REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 89 OF 2018

BENARD MWANGI WACERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 2216 of 2015 delivered by Hon. Jalango (SRM) on 18th May 2018).

JUDGMENT

1. The Appellant, **Benard Mwangi Wacera** was charged 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 14th day of July, 2015 at Dandora phase III estate in Njiru District within Nairobi County jointly with others not before court, while armed with dangerous weapons namely pistol and knife robbed **Michael Okumu Obondo** of cash in the sum of Kshs. 3,000/=and immediately after the time of such robbery threatened to use actual violence to the said **Michael Okumu Obondo.** The Appellant pleaded not guilty to the charge. Upon trial, he was convicted and sentenced to serve twenty years imprisonment. He was aggrieved by both the conviction and sentence against which he preferred the instant appeal.

2. In his Amended Petition of Appeal filed on 12th March, 2019 alongside his written submissions, the Appellant was dissatisfied that Section 214 of the Criminal Procedure Code was not complied with, that his right to a fair trial under Section 198 of the Criminal Procedure Code and Article 50 (2) (m) of the Constitution were contravened, that the credibility of his identification was wanting and that the prosecution failed to call crucial witnesses. He also took issue with the fact that the prosecution evidence was glaringly inconsistent, incoherent and tainted with discrepancies. Finally, he was dissatisfied that his alibi defence was not considered.

Determination

3. Before I delve into the summary of evidence, it is important that I first consider pertinent legal issues that the Appellant raised. I say so because if they are determined in his favour, the court will definitely rule that the trial was a mistrial. Key amongst them was the submission that the provisions of **Section 214 (1)** of the **Criminal Procedure Code** were contravened. He pointed out that he was not called to plead afresh to the charge which was amended on 10th July, 2017. He also stated that he was not accorded a chance to recall any of the witnesses who had testified prior to the alteration for further cross examination. He faulted the trial magistrate for failing to inform him about the mandatory provisions of the said Section. He submitted that the omission was fatal and invalidated the trial and his conviction should be quashed in view of the same.

4. Learned State Counsel, Ms. Atina conceded to the Appellant's submission under this limb. She added that the failure to call the Appellant to plead afresh amounted to a mistrial. She urged the Court to order a retrial arguing that there was sufficient evidence that the Appellant committed the offence in question. She went on to submit that the Appellant will not be prejudiced by a retrial since the period he has spent in custody so far shall be considered when he is being sentenced.

5. Section 214 (1) of the **Criminal Procedure Code** provides as follows:

"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and

give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

6. Under (1)(i) above, a mandatory provision is placed upon the trial court to ensure that after a charge sheet is amended, the accused takes plea afresh. The initial charge sheet contained a charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the penal code. On 10th July 2017, the prosecution applied for the same to be amended by deleting the phrase **"Section 295 as read with"**. The Appellant did not oppose and as such, the application was allowed and the amendment effected on the same day by crossing the said words with a pen. The Appellant was not called upon to plead to the amended charge. The prosecution went on to inform the court that he would rely on the evidence on record with regard to the amendment.

7. It is thus clear that the trial was vitiated by a failure to comply with mandatory legal provisions. It behooves the court then to order a retrial. Before so considering whether or not a retrial should be conducted, I shall also mention about other issues raised by the Appellant.

8. He contended that **Section 72 (3) (b)** and **Section 77** of **the old Constitution** which guarantees him a fair hearing within a reasonable time was violated **Section 72 (3) (b)** the **old Constitution** is akin to **Article 49 (1) (f)** of the **current Constitution.** Since the Appellant was charged under the dispensation of the current Constitution, the old Constitution would not apply. **Article 49(1)(f)** provides as follows:

(1)An arrested person has the right-

to be brought before a court as soon as is reasonably possible, but not later than-

(i) twenty-four hours after being atrreste; or

(ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next day

9. He also contended that **Section 77 (1)** of the **old Constitution** which is akin to **Article 50 (2) (e)** of the **current Constitution** which provides for an accused person's right to a fair hearing within a reasonable time and/or without unreasonable delay was also contravened.

10. A perusal of the charge sheet and the proceedings in the trial court reveal that the Appellant was arrested on 14th July, 2015 and presented in court two days later on 16th July, 2015 for plea taking. Further, the matter came up in court severally for hearing but was adjourned at the behest of the Appellant on health grounds before the first prosecution witnesses eventually tendered their testimonies on 15th February 2017. It is clear that there was only a delay of one day which in my view was not unreasonable. That is not to say though that if the Appellant so wishes, he at liberty to seek redress against the person or body he feels violated his right.

11. On the second limb, the Appellant contended that the learned trial magistrate contravened the provisions of **Section 198** of the **Criminal Procedure Code** as well as his right to a fair trial under **Article 50 (2) (m)** of **the Constitution** by failing to indicate the language used during trial in the typed proceedings. He pointed out that in the said proceedings, the only time when the language used is indicated as English interpreted to Kiswahili was during plea taking. He therefore submitted that his conviction cannot stand on the basis of such a serious defect.

12. Section 198 (1) of the **Criminal Procedure Code** provides as follows:

"(1) 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."

13. The said provision a has constitutional backing under Article 50 (2) (m) of the **Constitution** which provides that:

"(2) Every accused person has the right to a fair trial which includes the right-

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

14. The importance of using a language which an accused person understands during trial cannot be overstated. It ensures that an accused person is not only able to understand the charge he is facing as well as the evidence in support of the same but is also able to fully participate in the proceedings by cross examining witnesses and tendering his defence. It is therefore important that the trial record indicates the language used and whether there was an interpreter in case one was used.

15. The test therefore, in arriving at a conclusion that the failure to indicate the language of a court is fatal is whether the accused was able to fully participate in the trial. This test was applied by the High Court in the case of **Munyasia Mutisya v Republic (2015) eKLR where Dulu J. upon being confronted with a similar issue held thus :**

"The subsequent hearing date do not have any indication of the language used either by the court or by the witnesses. That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however note that the appellant participated fully in the trial by cross examining witnesses. He Cross Examined PW1. He Cross Examined PW2. He Cross Examined PW4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He

would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not alleged on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court."

16. In the instant case, the trial record does not indicate the language used in the proceedings except for the plea taking part. It is also not shown whether there was an interpreter during the proceedings. However, the Appellant actively participated in the proceedings as he was able to cross examine the prosecution's witnesses at length and tender his defence without any hitch. Further, at no point during the trial did he complain about his inability to understand the language being used. In the premises, it is obvious that he fully understood the language used. He was not prejudiced by the omission in any manner.

17. On the whole, a retrial is warranted for non-compliance with Section 214(1)(i) of the Criminal Procedure Code. Before ordering a retrial, the court must be satisfied, *inter alia*, that the retrial is likely to result in a conviction, that it will not aid the prosecution in filling up gaps in their case, that it will not prejudice an accused person and on the whole shall serve the interests of justice.

18. In the present case, three witnesses testified. This is a case in which the Appellant and two others confronted the complainant, PW1, in his shop while they were riding a bicycle. The Appellant was identified clearly by PW1 and PW2 who was an eye witness. He was arrested after a chase by police. Sight was not lost of links in his participation in the robbery before he was arrested. Conditions for a positive identification were conducive. My view is that a retrial would most likely result in a conviction.

19. On whether a retrial would prejudice the Appellant, the instant trial began in 2015 and judgment was delivered on 18th May, 2018. As at date, he has been in custody for about three and a half years. If found guilty, he would be liable to a death sentence. Taking into account that he was armed with a gun, and had PW1 hesitated to surrender, probably the robbers would have shot him, the interests of justice demand that a retrial be ordered.

20. Accordingly, I quash the conviction, set aside the death sentence and order that a retrial be conducted. The Appellant shall be escorted to Dandora Police Station not later than 10th April, 2019 so that he can take plea before the Chief Magistrate's Court in Makadara not later than 12th April, 2019. The trial court file shall forthwith be returned to the trial court for this purpose. It is so ordered.

Dated and Delivered at Nairobi This 4th April, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Appellant in Person

2. Momanyi for the Respondent