IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 280 OF 2007

BETWEEN

DANIEL KURUMA KANIU …… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Lessit & Dulu, JJ.) dated 1st November, 2010

in

HCCR. A. 631 OF 2004)

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JUDGMENT OF THE COURT

This a second appeal and our jurisdiction is limited by dint of **Section 361(a)** of the **Criminal Procedure Code** to deal with matters of law only but not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. It has so been held in numerous decisions of this Court such as **Njoroge v Republic [1982] KLR 388** that on second appeal we focus on points of law accepting and being bound by the concurrent findings of fact by the two courts below, unless those findings were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in making those findings.See, also, on an enunciation of those principles, **Chemagong v Republic [1984] KLR 611**.

The appellant **Daniel Kuruma Kaniu** was charged alongside another (whose appeal was allowed by the High Court) with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. Particulars of that offence were that on the 3rd day of January, 2003 at Turners Githurai 44 in Nairobi with others not before court he robbed **No.38855 PC Isaac Mbugua** of an AK47 rifle loaded with 30 rounds of ammunition and that at or immediately before or immediately after the time of the said robbery he used violence to the said police officer. The second count related to an offence of escaping from lawful custody contrary to **Section 123** of the **Penal Code**. Particulars of that offence being that on the same day at the same place having been charged with various offences of robbery with violence at the Thika Magistrates Court and while being escorted from Thika Law Courts to Kamiti Remand Prison under the custody of named police officers he escaped from the custody of those officers. The appellant was tried

and convicted by **J.O. Oseko, PM**. and was sentenced to death in the judgment that was delivered on 17th

December, 2004. A first appeal to the High Court (**Lessit & Dulu, JJ**) failed and hence this appeal.

We shall visit the facts of the case purely to ascertain how the trial court and the first appellate court dealt with the same and whether, as stated, we should uphold the concurrent findings of facts by the two courts below or whether there is reason in law to interfere with the findings.

On 3rd January, 2003 the appellant was one of 52 remand prisoners who were escorted from Kamiti Maximum Prison to the Thika Law Courts where they were facing various charges. They were escorted to court by police officers **PC Edwin Githinji (Githinji (PW1)), Isaac Mbugua (Mbugua (PW2)),** driver **Andrew Kariuki Kinyua (Kinyua (PW3))** and

Corporal Njuguna (this last officer died before the trial). When the court session was over the appellant and his collegaues were escorted into a prison vehicle driven by Kinyua. Mbugua and Githinji were seated at the back of the lorry and there was a wiremesh separating the compartment where these officers sat from the compartment where the prisoners sat. Kinyua and Corporal Njuguna were in the front cabin. According to the evidence given the whole party reached Zimmerman area at about 6.00 p.m. where they encountered a group of men who were shouting "Rainbow serikali mpya". The lorry was moving slowly as the area was bumpy and the road was full of potholes. The prisoners had been rowdy all along and had refused orders to sit down in the compartment reserved for them. Githinji testified that in the midst of the confusion where prisoners were rowdy and the men outside were shouting slogans he suddenly saw the appellant standing over him who ordered him to "leta hiyo kitu" an apparent order that he hand over his firearm. The appellant tried to snatch his rifle and the witness was surprised how the appellant and other prisoners had left their locked compartment. The witness further testified that he struggled with the appellant as other innmates were leaving the lorry and as his colleagues were struggling to contain the situation but that at no time did he let go his firearm. Githinji further stated that the appellant and other innmates beat him up and pushed him out of the lorry. He fell onto the tarmac while still hodling his rifle. The lorry was still in motion and so he was left behind. He said that he could not shoot because he feared that he could injure his colleagues. He however apparently shot in the air to alert his colleague the driver of the lorry and Corporal Njuguna. He saw that his colleague's rifle (Mbugua) had been snatched by the prisoners. He ran and followed the lorry but according to him the prisoners who had snatched his colleague's rifle were also shooting. The lorry stopped and some of the innmates escaped. Reinforcements arrived and the prisoners who had remained in the lorry were escorted to Kamiti prison. Upon inspecting the lorry Githinji found that the wiremesh separating the prisoners compartment had been cut and that is how innmates escaped. He was taken to hospital where he was treated and discharged. The next day he learned that one innmate had been arrested and a rifle had been recovered. The witness identified remand warrants and production orders issued by the Thika Magistrates Court in regard to the appellant for the criminal charges that he was facing at that court. Githinji knew the appellant very well because he had transported him regularly to Thika Law Courts.

Upon cross examnation the witness testified that the lorry was old and made rattling noises and that this could be the reason why he did not hear the wire mesh being cut. He denied that he had been bribed to let the innmates go free. Further that:

> ***"I do agree that you escaped from the lorry for fear of being hit. You are the one who wanted to snatch the gun from me".***

In re-examination:

> ***"I deny being bribed to enable the prisoners escape. I dont know if the other officer was bribed. I also deny that I opened the door for them to escape."***

The other police officers Mbugua and Kinyua testified in the same manner. Mbugua added that he was overpowered by escaping inmates and his rifle was snatched from him by one of them but he did not identify the actual person who snatched the rifle.

Police Officer Kinyua who was the driver added that he had inspected the lorry before the journey and the wiremesh was intact but that he had found a hole in the wiremesh after the incident.

Hadi Said (Said (PW4)) of Criminal Investigations Department, Thika Police Station, upon receiving information from members of the public on 9th January, 2003 with other officers went to the entrance of Polisak Containers in Thika where he saw two people one of them the appellant. He arrested them and detained them at Thika Police Station.

Doctor Z.N. Kamau (PW5) examined Githinji on 21st February, 2003. He found friction burns on the upper part of his left forearm, there was also a scar on the left elbow and healed bruises on both knees. The doctor thought that the injuries were caused by a blunt object. The doctor also examined Mbugua on 28th January, 2003 and saw healed bruises on the left mid parietal scale (left side of the head) and lateral aspect on the lower part of the left arm. He thought that these injuries were caused by a blunt object. The doctor produced a P3 form which had been completed by him**.**

C.I.P. No. 219333 Richard Muchai (Muchai (PW6)) was the Officer in Charge, Kasarani Police Station. On 15th February, 2003 he received information from members of the public and using this information an AK47 rifle was recovered from a bush along Mirema drive near Thika. The rifle was loaded with three live rounds of ammunition. He confirmed from records that this was the same rifle stolen from police officers who were escorting prisoners on the date that the escape incident took place.

No. 25278 Sergeant Fredrick Ngotari (Ngotari (PW7)) was at the material time attached at Kasarani Police Station attended to the scene on 3rd January, 2003. He was one of the officers who mounted a search of the escaped prisoners. He later went to Thika Police Station where he found the appellant detained at that station. He produced various documents including remand warrants in respect of the appellant and an extract copy of the register in respect of the recovered firearm. He is the one who prepared the charges that faced the appellant before the trial court.

That was the case that was made out against the appellant and upon consideration the trial magistrate found that the appellant had a case to answer. In his defence the appellant confirmed that he had been taken to court on the material day. He stated that on their way back to Kamiti Prison he heard gunshots and saw a colleague of his bleeding. He therefore jumped off the lorry to save his life and that he boarded a vehicle that took him to Thika where he stayed for nine days. He was thereafter stopped by police and asked if he had escaped from custody. That he readily admitted that he had and that he was arrested and later charged. He stated that he had no intention of escaping. In cross examination he stated that he was confused during the nine days he was in Thika and that he had stayed in Thika to save his life.

The trial magistrate considered the prosecution evidence and defence and convicted the appellant as already stated.

There are four grounds of appeal in the appellant's supplementary memorandum of appeal filed on his behalf by his advocate. In the first ground, the appellant faults the learned judges who heard the first appeal for confirming the conviction and sentence of the appellant when according to the appellant the case was not proved beyond reasonable doubt as required in law. In the second ground the High Court is faulted for upholding a conviction of the appellant without considering that the State was not represented at the time of the hearing. In the third ground the learned judges of the High Court are said to have failed to analyse and re-evaluate prosecution evidence. In the final ground it is said that the High Court failed to give due consideration to the appellant's defence.

This appeal came up for hearing before us on 5th October, 2015 when **Mrs. N. M. Kinyori**, learned counsel appeared for the appellant while **B.L. Kivihya** learned State Counsel appeared for the respondent. Learned counsel for the apellant faulted the learned judges of the High Court for not finding that the language of the court was not noted in the proceedings.

Learned counsel for the appellant also faulted the learned judges of the High Court for not noting what

learned counsel saw as inconsistencies in the evidence of the 1st and 2nd prosecution witnesses. Learned counsel submitted that the 2nd prosecution witness did not single out the appellant as the person who took the rifle. Learned counsel also took issue with identification stating that the appellant was not properly identified by any witness. Learned counsel also wondered how the compartment holding prisoners was opened because according to counsel no witness gave direct evidence on that fact. Learned counsel laid emphasis on what the appellant had raised in cross examination that it was police officers who opened the door for prisoners to escape.

On the other hand Mr. Kivihya opposed the appeal. Learned counsel submitted that it was the apellant who snatched the rifle from the 2nd prosecution witness. Counsel submitted that the identification of the appellant was not in doubt as he was already in custody. Learned State Counsel on the issue of language submitted that although it was not indicated what language the court was using the appellant had not been prejudiced and he had in any event cross examined witnesses at length.

We have considered the record of appeal, the memorandum of appeal, submissions of counsel and the law.

On the aspect of language we note that the appellant has not taken that as a ground of appeal. We note also that the appellant did not take that as a ground of appeal in the High Court. So the issue is really not before us. We say in passing that it is desirable that the language of the trial court should be indicated but it will be noted here and we agree with the learned State Counsel that the appellant cross exmained the witnesses at length and this is therefore an indication that the proceedings were conducted in a language that the appellant was familiar with.

Learned counsel for the appellant took all the grounds of appeal as one and presented them as such. The issue raised in ground 2 that the State was not represented at the time of hearing was not taken up by learned counsel for the appellant and no submissions were made on that issue. We note, indeed, that at page 6 of the Judgment of the High Court the learned judges state that:

> ***"The State was unrepresented during the hearing of this***
>
> ***appeal."***

As this ground was not argued before us, but as we think that nothing turns on it, we shall not detain ourselves and shall proceed to consider the other grounds. Was the case by the prosecution proved beyond reasonable doubt?

The learned trial magistrate after considering the evidence presented found that the appellant and the other accused before her had violently robbed PW2 of his firearm. The learned trial magistrate found that there was direct evidence against the two accused persons then before her. She found that the appellant had tried to snatch a rifle from the 1st prosecution witness and that the 2nd prosecution witness was robbed of his rifle but that there was no direct evidence as to who took that rifle. The learned magistrate held:

> ***"With respect to the defence raised by the 2nd accused person including that of his witnesses I denies the same. (sic) It purports to inputs (sic) innocence on his part which I do not believe. He was positively identified as one of the assailants. It surprised that he was not charged with attempting to rob PW1 of his gun. But that is now water under the bridge. He was recognized which evidence was corroborated on PW2 with respect to the 1st accused person despite of the fact that the court was not told exactly what he did but it's a fact that he too escaped and I believe he was equally involved. None so especially die (sic) to the fact that in cross-examination he put it to PW2 that he (PW2) had been bribed and gave out his gun to the people he knew. I also noted that PW1 and PW2 explained to their evidence that they were attacked by more than one inmates. They were beaten in the process. PW1 clearly saw 5-7 persons beating up PW2 and each one of***

them was holding the gun which later disappeared. The 1st accused there. (sic)"

Having so analysed the evidence the trial magistrate said that the absence of direct evidence of what the appellant did during the violence and subsequent escape was immaterial.

On the second count the trial magistrate found that the appellant and the other accused person admitted that they escaped from lawful custody but they did so to save their lives. In respect of the appellant the trial magistrate held:

> ***"He indeed had no intent of returning to custody. He does not explain what he was still doing out of custody. He is aware he was facing non bail able offences several of them. He knew he had no business being out for free while he had cases pending that required his attention. In the same breath I dismiss his defence to the count 2. In fact he offenced more and thus the prosecution evidence stand uncontroversial and I believe it with respect to the 1st accused persons. He was arrested the same day. He says he went to the police station. But PW5 who arrested him clearly indicated that this was not the position. He had no intention of going back to the vehicle. He was arrested long after the escape. If he really was just escaping to save his life he should have wanted and after thugs (sic) cooled down he would have gone back to the vehicle and gone back with other 40 plus prisoners to prison. He did not. He left the scene and when caught had no intention of going back. His evidence is dismissed both for count 1 and count 1I. I am satisfied that he had means to escape."***

In the first appeal the learned judges found that there was no evidence on how the wiremesh separating the two compartments in the lorry was cut. The learned judges took judicial notice of the fact that there was a new government in Kenya in January 2003 and that there was ecstasy and euphoria in the country. The learned judges believed the evidence that there were people chanting outside the prison lorry. The learned judges stated in their judgment:

> ***"The prosecution had a duty to show that the appellants acted in concert and that they had formed the necessary 'mes rea' to escape. This can be determined by the conduct of the appellant's both at the scene just before the escape and after. On the 1st appellant's part we are not satisfied that he is proved to have formed the necessary 'mens rea' to escape."***

Having so found the learned judges believed that the defence evidence of the other accused person to the effect that he jumped out of the lorry and escaped to save his life upon seeing some prisoners bleeding and upon seeing that the police officers who had been guarding them were no longer there. For those reasons they allowed the appeal by the other accused person. However, in respect of the appellant the learned judges found that it was he who tried to forcefully take the rifle from the 1st prosecution witness **(Githinji)** and that it was he who threw the police officer from the moving lorry. The court also found that the appellant escaped from lawful custody and it was not until 9th January, 2003 that he was arrested. They found:

> ***"We are satisfied that the evidence adduced against the 2nd appellant clearly establishes that he acted with a common intention which was to disarm the police officers guarding them by robbing them of their rifles and escape from their (lawful) custody. Even though the 2nd appellant did not succeed to rob PC Edwin of his rifle, the act of his accomplice to rob PC Isaac of his rifle was his act since they were acting with one common intention.***
>
> ***The 2nd appellant's defence was considered by the learned trial magistrate and properly rejected as the evidence against him was overwhelming. In fact the 2nd appellant's defence was an admission of the offence. We find that the conviction entered against the 2nd appellant was safe. We uphold the conviction and confirm the sentence***

accordingly."

So the position is that one accused person's appeal succeeded in the High Court on the basis that he had raised a reasonable defence while the other accused persons's appeal failed.

PC Githinji stated in evidence that it was the appellant who grabbed his rifle and demanded for it. This evidence was corroborated by PC Mbugua. This second witness stated:

> ***"I also felt another one hold my gun. I cannot tell exactly who he was....they managed to throw PW1 out but he never let go of his gun. I continued struggling with them. They overpowered me and threw me out of the lorry after they took the gun from me."***

We note that the charge on count 1 related to the robbery and use of violence against PC Isaac Mbugua (PW2). Having carefuly gone through the record there is no evidence to point to the appellant as the person who robbed PC Mbugua of the rifle. PC Mbugua says categorically that he could not tell who of the escaping prisoners took his gun. There is no evidence from this witness or any other that he was assaulted by the appellant.

The first appellate court believed that the other accused person had escaped the scene to save his life. The only reason that the same reasoning did not apply to the appellant was that he did not take himself to the police station as the other accused person had done. We believe that this is a misdriection on the part of the first appellate court. If the other accused person escaped from the scene to save his life does the fact that the appellant did not present himself to the police mean that his defence could not hold? We think with due respect that the appellant's contention that he escaped the scene to save his life created a reasonable doubt on his guilt and this should have been resolved in his favour.

In respect of the second count there was direct evidence that the appellant was a remand prisoner with several cases at the magistrate's court at Thika. He escaped from custody according to himself to save his life. He did not present himself to any police station and was arrested some six days after he escaped. Remand warrants were produced to confirm that the appellant was in prison custody awaiting hearing of matters that were before the magistrates court. In the event the second count was proved as required in law.

In the result we quash the conviction of the appellant on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and we set aside the sentence imposed.

On the second count of escaping from lawful custody contrary to **Section 123** of the **Penal Code** the trial magistrate properly convicted the appellant. The trial magistrate imposed a sentence of 2 years imprisonment on this second count which was to be held in abeyance due to the sentence in respect of count 1. The appeal fails in respect of count 2. We note that that sentence was imposed on 17th December, 2004 now well past and that the appellant has been in custody for a long time. Having allowed the appeal on the first count we order that the appellant be set free forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 11th day of December, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR