IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, G.B.M. KARIUKI & OUKO JJ.A)

CRIMINAL APPEAL NO. 230 OF 2011

BETWEEN

MICHAEL NGANGA KINYANJUI …….....……. APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(An appeal from a sentence of High Court of Kenya at Nairobi (Justices J. Khaminwa, M. Warsame, JJ) dated 15th February, 2011

in

HCCRA. 170 OF 2004)

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JUDGMENT OF THE COURT

Francis Kitela Kingoo, the complainant, who was at the time of the incident giving rise to this appeal, an employee of the Aga Khan Hospital, was walking through the City Park to his place of work when he was attacked and robbed of a mobile phone, Siemen C25 worth Kshs. 3,650/= by three armed men. The commotion accompanying the attack attracted the attention of, among others, Kennedy Wekesa Wanyonyi, who cried out "thieves, thieves" to which members of the public responded. The three robbers upon seeing the response took to their heels in different directions. Wanyonyi concentrated his attention on one of the robbers as he gave chase. According to him, the robber he was chasing was "cornered" by members of the public, arrested and beaten senselessly with threats of lynching. It was his evidence that the person who was chased and eventually arrested was the appellant. Wanyonyi saw a member of the public recovered from the appellant what was later found to be a toy pistol which was handed over to the police the moment they arrived at the scene. Both the complainant and the appellant were treated. The appellant was subsequently charged with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The appellant denied the charge maintaining in his sworn statement that while jogging from his Pangani Estate house to City Park, where he was to join his team for a game of football, he was confronted by a group of people who sought to know why he was running. An argument arose among those who had stopped him, whether he was a footballer at the City Park or whether he was one of the robbers who had attacked and robbed the complainant. He knew nothing about the attack, he maintained.

The learned trial magistrate **(Hon. Maundu, SRM)** found that the prosecution evidence on

identification and recovery of the toy pistol on the appellant was sufficient proof that he was involved in the robbery. The appellant was upon conviction sentenced to death. His second appeal to the High Court (**Khaminwa & Warsame JJ**, as he then was) was dismissed with the learned Judges concurring with the learned trial magistrate's finding. The appellant now comes to us by way of a second appeal arguing that:-

i. the language of the trial was unfamiliar to him.

ii. the ownership of the alleged stolen mobile phone was not proved.

iii. the ingredients of the offence as drafted in the charge sheet was not proved.

iv. there was no sufficient evidence to warrant a conviction.

v. the particulars of the charge were at variance with the evidence.

vi. the learned Judges of the High Court failed to analyze and re-evaluate the evidence.

vii. the learned Judges did not observe that the exhibit did not meet the evidentiary threshold.

viii. the conviction was based on inconsistent evidence.

ix. the learned Judges failed to find that the appellant's defence displaced the prosecution evidence.

x. the learned Judges failed to see that the conviction was based on extraneous considerations.

xi. the learned Judges erred in upholding a conviction based on identification or recognition.

Mr. Swaka teaming up with **Mr. Rombo** argued the grounds in two parts, with Mr. Swaka taking ten grounds, combining some, while Mr. Rombo addressed two grounds. For our part, we do not intend to adopt that pattern but instead will give a global consideration of the grounds argued.

The question before the two courts below was whether the appellant was properly identified as being part of the gang that robbed the complainant. Both courts below made concurrent factual findings that, since the attack and robbery occurred in broad daylight, (at about 3pm), the identification of the appellant was free from any mistake.

The courts have all along been alive to the fallibility of eyewitness identification. The justice system has, as one of its basic foundations, the assumption that witnesses are capable of accurately describing events that form the basis of a case. It is equally true that witnesses may be deliberately untruthful, but there may be many other causes of inaccuracy in a witness's testimony, like imperfect observation, faulty memory or self-interest. It is for these reasons that courts approach the question of identification with caution, in situations of disputed identification evidence as demonstrated in **Abdullah bin Wendo V. Republic** (1953) 20 EACA 166 and **Republic V. Turnbull & others** [1976] 3 ALLER 549. This court relying on **Turnbull** (supra) said in the case of **Cleopas Otieno Wamunga V. R.** Criminal Appeal No. 20 of 1982 (UR) that:-

> **"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well known case of Republic V. Turnbull [1970] 3 ALL E.R. 549……..…"**

See also **Francis Koikai Katikeya V. R** Cr. Appeal No. 1183 and 1187 of 2002 (UR). Another principle that an appellate court must bear in mind is that it will only interfere with the trial court's findings of fact in exceptional circumstances. The traditional view is entrenched, that an appellate court should not reverse the decision of a trial Judge on a question of fact unless that decision is shown to be wrong. The fact that the trial Judge hears and sees the witnesses is regarded as being of paramount importance. See **Okeno V. R** [1972] E.A. pg 32.

We are satisfied from the concurrent finding of fact that the complainant had sufficient opportunity, aided by the afternoon daylight, to positively identify the appellant. The appellant had shortly before the attack passed the complainant. One of the appellant's confederates got hold of the complainant and as they struggled the appellant hit the complainant with a pistol, snatched his mobile phone and fled. Wanyonyi who, all along, was watching the attack from a 6 meter distance confirmed in his own words that:-

> **"One man who had a pistol was holding the person who was following us by the neck. ……. Accused was the one holding that person by the neck. He had a pistol. He ran away holding the pistol."**

Wanyonyi with the assistance of members of the public gave chase and the appellant was arrested by members of the public as Wanyonyi watched. These latter events, leading to the appellants' arrest including his presence at the scene of the robbery are not in dispute. Taking together the testimony of the complainant, that of Wanyonyi, an independent witness, and the recovery of the toy pistol, the inevitable conclusion is that the appellant was part of and an active member of the gang that robbed the complainant.

The alleged inconsistencies between the complainant's and Wanyonyi's evidence as to where the pistol was recovered is resolved by the fact that the complainant did not chase the appellant after he was attacked and injured. Wanyonyi on the other hand did not lose sight of the appellant as he was being chased and saw the latter throw away the pistol before he was caught.

The next issue is with regard to the failure to indicate in the charge sheet that the pistol was a *"dangerous or offensive weapon"*. First, by dint of **Section 34 (2)** of the Firearms Act, an imitation firearm, although incapable of discharging any shot, bullet or missile is, in law, deemed to be a dangerous weapon for purposes of the offences under the Penal Code. This Court has consistently held that the offence under **section 296 (2)** of the Penal Code is committed if the charge states, **one,** that the accused was armed with a dangerous or offensive weapon or instrument, or **two**, that he was in the company of one or more other person or persons or, **three,** that at or immediately before or immediately after the time of the robbery he wounded, beat or struck or used any other form of personal violence to any person. See **Suleiman Juma alias Tom V. R.** Criminal Appeal No. 181 of 2002 (UR).

The act of being armed with a dangerous or offensive weapon is but just one of the elements under **Section 292 (2)** of the Penal Code. There are other elements such as being in the company of one or more persons, or wounding, beating, striking the victim, which if proved would bring the offence under **Section 296 (2)** aforesaid. **Johana Ndungu V. R.** Cr. Appeal No. 116 of 1995 (UR). In this appeal, there was evidence that the appellant was in the company of two other persons and that they struck and injured the complainant as they robbed him of a mobile phone. We hold on this question that the failure to describe the pistol as a dangerous and offensive weapon was not fatal to the prosecution's case because that was not the only element relied on by the prosecution to prove the charge under **Section 296 (2)**. That ground must fail.

Was the complainant bound to prove that the stolen mobile phone was his? Although he was categorical that the phone was snatched from him by the appellant, the phone itself was not recovered when the appellant was arrested. Under **Sections 295** and **296** of the Penal Code, there is no requirement that the thing stolen in a robbery must belong to the person from whom it was robbed. We find no merit on this ground too.

Regarding the ground that the appellant did not understand the proceedings at the trial on account of the

language used, we emphasize that both **Section 77 (2)** of the former Constitution and **Section 198** of the Criminal Procedure Code enjoin the court to avail to an accused person (or even the appellant) an interpreter if he does not understand the language used at the trial or on appeal. A Criminal trial is about providing sufficient and clear information of the allegations against him in order to help him in his defence. There are many ways of ascertaining in each case whether or not the accused understood the proceedings. One way is look at the record to see if the trial court recorded the language(s) used or if the name of the interpreter has been provided. In the absence of these, the court can also consider the level of participation of an unrepresented accused person in the proceedings. If from the record the appellate court is satisfied that the appellant understood the proceedings, it will not interfere with the conviction. It must be stressed however that as part of an accused person's right to a fair trial, the presiding judicial officer must sedulously inform the accused of his right to an interpreter. Trial courts must be satisfied even after providing an interpreter that the accused person has understood the interpretation. Trial courts must further endeavour to ensure that the manner of interpretation is indicated and reflected on the record. We repeat; where it is clear that the accused person did not understand the language of the trial, the consequence is to quash and set aside the conviction and sentence, each case being considered in the context of its peculiar facts and circumstances. See **Julius Kaunga vs. Republic** Criminal Appeal No. 189 of 2000.

In this appeal, the record speaks for itself. The appellant fully participated in the trial, addressing the court, making various applications, cross-examining witnesses and eventually giving a sworn defence which leaves no doubt that he followed the allegations against him and made great effort in that defence to rebut those allegations. Once again, this ground is dismissed.

In the result, we dismiss this appeal.

Dated at Nairobi this 31st day of January 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR