REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 266 of 2008

GEORGE KARANJA WANJA ..... 1ST APPELLANT

LINUS MACHARIA MWANGI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 16 of 2008 of the Chief Magistrate's court at Kibera by Mr. Maundu (Senior Resident Magistrate)

JUDGMENT

The appellants, **GEORGE KARANJA WANJA** and **LINUS MACHARIA MWANGI,** were convicted on 2 counts of robbery with Violence **contrary to Section 296 (2) of the Penal Code**. They are said to have robbed the 2 complainants, GABRIEL KIHIU HINGA **(PW 1)** and KENNEDY NGETHE KUNGU **(PW 2)** at the same time and place.

The incident took place on 30th December 2007, at Dagoretti Market, when **PW 1** and **PW 2** were walking home. They were cornered by about six (6) men, who assaulted them, and also robbed them of their mobile phones together with cash.

Whilst the robbery was still ongoing, police officers who were on patrol, using a civilian vehicle, arrived at the scene. **PW 3** and **PW 5** were police officers. They were on patrol duties, when they encountered the scene where the complainants were being robbed. **PW 3** and **PW 5** arrested the appellant.

After the appellants were tried, they were convicted by the learned trial magistrate. Thereafter, each of them was sentenced to suffer death as by law prescribed. The said sentences were in respect of count 1.

Meanwhile, the trial court ordered that the sentence on count 2 be held in abeyance.

In the appeal before the high Court, the appellants have raised issues which are substantially similar. The issues can be summarised as follows;

(a) ***The failure to indicate the language in which the plea was taken constituted a violation of the appellants' constitutional rights under Section 77***

(1) (2) of the Constitution of Kenya.

(b) The credibility of the prosecution witnesses was doubtful, and therefore their evidence ought not to have formed the basis of conviction.

(c) The charges were not adequately proved.

(d) The trial court shifted to the appellants, the burden of proving their defences, thus violating section 212 of the Criminal Procedure Code.

When canvassing the appeal, the appellants submitted that the trial court was obliged to record the language in which the plea was taken.

They also said that the trial court had an obligation to caution the accused person about the consequences of the charges he was facing.

As far as the appellants were concerned, the failure to record the language used during the plea, and the failure to caution him about the consequences of the charges preferred against him, were fatal.

On the issue of identification, the appellants submitted they were not positively identified. The reasons for that submission are, firstly, that the source of light was not disclosed.

Secondly, the evidence of the complainants is said to be wanting in harmony, thus giving rise to the conclusion that the complainants may have been mistaken in their alleged identification of the appellants.

The appellant pointed out that the time when the incident took place is not clear, as **PW 1**, **PW 2** and **PW 3** gave different timings.

Furthermore, the chain of events, as recounted by the prosecution witnesses, is said to be inconsistent.

The 1st appellant also pointed out that none of the items stolen from the complainants was recovered from him.

And, whilst the witnesses said that a panga was recovered from the 2nd appellant, he says that that was not proved. Had any such recovery been made, the 2nd appellant argues that the occurrence Book (O.B) should have been exhibited in court, together with the items. As that was not done, the 2nd appellant submitted that the prosecution failed to prove that any item was recovered from him.

In any event, the ownership of the mobile phone that was allegedly recovered from the 2nd appellant, was never established, so he argued.

The appellants also argued that there was inconsistency between the charge sheet and the evidence tendered by the complainants, regarding the number of assailants. The charge sheet is said to have indicated that the appellants were in company of an unspecified number of other persons, whilst **PW 1**and **PW 2** talked of six (6) other persons.

In those circumstances, the appellants contended that the Investigating Officer ought to have clarified the correct factual position.

Finally, the appellants submitted that their respective *alibi* were not displaced by the prosecution.

In answer to the appeal, Mr. Mulati, learned state counsel, submitted that the convictions were sound, as the case was proved beyond any reasonable doubt.

He also said that the trial court gave due consideration to the defences.

As regards the plea, the respondent pointed out that the original charge sheet was substituted, and that when the new charges were presented to court, the appellants took their plea in Kiswahili.

Being the first appellate court, we have re-evaluated all the evidence on record. We have drawn our

own conclusions from the evidence. We have also given due consideration to the submissions on both the law and the evidence.

On the issue of the language used when the plea was first taken on 7th January 2008, there is no doubt that the court failed to put it on record.

However, the original charge sheet was substituted on 27th February 2008, before any witness had testified for the prosecution. At that stage, the plea was taken in the Kiswahili language.

The taking of the plea on 27th February 2008, constituted the commencement of the trial, because it is then that the appellants were made aware of the charges facing them. Anything that had been substituted was no longer in place either at that stage or when the witnesses testified or even when the learned trial magistrate gave his verdict.

We therefore find and hold that the appellants' rights under **section 77 of the Constitution** were not violated

We further find that there is no constitutional requirement that the trial court should explain to an accused person the consequences of a conviction for the offence with which he was charged.

Of course, if an accused person chooses to plead guilty to an offence, and if the penalty for such an offence was a very severe penalty such as the Death sentence or life imprisonment, it is considered prudent for the court to draw the attention of the accused to the penalty.

Even then, the failure to draw the attention of the accused to the penalty would not, of itself, necessarily render the proceedings a nullity.

PW 1 testified that 31st December 2007, he watched news on television, at an hotel situated in Dagoretti. He left the hotel at about 10.25p.m, in the company of **PW 2**.

Whilst the 2 were walking home, they were attacked by six (6) men who were armed with pangas.

PW 1 testified that the 2nd appellant hit him with a panga. The said appellant is said to have stood guard over **PW 1**, whilst his accomplices ransacked the complainant's pockets.

Whilst the robbers were still robbing **PW 1**, a vehicle arrived, and police officers emerged from it.

The arrival of the police officers caused the robbers to flee. But, as the 2nd appellant attempted to run-off, **PW 1** entangled him with his leg, causing the said appellant to fall down. It is then that the 2nd appellant was arrested.

During cross-examination, **PW 1** said that the accomplices of the appellants run away with the “loot” which they took from the complainants.

PW 2 corroborated the evidence of **PW 1**, save that he said that the attack took place at 10.25p.m.

The 1st appellant was identified by **PW 2** as the person who pinned him down. **PW 2** said that the 1st appellant stepped on his back, whilst **PW 2** was lying down.

Luckily for the 2 complainants, police officers got to the scene when they were being robbed. The police officers included **PW 3** and **PW 5**. They were in a civilian vehicle.

PW 3 testified that the police stopped their vehicle when they noticed some 8 people fighting. The officers confronted them.

In particular, **PW 3** confronted the 2nd appellant, who was armed with a panga.

According to **PW 3**, the said appellant was entangled by **PW 1**, causing him to fall down. At that stage, **PW 3** arrested the 2nd appellant.

PW 3 also recovered the panga which the 2nd appellant had. That panga was produced as an exhibit before the trial court.

Meanwhile, **PW 5** arrested the 1st appellant. However, **PW 5** did not recover anything from the said appellant.

PW 4 is the medical doctor who examined **PW 1** at the Kinoo Medical Clinic, in Kikuyu. He noted that **PW 1** had a swollen and bruised back. He concluded that the injuries were caused by a blunt object.

Having re-evaluated the evidence tendered by the prosecution, we find that same is in harmony, contrary to the contentions by the appellants.

The only slight difference is about the actual hour when the incident took place. **PW 1** said it was at 10.25p.m; then during cross-examination, he said it was ***"around 10.15p.m. to 10.20p.m."***

PW 2 also talked about 10.25p.ml, as did **PW 3**. But **PW 5** said it was around 10.30p.m.

To our minds, the slight differences as to the exact time when the complainants were robbed, were of no consequence. At most, the time-span ranges over a period of 15 minutes. It cannot have occasioned any prejudice to the appellants.

PW 1 and **PW 2** knew each other. They were walking together, on their way home. It is then that they were confronted by six men.

The appellants were not bystanders, who could have been confused with those who robbed them complainants.

First, that is because the complainants described the exact roles that each of the appellants played. And, secondly, **PW 2** made it clear that at that time and place, there were not many other people.

The failure to recover the complainants' property from the appellants is attributed to the fact that the accomplices of the appellant ran way with the stolen property. It was easy enough for them to do so, because they are the ones who ransacked the pockets of the complainants, and also because mobile phones and cash are small items which could be easily carried away by those who fled the scene.

The appellants confirmed that they were at the scene where they were arrested. Therefore, their defences cannot be termed as alibis, because they did not purport to be at a place other than where the offences were committed.

They were at the scene, but alleged that they were innocent bystanders.

We have also held that they were not innocent bystanders. They actively participated in the robberies. The prosecution adduced sufficient and cogent evidence, that proved the guilt of the appellants beyond any reasonable doubt. The defences did not cast any doubt on the case put forth against the appellants.

Consequently, we find no merit in the appeal. The same is dismissed. We uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi, this 4th day of November, 2012.

…..... **….....**

FRED A. OCHIENG

JUDGE

LYDIA A. ACHODE

JUDGE