REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 1 of 2002

JASAN MAINA NGAU…….....……APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

(From original conviction and sentence in Criminal Case

No.2266/2001 of the Senior Principal Magistrate's Court at

Naivasha – M.M. MUYA, ESQ.(SPM)

JUDGMENT OF THE COURT

The appellant, **Jasan Maina Ngau** was charged before the Senior Principal Magistrate, Naivasha with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of the offence were that on the night of 10th and 11th day of November, 2001 at Kirima Trading Centre, Naivasha in Nakuru District of the Rift Valley Province, jointly with others not before court, being armed with dangerous weapons namely pangas and rungus robbed **Luka Githinji** of his six dozen dry cells, 300 packets of cigarettes, 15 packets of supermatch cigarettes, 10 packets of embassy, one dozen petroleum jerry, 5 packets of nice and lovely, Kshs.4,000/- all valued at Kshs.30,000/- and immediately before or immediately after the time of such robbery assaulted the said Luka Githinji.

The appellant pleaded not guilty to the charge and after a full trial the appellant was convicted and sentenced to the mandatory death sentence. The appellant being aggrieved by his conviction and sentence appealed and raised the following grounds of appeal, inter alia:-

Ø That the Learned Magistrate erred in law and fact in failing to consider the fact that there was doubt in the identification of the appellant.

Ø That the Learned Magistrate erred in law and fact by failing to consider the appellant's defence and failing to comply with the provisions of section 211 of the Penal Code.

Ø The appellant was convicted on circumstantial evidence that was inconsistent and uncorroborated.

Ø Finally, Counsel for the appellant contended that the proceedings were a nullity as the plea of the appellant was not taken and more importantly there is no indication on the proceedings of the 21/12/2001,

who was the prosecutor when the Judgment was read. Counsel further pointed out that in the light of the decision in the case of ***Benard Lorimo***

Ekimat, Criminal Appeal No.151 of 2004, it

Was his view that in the absence of a properly written out coram the court cannot be left to assume that there was a prosecutor as per the law prescribed.

The prosecution Evidence that led to the conviction and Sentence of the appellant can be summarized as follows:-

On the night of 10th and 11th day of November 2001, a gang of robbers decended on a trading centre called Kirima at Naivasha at about 1.00 am. They attempted to break into the shop of Peter Kimani (PW4) but he managed to scare them away by shooting them with bows and arrows. They proceeded to break into the shop of Luka Githinji, PW2 who together with his wife Rebecca Kathure (PW3) had in the meantime been woken up by the commotion outside. PW3 started screaming. However, the robbers were not deterred and forced PW2 to open the door. When the robbers entered the house, one of the men ordered PW2 to give him battery cells which he inserted into his torch and ordered him to give all the money and stuff it in a bag. At the time the torch was lying horizontally on a table. PW2 told the court that a man he knew as Maina (appellant) confronted him asking him why he was looking at them. PW2 testified that Maina cut him with a panga and he fell down. At the time PW2 said that he heard the robbers say that his wife had escaped and at that moment another robber who was on top of the roof dropped down carrying an axe and when he swung to cut PW2, he managed to duck and instead his finger was cut. Later PW2 was taken to hospital where he was treated.

The robbery was reported to the Naivasha Police station and the Police launched investigations and arrested the appellant two days later. The victims of the robbery, that is PW2, PW3 and PW4 from where the robbers had attempted to break in all said they identified the appellant with the aid of lights from the torches. PW2 was emphatic that the appellant was the man who cut him with a panga on the hand. He said he knew the appellant as a resident of Kirima village. PW3, the complainant's wife also identified the appellant with the light from the torches. It is important to capture these words from the evidence of PW3.:-

" I met the accused at the verandah. There were other men with torches. The accused ordered a colleague of his to leave me stripped naked. I was told to strip. I stripped naked as ordered. I was told to sit down. I decided that they wanted to rape me. I decided to ran for my dear life. I went and hid in a kitchen near our shop. I was being followed. The man who was following me got hold of me. He had a knife he threatened to cut me. I suddenly threw him down and escaped and hid in the bushes nearby. I could see the accused checking

Where I had hidden. He returned to our **shop. I could hear what they were saying.**The accused was asked where I was. He **said that I had escaped. Later they left."**

During cross-examination PW3 insisted that she identified the appellant and he was wearing a red jacket. This evidence of identification by recognition was further corroborated by the evidence of PW4, who said that after he foiled the robbery at his shop, he checked through the window and saw the appellant who was wearing a red jacket.

PW3 told the police that she had identified one of the attackers and they proceeded on the same night to the home of the appellant but they did not find him at his home. The appellant was arrested two days later when he was spotted at Naivasha town at a changaa drinking den. He was apprehended and taken to the Naivasha Police Station.

In his unsworn statement, the appellant denied having been connected with the alleged robbery.

On the part of the State, the Learned Senior State Counsel Mr. Koech opposed the appeal on grounds that,

firstly a plea of guilty must have been recorded. This can be checked from the proceedings because the appellant proceeded to face a full trial.

On identification the appellant was convicted on the evidence of recognition. This was not a single identifying witness but the three witnesses said they recognised the appellant. PW3 even led the police to the home of the appellant but he was not found at home on that material day.

Lastly State Counsel argued that the fact that there is no indication on the coram on 12.12.2005 when the Judgment was read the rank of the police officer, the proceedings of that day did not prejudice the appellant. The proceedings had been completed and what remained was the delivery of the judgment. He urged the court to dismiss the appeal.

We have carefully re-evaluated the entire evidence and reconsidered the Judgment as it is the duty of the first appellate court to arrive at its own independent Judgment. See (***Okeno Vs Republic [1972] (E.A.32).***

The issue of particular concern is whether the evidence on identification was riddled with contradictions and incapable of sustaining a conviction and sentence.

The conviction in this case turns only on the evidence of identification by PW2, PW3 and PW4 who said they were able to recognize the appellant by the light from the torches.

The Learned Senior Principal Magistrate properly warned himself of the danger of relying on evidence on identification of a robbery that took place at 1.00 a.m. in a rural area without electricity. However the Magistrate was satisfied the evidence by the three witnesses on identification based on recognition was sufficient.

We are satisfied that the Trial Magistrate properly directed himself and therefore nothing turns on this ground of appeal for reasons that this finding is based on the evidence on record that shows PW2, was engaged by the gang of robbers for some time when he was subjected to the ordeal of putting the money in the bag and giving them the batteries for the torch. This gave him ample opportunity to recognize the appellant who was known to him, prior to the robbery incident. In the case of PW3, she managed to escape after she was ordered to strip naked and said she saw the appellant and identified him as the man who checked for her and announced to the others that she had escaped. It is PW3 who led the police to the home of the appellant on the same night of the attack. This evidence was corroborated byPW4 who saw the appellant through his window.

We are satisfied that the Learned Senior Principal Magistrate

properly considered the evidence and came to the correct finding. There is no reason why we should upset this finding.

On the issue of the plea not having been taken, the proceedings show that on 22/11/2001:-

Coram

Before: N.M. Muya, SPM

Pros: IP Kihura

Court/Clerk: Kennedy

Inter: English/Kiswahili

Court

Charge read out to the accused who replies:-

Accused:

Hearing on 4/12/2001.

Although the answer by the appellant is not indicated what followed was a full trial which is a clear indication that the appellant pleaded "not guilty".

As was recently held by the Court of appeal in the case of **David Irungu Murage & Another Vs Republic, C.A. Criminal Appeal No.184 of 2004 (Nakuru)(**unreported) that an accused was not prejudiced when the trial proceeded on the assumption that the accused had pleaded "**not guilty"** to the charge. At page 7 of the said Judgment it was held that:-

"**The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under Section 382 of the Criminal Procedure Code."**

Although the appellant did not plead to the charge, he was given an

opportunity to participate in the trial by cross-examining the Prosecution witnesses. Further when he was put on his defence he capably defended himself. We find no merit in this ground of appeal.

That is not the end of the matter as regards coram as Counsel for the appellant submitted that on 21/12/2001, when the Judgment was read on the coram the rank of the prosecutor is not indicated.

On the day of the Judgment, the same was read and whoever prosecutor was present only said that the appellant may be treated as a first offender. The record will show that throughout the proceedings this case was prosecuted by Inspector of Police Kihara. This court cannot assume that the same prosecutor was present on the day of the Judgment. However, we ask ourselves whether the prosecutor, whatever his rank was, on 21/12/2001 when the Judgment was read, the prosecution case was concluded and Judgment read out whether what was said by the prosecutor, was prejudicial to the appellant? We in this regard refer to the decision of ***KALE AHMED KALE & ANOTHER VS. REPUBLIC*** Criminal Appeal No.577 of 2000, High Court Mombasa (unreported) where the court held that:-

"**To prosecute, a prosecutor must do things or act in a way against another in crime or claim. This means the prosecutor must put forth material in our adversarial system, which attacks the other case. We therefore are of the view, with great respect to the Learned State Counsel, that PC Karongo appearing on record merely to facilitate an adjournment under Section 205 Criminal Procedure Code did not constitute prose-cuting the case against the appellant or purporting to do so at all. This officer did not take plea, call witnesses, examine them etc. C.I. Kandi properly prosecuted that case."**

In the present case we share the same view as was expressed in this Judgment that on 21.12.2002, whoever the prosecutor was and his rank in office did not take plea, call witnesses, examine them, e.t.c.

In the sum total we are satisfied that the trial was conducted according to the law and we accordingly dismiss the appeal and confirm the conviction and sentence of the Senior Principal Magistrate.

It is so ordered.

Judgment Read and Signed on 23rd March, 2003.

MARTHA KOOME

JUDGE

23.3.2006

L. KIMARU

JUDGE

23.3.2006