



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & MWILU, JJ.A)

CRIMINAL APPEAL NO. 342 & 348 OF 2009

BETWEEN

MARTIN MANANI MAKANGU)

HANNINGTON ONDIKO ONGONJI)APPELLANTS

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nairobi (Njagi & Warsame, JJ.) dated 2nd November, 2009

in

H.C.CR.A. Nos. 457, 458 & 459 OF 2006)

JUDGMENT OF THE COURT

The two appeals herein which we consolidate and determine together arose from the judgment of the High Court (*Njagi, J. and Warsame, J.*, as he then was) delivered on 2nd November, 2009. The learned Judges heard consolidated appeals of three people, the present 1st appellant, *Martin Makungu*, the 2nd appellant *Hannington Ondiko Ogonji* (and *Charles Abongo Odiyo* who is not an appellant here). The three and another, *Moses Otieno Ogutu* who was acquitted by the lower court, were charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code** at Kibera Chief Magistrate's Court. They also faced an alternative charge of handling stolen property contrary to **Section 322 (2) of the Penal Code**. After trial, the three appellants in the High Court were found guilty of the offence of robbery with violence, convicted and sentenced to suffer death. The appeal of *Charles Abongo Odiyo* was allowed by the High Court while appeals of the two appellants herein were dismissed. That led to the present appeal.

The robbery with violence charge in the lower court read that on 17th January, 2004 at Woodley Estate Nairobi, the accused persons jointly with others not before court while armed with a dangerous weapon, namely a pistol, violently robbed *Humphrey Maina Wanjohi* of motor vehicle registration number KAR 886 F a Toyota Corolla, Silver in colour, two shirts, one coat, a mobile phone (Erickson), all worth

Shs.721,000/=. That during the incident the robbers used actual violence to the said **Humphrey Maina Wanjohi**.

After hearing eight prosecution witnesses and the defences offered, the learned trial magistrate found the three appellants before the High Court guilty of the offence and duly sentenced them. As noted above, one appellant went free at the High Court and the two before us being aggrieved with the decision of that Court have come before us on a further appeal.

The condensed evidence before the trial court was that the complainant **Humphrey Maina Wanjohi** (PW3) operated a taxi service using the subject motor vehicle at a place called Green Corner Hotel in Nairobi. On the material night the first appellant (**Martin**) approached PW1 to render taxi services to pick up some relatives from a certain bus stop on the way to Woodley Estate. After agreeing on the fare payable, PW3 drove with the 1st appellant to the point where they picked up the 2nd appellant (**Hannington**) and another. They proceeded to Woodley but as PW1 stopped to have his passengers disembark, the 2nd appellant pointed a pistol at him and there he was robbed. The thugs drove off with PW3 whom they later drugged and threw out of the car. When he came to, PW3 proceeded to Kilimani Police Station and reported the incident. Two days later on 19th January, 2004 PW3 learnt that his taxi had been traced at Migori, South Nyanza at the garage of **David Malayo Yoge** (PW4) where three people had taken the subject motor vehicle for repairs after being involved in an accident and that the three suspects told PW4 that the accident had taken place at Naivasha. PW4 told his customers to go and bring an abstract from the police on that account. But on their return later in the day, PW4 had informed the police whom he signaled to move over. Apparently the suspects sensed danger, and **Charles Odiyo** fled while the two appellants herein were arrested by **P.C Jacob Obiso** (PW7) as they too, made to get away, they were arrested there. Information filtered in that the motor vehicle they had taken to PW4 for repairs had been stolen through a robbery at Nairobi. Further investigations led to the arrest of the other co-accused. All were then arraigned in court.

Investigations included identification parades conducted at Migori by Ag. **I.P Alfred Ouko** (PW5) in respect of the 1st appellant and **I.P Morris Okal** (PW2) regarding the 2nd appellant.

In her judgment the learned trial magistrate found the accused persons guilty of the main charge of robbery with violence on the grounds that:

“PW3 who was the victim of the robbery said (that) the person who hired him and who negotiated with (sic) the charges at a sport (sic) where there was enough light is the 1st accused. In fact although he did eventually identify the 1st and 2nd accused at the identification parades in cross-examination he as much showed doubt of how well he could identify the 2nd accused. This is helped away by the evidence of PW4 who said (saw?) the 3 during the day as they took the motor vehicle robbed of the complainant to his garage for repairs. He was able to identify in court 1st, 2nd, 3rd and 4th accused persons. The 1st, 2nd, 3rd and 4th accused persons all denied ever robbing PW3 (of) the motor vehicle.”

The learned trial magistrate added:

“However I do not doubt the evidence of PW4 who did witness the 1st and 2nd accused persons arrested before him while the 3rd accused was able to escape. It was the 3rd accused person who was driving the motor vehicle when it was taken to his garage.”

Accordingly the trial court found the 3 accused persons guilty of the offence of robbery with violence which took place on 17th January, 2004. A day after they drove the subject motor vehicle into the garage of PW4 on 18th January, 2004 for repairs. The 3rd accused person **Charles Odiyo** was found to have been an accessory to the offence by the trial court and in any case his appeal was allowed by the High Court. The appellants including the 3rd accused, whose appeal was allowed, argued before the High Court, the grounds that the prosecution evidence was insufficient and the case against them was not proved beyond a

reasonable doubt. It was added in the grounds that there was doubt about their respective identifications and that the identification parades were not properly conducted.

The learned Judges addressed the grounds of appeal in the light of all the evidence on record which they re-evaluated. Focus was put on the evidence of PW3 when he negotiated the payable charges with the 1st appellant at a well-lit spot at Green Corner Hotel. The appellants were then arrested when they took the subject motor vehicle to PW4 at Migori, the following day for repairs. And there the police arrested them as they tried to run away. The learned Judges turned to the evidence regarding how the identification parades were conducted. They found no truth in the appellants' submissions that circumstances favouring positive identification were absent. The Judges added that the identification parades were free from any possibility of error or mistake and concluded that:

“The evidence tendered by PW1, PW3, PW4, PW5 and PW7 is overwhelming and incriminating against the 1st and 2nd appellants.”

With that the appeals of those two appellants were dismissed, the decision that provoked the present appeal.

Being the second appeal, we are enjoined by the provisions of **Section 361(1) of the Criminal Procedure Code** and the many past decisions of this Court that in such appeals we only concern ourselves with points of law while accepting the concurrent findings of fact by the two courts below unless it appears that those findings were not supported by evidence (see the case of **Njoroge vs. Republic [1982] KLR 388**).

The appellants were represented by learned counsel **Ms. B. Rashid** and **Ms. J. Ekin** respectively while **Mr. M. Omirera**, Senior Assistant Director of Public Prosecutions (SADPP), appeared for the State.

The submissions of both **Ms. Rashid and Ms. Ekin** were similar on grounds of identification and non-production of the subject motor vehicle as an exhibit. **Ms Rashid** added one or more points regarding the 1st appellant. We should at this juncture remark that the non-production of the subject motor vehicle occurred in the trial *de novo* which was undertaken. It had been produced in an earlier trial together with its photographs.

Ms. Rashid told us that identification of the 1st appellant at Green Corner Hotel was doubtful since PW3 did not describe the sufficiency of the light at the spot where the two discussed the taxi fare to Woodley; and that at the Woodley gate a gun was pointed at the witness and so he was too frightened to observe/identify his attackers; that at Migori garage, PW4 was talking on telephone when the subject motor vehicle was taken for repairs and so his identification of the appellant could not be said to be free of error; and PW7 did not say how far he caught the 1st appellant from PW4's garage to support the claim that he was indeed running away and not hurrying to a shop as he stated in his defence.

Moving to the non-production of the subject motor vehicle as an exhibit, we heard that only a letter was availed stating that that motor vehicle could not be produced. That letter also spoke of photographs taken and produced at the initial trial. Counsel faulted that mode of conducting a trial which she urged us to declare a nullity since the exhibit, the motor vehicle itself, was never produced.

Further, counsel submitted that without the language used at the trial being noted on the record, the 1st appellant was prejudiced in his trial. That constituted a violation of his rights under **Section 77(2)(b) of the repealed Constitution** (the present **Article 50(2, (m))** and **Section 198(1)** of the Criminal Procedure Code. She then concluded that the identification parade in respect of the appellant was not properly conducted when the officer conducting it declined to do so in the cells as the 1st appellant asked to be done and instead conducted the parade in the open, without allowing him to invite his relative, agent or advocate to be present. And that the 1st appellant was coerced to sign the identification parade form.

On her part **Ms Ekin** similarly impeached the circumstances in which the 2nd appellant was allegedly

identified, terming them unfavourable. We heard that when this appellant got into PW3's taxi, he sat at the back and PW3 had only fleeting moments to observe his features in order to identify him at the bus stop before proceeding to Woodley. And that at Woodley PW3 did not say whether or not there was light at the gate where he was attacked when he was about to let his passengers disembark.

Regarding the subject motor vehicle, counsel argued that it was not produced and neither were its photographs. She concluded by claiming that identification parade form of the 2nd appellant was never produced in the lower court.

In turn, **Mr. Omirera's** position was that both the courts below made concurrent findings that the identification of both the appellants was satisfactorily proved. That PW3 had ample time to negotiate the payable fare with the 1st appellant at a spot with electric light bright enough as if it was day time, according to PW3.

On the identification parades conducted by PW1 and PW5, PW3 picked out the appellants herein and from the evidence of those witnesses, it was recorded that due parade forms were produced and marked as exhibits. And that the subject motor vehicle whose photographs had been taken in the earlier trial, was not produced in the subsequent trial because **William Mutisya** (PW2) its owner exhibited the log book and testified that the motor vehicle could not be produced because in between the trials, it was stolen never to be recovered. So the photographs were produced by PW8 – as exhibit 3. And that sufficed in the circumstances, and did not negate the charges that the appellants faced.

Turning to the testimony of PW4, **Mr. Omirera** stressed the fact that hardly 12 hours after the robbery, the appellants were presenting the subject motor vehicle to PW4 at Migori for repairs. On being asked to show police evidence of the accident in which the motor vehicle was said to have sustained the dents, the appellants could not produce any right away. They left and when they returned later the police whom PW4 had alerted, closed in on the appellants. They made to flee but were arrested. That all this took place at about 3.00 p.m. on 18th January, 2004. Accordingly, the conduct of trying to run away was manifestation of guilt. The appellants were not rushing to a shop or to collect some cassettes as they claimed in their defences. Those defences were rejected by both courts below. And with that we were urged to dismiss the appeal.

Bearing the principle alluded to above, we are not in doubt that identification of an accused person in any criminal prosecution is crucial and thus constitutes a point of law.

In the present appeal, the two lower courts found that identification of the appellants whether at the Green Corner Hotel in Nairobi, at Woodley or at the garage at Migori or on the identification parades could not be faulted.

We hold in mind the enunciation in **Regina vs Turnbull [1976] 3 WLR 445** and as cited with approval in many decisions of this Court including **Joseph Ngumbao Nzavo vs Republic [1991] 2 KAR 212**, that errors could occur even where a witness asserts that the conditions were so favourable that a mistake could not occur, whether it was a case of identification or even recognition. In the present matter, PW3 saw the appellants for the first time. It was at night. The light at Green Corner Hotel was as bright as day, so he told the lower court. The two discussed the fare payable and got into the taxi to go and pick up the 2nd appellant and others. Even as the learned trial magistrate noted that PW3 did not appear quite sure about the 2nd appellant, he had nonetheless picked out both appellants in the two identification parades, found by the two courts below to have been properly conducted. Then all that was strongly supported by the evidence of PW4, that indeed the appellants took the subject motor vehicle to him for repairs on 18th January, 2004. They went away and returned later at about 3.00 p.m. when police pounced on them in connection with the robbery herein. All in all we find that the evidence on identification was tight and the defences advanced were properly rejected. We see no reason to interfere with the decisions both by the trial court as well as the High Court.

The record has it that the identification parades were properly carried out and the reports were produced

in the trial court by PW1 and PW4 (Exh.1, 4). We were not able to glean from the appellants' lawyers' submissions what their quarrel was with this point. It was not demonstrated that the parades were irregularly conducted or otherwise. In any event, the appellants signed due forms as acknowledgement. We see no merit in this ground and accordingly we reject it.

The non-production of the subject motor vehicle at the subsequent trial was explained by its owner **William Mutisya** (PW2). It was stolen in between the trials, never to be recovered. He produced its log book. The photographs earlier taken were produced in court as exhibit 3, by PW8. It is not lost on us that it is always desirable that a specific exhibit be produced in a hearing. But in the circumstances of this case the best course possible was taken and no injustice appears to have befallen the appellants. This ground, too, fails and is similarly rejected.

The other ground advanced before us was that of the language used in the trial court. Ms. Rashid told us that the same was not noted on the file and so the trial went on without the 1st appellant following proceedings and so he was prejudiced. That therefore **Article 50(2)(m)** was violated (formerly **Section 77(2)(b)(f) of the repealed Constitution**). The Article reads:

“50(1) ...

(2) Every accused person has the right to a fair trial, which includes the right –

(a) ... (l)...

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

(n) ... (q) ...”

Section 198(1) of the Criminal Procedure Code provides for what the above Article mandates and the reason behind the right is clear: an accused person should be able to understand and follow criminal proceedings against him not only to be able to answer the charge and call witnesses, if need be, but also such a process ensures a fair trial lest an accused person be deprived of his liberty (by imprisonment) or property (through fines) because he did not understand the whole thing. In the trial before the trial court which started afresh on 29th June, 2005 it can be observed, that the learned trial magistrate unfortunately did not record the language in which the plea was taken or even during the subsequent proceedings. But all the time there was a Court Clerk in attendance whose duties include interpretation. There is no evidence that he was not doing his work interpreting. The appellants answered the charges and cross-examined the witnesses. They were also heard in their defences without any complaint. They presented their grounds of appeal to the High Court which that court reviewed. Looking at the whole exercise, we are satisfied that the appellants followed the proceedings in the two courts below and were not prejudiced on account of language at all. Again, this ground has no merit and is dismissed.

In the result this appeal lacks merit and is dismissed on its entirety.

Dated and delivered at Nairobi this 20th day of February, 2015

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR