IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & MURGOR, JJ.A.)

CRIMINAL APPEAL NO.7 OF 2004

BETWEEN

JOSEPH KINYANJUI WAINAINA…….....……APPELLANT

AND

REPUBLIC.....…….... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ delivered on 27th January, 2004

in

H.C.CR.A NO.697 OF 2001)

****

JUDGMENT OF THE COURT

The Appellant, ***Joseph Kinyanjui Wainaina***, was tried and convicted on 18th June, 2001 by Makadara Principal Magistrate, ***Hon. Juma***, for the offence of Robbery with violence contrary to section 296(2) of the Penal code. It had been alleged in the charge sheet that on the 26th day of October, 2000 at Kariadudu village in Nairobi, jointly with others not before court, while armed with a pistol, he robbed ***Harrison Mwangi Kimotho*** of Ksh.2,610 and at or immediately before or immediately after the time of such robbery threatened actual violence against the said ***Harrison Mwangi Kimotho***. Upon his conviction, he was sentenced to death as by law provided, but he challenged both the conviction and sentence before the High Court in criminal appeal No. 697 of 2001. That Appeal was dismissed on 10th May 2005 and he appealed further to this court in criminal appeal no.102 of 2006. One of the five grounds of appeal put forward in that appeal, and the only ground judicially considered by the court, was that a Judge of the High court who did not participate in the hearing of the appeal, appended his signature to the final judgment. The court found the complaint valid and declared that the procedure followed was irregular and therefore it vitiated the judgment. The appeal was allowed and the file was remitted back to a different bench of the High court for hearing and disposal of the original appeal. The High court eventually rendered itself in judgment on 27th January 2009, dismissing the appeal hence the appeal now before us.

The appellant's learned counsel, ***Mrs. Rashid***, submitted an amended memorandum of appeal (not a supplementary memorandum of appeal) containing the following four grounds, on the basis of which she made her submissions on behalf of the appellant:

"1. The learned Judges of the Superior Court erred in Law failing to ADEQUATELY evaluate and analyze all evidence and arrive of (sic) ***their own decision.***

2. The learned Judges of the Superior Court erred in Law and fact failing to note the trial Magistrate erred in admitting the coins as exhibits on hearsay evidence as PW1 the complainant never identified them.

3. The learned trial Judges erred in failing to note that there was inadequate investigations as PW4 never visited the locus in quo to ascertain the exact width of small opening through which PW1 was serving customers to ascertain if the hand and heed (sic) ***of an intruder could fit in a 5 inch by 4 inch opening.***

4. That the learned Judges erred in Law in upholding the Appellant's conviction and sentence when the plea was not unequivocal."

We shall examine those grounds and the submissions made thereon presently.

The concurrent findings of fact made by the two courts below are as follows:

At about 7pm on 26th October 2000, ***Harrison Mwangi Kimotho*** (pw1) (***Harrison***) was in his retail general shop at Kariadudu selling goods to customers who included school children. He sat behind a counter which had grilles apart from a small window which he used for giving out goods and receiving payments. There was electricity lighting inside the shop. Suddenly, three people burst into the shop, shoved aside the customers and separately positioned themselves on the left, middle and right sides of the counter. The man on the left whipped out a pistol and demanded all the money there was. Some customers fled from the shop. Harrison refused to surrender any money whereupon the man at the centre of the counter pushed his hands through the small opening and removed money from the counter drawer which he handed over to the man with the pistol. Harrison then raised an alarm whereupon the armed man and the man on the right ran away as the man in the middle pushed his hands and head through the small opening to collect the remaining coins from the drawer and put them in a paper bag. ***Harrison*** grabbed and firmly held the intruder's hand and was assisted by members of the public who came to the scene and apprehended the intruder. The intruder was the appellant.

Two of the members of the public who testified at the trial were ***Boniface Kairu Kimotho*** (pw2) (***Boniface***) and ***Joseph Odeyo Ondosi*** (pw3) (***Joseph***). Boniface was going to the shop to buy sugar when he heard noises and screams from inside the shop and saw two people running away from the shop. From six meters away, he saw one man struggling with another one through the opening where sales are done at the counter. The person behind the counter was calling out for help. Boniface grabbed the man outside the counter as Joseph also arrived and assisted to subdue the man. Joseph was at the time at his brother's house close to the shop when he heard the screams and entered the shop. The man they grabbed and subdued was the appellant. Harrison, Boniface and Joseph were consistent that the appellant had a black paper bag which he put in his trouser pocket and when they removed it, they counted coins in three different denominations amounting to Ksh.110. Other members of the public joined in and wanted to lynch the appellant but the three took him to Ruaraka Police station and reported the incident. The appellant was re-arrested by ***PC. Festus Nyakeno*** (pw3), who also took possession of the paper bag and the coins therein, at 8.20 pm. ***Harrison*** reported that he had lost Ksh 2,610 in the robbery incident and the appellant was arraigned in court accordingly.

In his defence, the appellant asserted that he was on the material day and time heading to his residence in Kariadudu when he met Harrison, who was his enemy, with some village youths and they ordered him to stop and sit down. Thereupon they beat him up saying he was one of the other thieves but he started screaming attracting other villagers who advised Harrison and the youth to take him to the police if he had wronged them. They went to Ruaraka police station where Harrison produced some coins and told the police that the appellant had stolen from him. The police then charged him with the offence which he denied. He called his father, ***William Wainaina Leshire***, as a witness but he only stated that he knew Harrison as a tenant of his mother. He knew nothing else about the case.

The two courts below rejected the defence of the appellant and believed that the testimony of the three witnesses for the prosecution was consistent and credible. After reviewing the evidence and the complaints put forward by the appellant on appeal, the High court stated:

> ***"It is our position that there is no contradiction in the evidence tendered by the prosecution to warrant us to say that the case against the appellant was not proved beyond reasonable doubt. The totality of the evidence by PW1, PW2 and PW3 puts the appellant on the scene of crime beyond any doubt. The evidence of PW2 is that having heard screams from the shop of PW1, he responded to help him and found the complainant struggling with the appellant. He says that he held the appellant from behind while his head and his hands were inside the shop beyond the grilled counter. That evidence was supported and/or corroborated by the evidence of PW3 who also found that the appellant had been arrested by PW2 and PW1.***
>
> ***We therefore think the evidence of the three prosecution witnesses who witnessed the arrest of the appellant is beyond error or mistake. This case is not about identification but whether the appellant was arrested as he was trying to rob the complainant. The evidence of PW1 is that from the time the three intruders came to his shop to the time the arrest of the appellant, he did not lose sight of the appellant. This therefore means that from the time the appellant and his colleagues attacked the complainant to the time of his arrest the chain of events were clear, continuous and appropriate to the guilt of the appellant."***

The main ground of appeal in challenging those findings is that the High court did not adequately evaluate and analyse all the evidence to arrive at its own conclusions. If it had done so, according to the appellant, it would have noticed and acted upon the other three grounds, to wit: that the admission of exhibits was based on hearsay evidence; that there was no investigation carried out to ascertain whether it was possible for any human hand to go through the small opening at the counter; and that the plea was not unequivocal. ***Mrs. Rashid*** further referred, unprocedurally we must say, to other issues outside the amended memorandum of appeal, relating to the language used at the trial and alleged shifting of the burden of proof.

In dealing with those issues, we must recall that this is a second appeal and therefore it must lie on issues of law only (see section.361 of the Criminal Procedure Code). As this court has stated times without number, it would not readily interfere with concurrent findings of fact made by the two courts below, and will accord them due deference, unless those findings are based on no evidence at all or on a perversion of the evidence on record or where, looking at the case as a whole, no reasonable tribunal properly directing its mind, would have made such findings. The findings would simply be bad in law. This court would also largely defer to assessment of credibility of witnesses made by the trial court which had the advantage of hearing and seeing the witnesses testify before it.

The failure, if any, by the first appellate court to analyse and re-evaluate evidence would, of course, be a valid ground of appeal in law because the court would have shirked a solemn duty which the appellant expects it to discharge. See ***Okeno v. Republic [1972] EA 32***. Nevertheless, there is no set format to which a re-evaluation by a first appellate court should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court. That was the view expressed by the Uganda Supreme Court in the case of **Uganda Breweries ltd v Uganda Railways Corporation [2002] 2 EA 634**, which we find persuasive. The court in that case further stated:

> ***"A first appellate court is expected to scrutinize and make an assessment of the evidence but this does not meant that the court should write a judgment similar to that of the trial court" – See Semoya v Airports Services Uganda Ltd [1999] LLR 109.***
>
> ***And in Odingo & Another v Bunge No. 10/89, the court stated:***
>
> ***"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."***

In this case, the evidence on record came from three crucial witnesses-pw1, pw2 and pw3. We have examined the record of the first appellate court and we are satisfied that it was aware of its duty to re-evaluate the evidence afresh and to arrive at its own conclusions. It stated so expressly. It is possible, of course, that a court may well state so expressly and still fail to demonstrate its faithfulness to such expression. In this case, however, it is clear that the High court examined the evidence tendered by all the witnesses, including the evidence of the appellant and his witness, before coming to the conclusion stated above. We find no merit in the complaint made by the appellant on that score.

The specific issues raised by ***Mrs. Rashid*** are, firstly, that there was no plea taken before the appellant was tried, and if there was, it was not unequivocal. Consequently, the proceedings were a nullity *ab initio*. This was not an issue raised before the High court but is nevertheless an issue of law which we may deal with. The basis for the submission was that the Court of Appeal, in the first appeal which was allowed and the matter remitted back to the High court (Cr.A No. 102/2006), held that there was no plea taken. The record of the judgment in that case was produced before us but it is clear to us that the issue of plea was only mentioned in passing or was made *obiter* and was not part of the *ratio decidendi* in that decision. The court stated in part, in the only reference made to the "Plea":

> ***"It is not clear as to whether he pleaded guilty to the charge or whether he did not plead guilty to that charge....)***

As stated earlier, the only reason given for allowing the appeal was that a judge who did not participate in the appeal appended his signature to the judgment of the court. The decision cannot therefore be relied on as a finding of this court, differently constituted, that there was no plea taken or that the plea was equivocal. On our own examination of the record, it shows that the appellant was taken before the Chief Magistrate in Makadara on 31st October 2000 when the following transpired:

"31/10/2000

Before Hon Tunya CM

Prosecutor CIP Kimanyi

Court clerk Lucy

Accused

Interpretation Kiswahili

Court

Charge read over and explained to accused

Accused plea of not guilty entered

Hearing 15/1/01 court 4. Reallocation 14/11/2000

Hon. Tunya

CM"

It is apparent from that record that the appellant never pleaded "guilty" and that his plea was "not guilty", hence the reason for fixing a hearing date for the case. The manner of recording the plea caused no prejudice to the appellant, who was subsequently reminded of the charge before the trial commenced. In our view, the issue of "plea" is a non-issue, and we reject that ground of appeal.

The second specific complaint raised by the appellant was that the production of the exhibits in form of

the coins and the paper bag containing them was improper. If we understood Mrs. Rashid, the impropriety arose because the silver coins or the paper bag were not shown to Harrison to identify before production in court by the arresting officer who had been given custody of the coins. In her view, only Boniface and Joseph were shown the items in court for identification and therefore, the production of the exhibit was based on hearsay evidence and was inadmissible. In response to this submission, learned state counsel, ***Mr. Monda***, submitted that the exhibits were properly identified by the witnesses before production in court. ***Mr. Monda*** is right.

The record shows that before the exhibits were "marked for identification" (MFI 1), they were shown to Harrison who stated as follows:

> ***"The accused had silver coins in his pockets. There was electric light (in)*** (sic) ***he had coins amounting to Ksh.110/=.***
>
> ***2 five shillings coins.***
>
> ***2 ten shillings coins***
>
> ***Rest were one shillings coins. (Mfi-1)"***

The same "MFI 1" was shown to ***Boniface*** and ***Joseph*** and they consistently identified them as the items they recovered from the appellant. We find no merit in this ground of appeal.

The third specific issue relates to the size of the opening through which the appellant's hand was purportedly grabbed and held by ***Harrison***. ***Mrs. Rashid*** referred to the record in which the trial court recorded ***Harrison*** as stating as follows:

> ***"I sell through a window measuring 5"x4" which has a small window for commodities, the rest of the place is grill"***.(sic)

In the judgment of the trial court, the court simply referred to this opening as ***" a small window used by PW1 for giving out goods and receiving payments"*** while the High court, stated that the window was ***"measuring 5x4 metres for selling commodities to customers"***. There was thus an obvious disconnect relating to the size of the window at the counter and it was the submission of Mrs. Rashid that a reasonable doubt arose as to whether really Harrison was robbed in the manner he and his witnesses narrated. In response, ***Mr. Monda*** submitted that the crucial issue is not the size of the window but whether it was the appellant who robbed the complainant, and on this there was consistent and credible evidence that the appellant was caught red-handed in the act.

We have anxiously considered this ground of appeal but in the end we have come to the conclusion that it has no merit. It is indeed so, that there is disparity in the description given to the small window, and particularly with regard to the actual size. It did not help matters that the investigating officer did not visit the scene of crime to verify the size, but we are satisfied from the record, even in the absence of that evidence, that there was a small window at the counter through which Harrison sold his goods and received payments and that was the window through which the appellant put his hand which was held by Harrison. We say so because the evidence of Harrison is supported by Boniface who on arrival at the scene found ***"one person struggling with the one at the counter calling for help. They were struggling through the opening where sales are done. I held the person outside..."***.

Joseph on his part found on arrival: ***"The person was at the counter. The person's hand was inside and shopkeeper was holding his hand from inside"***. There was a reasonable basis therefore for accepting the evidence that the appellant put his hands through the small window and we have no reason to disturb that finding of fact.

That would have been the end of the grounds raised by the appellant in the amended memorandum of appeal. But ***Mrs. Rashid*** adverted to the original memorandum of appeal drawn up by the appellant in

person to submit that the issue of language was not considered by the High court although it was specifically raised and argued by counsel on record. She also raised the issue of shifting the burden of proof to the appellant, contrary to the law.

It is indeed correct, that counsel on record for the appellant raised the issue of language before the High court, but there was no consideration or decision on that issue. It is a matter this court would have considered anyway even if it was raised for the first time because it is an issue of law going to the root of fair trial which is jealously protected under the Constitution. The complaint does not relate to the entire trial but to the evidence of one witness, the arresting officer (pw4), who is recorded to have testified in "English" when the rest of the trial was in "Kiswahili". According to ***Mrs. Rashid***, the trial was thus irreversibly vitiated and a retrial cannot be ordered after13 years since the appellant's arrest. On his part, ***Mr. Monda*** submitted that the issue was not only raised belatedly but also without merit. He pointed out that the appellant had fully participated in the trial where he is recorded as having cross-examined all the witnesses including the arresting officer (PW4). The appellant also filed written submissions in English in the appeal before the High court.

We have carefully re- examined the record and confirmed that there was a court interpreter at every stage where the appellant appeared during the trial. There was no complaint raised about interpretation of the proceedings to such language as the appellant professed to understand. In the circumstances the issue of language was raised belatedly and without a proper basis. We reject the complaint.

Finally, ***Mrs. Rashid*** submitted that the trial court shifted the burden of proof when it appeared to require proof from the appellant about his assertion that Harrison was his enemy and that is why he fixed the robbery charge on him. That evidence came from the appellant himself in his defence and the portion of the trial judgment complained about is the following:

> ***"The issue is could it be true that the accused person with those who ran off robbed the complainant of money or could it be true that complainant is enemy of accused and is only making up a case against him. It is not clear how the enemity came about. The fact that the complainant may be a tenant of the grandmother of the accused (something denied by pw 1) does not make it obvious that accused has shares in his grandmother's property in other words I do not see how the accused would be affected by the tenant/landlady relationship."***

The issue was not specifically raised or argued before the High court which agreed with the trial court in rejecting the appellant's defence. We find no merit in it either. The burden of proof in a criminal case in this country never shifts in law as it is always on the prosecution to prove the case beyond reasonable doubt. In some circumstances, however, the law allows the evidential burden of proof to shift to the person who makes a particular allegation, on a balance of probability. The prosecution in this case proved a version of events which the two courts below believed and expressed no doubts. But the appellant sought to rubbish those events on an alleged existing enemity between him and ***Harrison***. The two courts found no reason to believe him since there were no allegation of enemity between the appellant and the other witnesses who supported the complainant. The burden of proof was not shifted.

In sum we find no merit in the entire appeal and we order that it be and is hereby dismissed.

Dated and Delivered at Nairobi this 7th day of February, 2014

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/jkc