



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI (PCA), OKWENGU & AZANGALALA, JJ.A)

CRIMINAL APPEAL NO. 97 OF 2014

BETWEEN

JAMES MBUGUA MUREGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngugi & Achode, JJ.) dated 11th November, 2013 In H. C. CR. A. No. 128 of 2008)

JUDGMENT OF THE COURT

1. James Mbugua Murega, the appellant herein, was arraigned before the Chief Magistrate's Court at Kiambu and charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of that offence were that on the 5th day of August 2007, within Kasarini area in Kiambu District in Central Province, he along with others not before the court, while armed with a toy pistol, robbed John Kabaya of Kshs 5,000.00, and at, or immediately before, or immediately after, the time of such robbery, threatened to use actual violence against the said John Kabaya.
2. The prosecution evidence was that on the material day, at around 10:30 am, John Kabaya (PW1), the complainant, was driving along the Paradise Lost road in Kiambu. He saw three men walking about 200 meters ahead of him. As John approached them, the three men got onto the road and barred his way. Due to his shock, John switched off the engine of the vehicle. John then saw the appellant approach his car, pull out a pistol and point it at him. The appellant then pulled John out of the car, searched his pockets and removed his wallet, from which he took the sum of Kshs 5,000.00. After taking the money, the appellant returned John's wallet, and then the three men turned and started walking in the direction of Kiambu town. John had noted that the pistol was not real, so he decided to follow his assailants. He got into his car and followed the three men for a distance of about 200 meters where there were several members of the public. John begun shouting for help so the members of the public caught up with the appellant and started to beat him up.
3. PC Rogers Nariani (PW2) arrived on the scene and found a crowd of people beating up the appellant. He recovered the toy pistol, which had fallen while the appellant was running away.

After John had positively identified the appellant as one of his assailants, John and the appellant were escorted by PC Nariani to Kiambu Police Station where they were received by PC Matheru Masivo (PW3) who also took custody of the toy pistol and recorded the complainant's statement.

4. In his defence, the appellant denied committing the offence with which he was charged. He described himself as a hawker who hails from Githogoro village. He stated that on the material day, he was headed to his place of work along the road to Kasarini. As he neared the junction on the Kiambu-Nairobi Road, he met two men, and saw a vehicle being driven at a very fast speed. He was trying to cross the road, and the vehicle hit him. He lost consciousness and woke up at 4:00pm later that day in the hospital, and found that he had a broken leg. Later on, a police officer came to the hospital and took him to the police station where he was locked up for a period of thirteen days. He was then brought to court and charged with robbery with violence.
5. After an evaluation of the evidence tendered, the trial court convicted the appellant, and after receiving mitigation, sentenced him to death as provided by law. Being aggrieved with that conviction and sentence, the appellant appealed to the High Court. In that appeal, he claimed that his right to a fair trial was violated because a part of the trial was conducted in English, a language that he is not conversant in, and because prosecution witnesses that he sought to have recalled were not availed for him to cross examine. The appellant also contended that the identification evidence that was relied upon in his conviction was unsafe because it was the evidence of a single witness.
6. The first appellate court, after re-evaluating and reconsidering the evidence that was tendered before the trial court, found that the appellant's rights were not violated as he claimed, as it was apparent that he fully participated in the proceedings by cross-examining the prosecution witnesses and also by giving sworn testimony. The first appellate court therefore held that there was no language barrier that occasioned him any prejudice. In addition, the court held that the evidence of the complainant on identification was proper and reliable. The court therefore found that there was no doubt as to the question of the appellant's involvement in the robbery, affirmed the conviction and confirmed the sentence meted out on him by the trial court.
7. The appellant has now preferred this second appeal before us. Section 361 of the Criminal Procedure Code constrains this Court, when dealing with a second appeal, to determine only matters of law. This legal duty has been restated by this Court in ***Boniface Kamande & 2 Others v Republic [2010] eKLR (Criminal Appeal 166 of 2004)*** as follows:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

8. The appellant, through learned counsel Mrs. Nyamongo, has raised three grounds of appeal. The first issue raised by learned counsel is that the first appellate court failed to consider that the identification evidence that was relied upon to convict the appellant was unsafe. Counsel submitted that since the complainant was over 200 meters away from his assailants, and that since he had even admitted to being in shock when he was accosted by the three men, the complainant was in no position to make a positive identification of any of his assailants. Counsel also contended that the identification evidence was unreliable as it was from a single witness, and further that this evidence was corroborated by PC Nariani who was not an eye witness to the robbery.
9. The second ground raised by the appellant concerned his defence. Mrs. Nyamongo submitted that the courts below did not properly consider the appellant's defence that he lost consciousness when he was knocked down by a vehicle as he was crossing the road, and only recovered later in the

day.

10. The third issue raised by the appellant was the conduct of his trial before the Magistrate's Court. He alleged that his right to a fair trial was impugned because PC Nairana testified in English, which the appellant did not understand, and further, that the appellant had applied to cross examine the prosecution witnesses, but they were never availed.
11. Opposing the appeal on behalf of the state was Mr. O'Mirera, Senior Assistant Director of Public Prosecutions. He urged us not to interfere with the concurrent findings of fact regarding the identification of the appellant which were that the conditions were favourable for a positive identification because the offence occurred in broad daylight and that the complainant was able to properly identify appellant as one of the people who robbed him since he never lost sight of the appellant as he chased him.
12. Mr. O'Mirera further argued that while there was no interpretation, the appellant fully cross examined all three prosecution witnesses, which is an indication that he understood what was going on. He further urged that there was no prejudice suffered by the appellant due to the fact that the witnesses were not recalled, and that even if those witnesses were called, nothing further could have been gained from a further cross-examination.
13. Regarding the appellant's complaint on his defence, Mr. O'Mirera submitted that both the trial court and the first appellate court considered the testimony given by the appellant in his defence, and correctly found that it was displaced by the credible prosecution evidence and therefore dismissed it. For these reasons, counsel for the state urged us to dismiss the appeal.
14. The main evidence that links the appellant to the commission of the offence is that of a single identifying witness. In ***Francis Kariuki Njiru & 7 Others v Republic [2001] eKLR (Criminal Appeal No. 6 of 2001)***, this Court set out the factors that a court should consider before using identification evidence as a basis for conviction. It was held therein that:

“The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error. The surrounding circumstances must be considered.”

15. This caution must especially be applied to the evidence of a single identifying witness. In ***Kiilu & Another v Republic [2005] 1 KLR 174*** the importance of caution in accepting the evidence of a single witness on identification was put thus:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.”

16. John's evidence was that as he was driving along the Paradise Lost road, he came across three men. He saw the appellant draw a pistol and point it at him. After that, the appellant pulled John out of the car, took a wallet from his trouser pocket, removed some money from it and then gave it back. It is clear from this testimony that John had ample opportunity to see his attacker clearly. In addition, once he had established that the pistol was not a real one, John followed the appellant, never losing sight of him and shouting for help until members of the public caught him.
17. After considering the identification evidence alongside the appellant's defence, we are satisfied

that the evidence of the complainant was free from error. We are satisfied that John was in a position to properly identify the appellant as one of his assailants, and find that this attack on the judgment of the first appellate court fails.

18. From the record, it is abundantly clear that the appellant participated in the proceedings. It is also clear that he cross examined PC Nariani and PC Masivo who gave their evidence in English. He therefore understood their testimony. We are guided by the sentiments of this Court in ***John Kamau Githuku & Another v Republic [2011] eKLR (Criminal Appeal No. 229 of 2008)*** where it was found that if an accused person participates in proceedings after taking of plea, it is indicative of him understanding the charges against him.

19. As stated in ***George Mbugua Thiongo v Republic [2013] eKLR (Criminal Appeal No. 302 of 2007)*** “for the court to nullify proceedings on account of ... [the] language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial”.

In our view, the appellant fully understood what was happening during the trial and we can see no prejudice that he may have suffered as a result of some of the witnesses testifying in English.

20. We have noted from the record that on the 24th October 2007, after the three prosecution witnesses had given evidence, the prosecution applied for an adjournment to call one more witness. The appellant simply prayed for an early hearing date. He never made mention of the fact that he had been unwell.

It was not until the next hearing, on the 9th November 2007, that the appellant applied to recall the witnesses, stating that he had been unwell when they testified. We find that there was no material prejudice suffered by appellant when the prosecution witnesses were not recalled since he had already had an opportunity to cross examine them, and therefore reject this ground of appeal as well.

21. In the circumstances we are satisfied that the appellant was properly convicted and that this appeal is devoid of merit. Accordingly, we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 6th day of November, 2015.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR