proceedings from other proceedings conducted during judgment; when judgment was given, the Court was not properly constituted; proceedings must be valid at all stages up to judgment."*

It appears to us that the most contested part of this appeal is that which relates to the trial Court's record of *coram* on the day of judgment. The substantive claim by learned counsel for the appellant, that the regularity of proceedings is required at all stages in the trial, is acknowledged, save that this Court has a discretion, by virtue of s. 381 and 382 to cure defects of procedure which may be considered minor, especially where they have not prejudiced a party and have occasioned no failure of justice.

While we are in agreement with the principle stated in *Henry Karuku Karauni v. Republic*, Crim. App. No. 582 of 2003 that failure to state *coram* in the proceedings is potential cover for unqualified officials participating in a criminal trial, and therefore *ex facie* would render a trial a nullity, we hold that this principle must be applied judiciously, in relation to the facts of a particular case. Learned State counsel has urged that the trial Court had all along been properly constituted, as the prosecution moved its case forward, since *coram* was in all the relevant instances properly recorded, save that on the final day of judgment, when the only business of the Court was to give a decision, the *coram* had not been shown. It is contended that no prejudice had been occasioned to the appellant, and there had been no failure of justice; and this Court is invited to cure the said defect, by virtue of powers conferred upon it by s. 382 of the Criminal Procedure Code (Cap. 75).

We find this to be a submission of merit; and accordingly, we declare the failure to record *coram* on the day of judgment to be cured.

The main thrust of the appellant's other contentions has focused on *identification*; it is urged that the appellant had not been properly identified as a suspect.

How did PW1 identify the appellant, at the material time? In the words of PW1:

"One person turned and pointed a Somali sword [at] my stomach. He is in Court … [today]. He told me to remove everything. I tried to resist. The other came with a *panga*. The other one removed my mobile, a Motorola T191 and Kshs.1,400/= … I shouted and people came. We followed. They entered a certain house in the slum. We got to the door. The accused came with a *panga* in his hands. Members of the public ran away. I also ran …"

And PW2 said

"On 13th February, 2005, at 3.00 p.m. I was with [PW1]. [PW1] was ahead, I was behind. Two people were ahead of us … One of them pointed a Somali sword at [PW1's] stomach. The other with a p*anga* told him to give out everything. He gave out his mobile phone and money; we followed; we screamed people came. The man with the sword brandished it, the accused herein. He entered a house. When he got to the door, we followed. The accused had a sword, he was brandishing it. We did not apprehend him at the time … We sought assistance. We went back to that house; and we met a lady who took us to the accused's father's house … I knew the accused before the incident".

In the appraisal of the evidence the learned Magistrate thus proceeded:

"Was the accused positively identified? The accused accosted the complainant …and after a while this gave the complainant the opportunity to identify him. He spoke to [the complainant]; this gave [the complainant] a further opportunity to see him. After [the complainant] was robbed, he and others followed the accused, and they never lost sight of him till he got in and came out of the house and chased them".

The learned Magistrate concluded that – "the accused was positively identified, ", "*in broad daylight*". She rejected the appellant's unsworn defence, held that the said defence "did not cast any doubt on the

prosecution case", found him guilty as charged, and convicted him under s. 296(2) of the Penal Code (Cap. 63).

We are convinced, and in agreement with the learned Magistrate, that the appellant had been positively identified as the culprit. Both PW1 and PW2 had clearly observed the appellant as he, in the company of another – the two being armed with dangerous or offensive weapons – executed their act of robbery. PW2 had known the appellant before the incident; both PW1 and PW2 did not lose sight of the appellant up to the time he got into a house, and then came out to chase his pursuers (who included PW1 and PW2) – an occasion which provided further opportunity to observe the identity of the appellant; such clear identification of the appellant, added to the fact that PW2 already knew him, led to accurate descriptions being given to PW3 and PW4 who, therefore, made no mistake in identifying and arresting the appellant herein. There is, in substance, an *unbroken chain in the identification process;* as PW2 already knew the appellant at the time of the robbery, he and PW1 were able to give the particulars of the suspect to PW3 and PW4, and this coincided with the fact that PW3 had been to primary school with the appellant, and so knew him well before the material date. Of that early acquaintance, PW3 thus responded during cross-examination:

"*I went with you to primary school. You used to be called Bilal."*

The circumstances in which the appellant was arrested, in our opinion, show what is a "*first report*", of a clear, descriptive nature, being made by PW2 in particular, to PW3 who, relying *inter alia* on his own knowledge and recognition of the appellant herein, teamed up with PW4 and others to effect the arrest.

We would consider the state of the evidence to bear an uninterrupted identification chain, running all the way from the material moment of the robbery, to the time of arrest of the appellant herein, thus providing an unmistakable nexus between the appellant and the offence charged. We believe the appellant was properly identified as the culprit, and the learned Magistrate rightly fixed him with the offence and convicted him. The evidence adduced before the Court provided proof beyond reasonable doubt; and we would not agree that additional witnesses, as proposed by learned counsel for the appellant, would have made any qualification to the weight of the prosecution case, or added anything thereto.

Accordingly, we dismiss the appellant's appeal; uphold the conviction; and affirm the sentence imposed by the trial Court.

Orders accordingly.

DATED and ***DELIVERED*** at Nairobi this 25th day of September, 2007

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ

Court Clerk: Tabitha Wanjiku & Eric

For the Appellant: Mr. Kahonge

For the Respondent: Ms. Gakobo