REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, KIAGE & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 234 OF 2007

BETWEEN

GEOFFREY NDUNG'U NJUNGE.......................................APPELLANT

VERSUS

REPUBLIC….………………………………....…….RESPONDENT

(An appeal from a sentence of the High Court of Kenya at Nairobi (Ojwang' & G.A. Dulu, JJ)

in

H.C.CR. C. NO. 6 OF 2006)

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JUDGMENT OF THE COURT

1. **Geoffrey Ndung'u Njunge**, the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 28th October 2004 along Kikuyu Road, Nairobi with others being armed with dangerous weapons robbed Gerald Gitau Kiguru of a bicycle, wristwatch and cash and at or immediately before or after the time of the robbery used actual violence on Gerald Gitau Kiguru.

2. The appellant also faced a second count of the offence of handling stolen property contrary to section 322(2) of the Penal Code the particulars being that on 28th October 2004 along Kikuyu road, Nairobi with others handled a bicycle knowing or having reason to believe it to be stolen property.

3. The appellant was tried and convicted on the first count and sentenced to death. His appeal to the High Court was rejected prompting him to lodge the present second appeal to this Court.

History

4. On 28th October 2004 at about 7.30 pm, PW1 **Gerald Gitau Kiguru**, a milkman and (PW2) **Robert Kamau Muthea**, a hotelier, were riding their bicycles along Dagoretti/Kikuyu Road on their way home from work. On reaching a steep ascent, they alighted and were pushing their bicycles uphill, one behind the other, when they were attacked by a gang of four people at a place known as Kihunguro or Daraja.

5. PW 1 was hit on the head and hand with an iron bar and fell alongside his bicycle. His pockets were ransacked. The assailants threatened to kill him. One of the assailants had a knife with which he threatened to stab him. The assailants took his watch and his bicycle and cash in the amount of Kshs.200.00. A Good Samaritan who was passing by came to his aid and together with members of the public, gave chase and apprehended one of the assailants, the appellant, who was taking off with PW1's bicycle.

6. PW2 unsuccessfully attempted to run away on noticing the assailants. He was hit twice with something that looked like a metal bar and he fell down alongside his bicycle. His pockets were also ransacked. The assailants took his identity card and cash in the amount of Kshs.500.00. On sighting a vehicle approaching the scene, the assailants ran away.

7. On 28th October 2004 at about 7.30pm, John Kamau Mungai, PW3, a butcher at Kikuyu town was on his way home aboard a matatu. He was sitting in the front seat of the Matatu next to the driver. He saw a bicycle in the middle of the road. Suspecting that a passing vehicle had hit a cyclist, the Matatu turned back and at the scene found PW1 who had been attacked and robbed. PW3 decided to assist him to make a report to the police and together they began on their way to the police post. On the way, PW 1 spotted his bicycle with the appellant. PW3 and members of the public arrested the appellant with PW1's bicycle and also recovered a knife from him. The appellant was taken to Dagoretti Police Post where he was re-arrested by Police Constable Joseph Kairu, PW4, placed in the cells and subsequently charged.

8. In his defence the appellant stated that on 28th October 2004 at about 6.00pm, he took a matatu from Limuru to Kikuyu having delivered cows to Limuru. On getting to Kikuyu at about 8.00pm he decided to walk and then got into a matatu when Somebody inside that matatu claimed that he was "one of them"; that he was then beaten up and taken to the police post where he was locked up and later charged with an offence he knew nothing about.

9. The magistrate's court at Kibera had no difficulty in convicting the appellant for the offence of robbery with violence and sentencing him to death. The appellant unsuccessfully appealed to the High Court and hence the present appeal.

The appeal

10. The grounds on which the conviction and sentence are faulted and on the basis of which the decision of the High Court is challenged are that the appellant's rights under section 77(2)(b) of the now repealed Constitution, were violated in that the trial court failed to indicate the language used in the trial; that the ownership of the bicycle allegedly stolen was not proved; that the prosecution did not prove its case to the required standard and that the lower courts failed to adequately consider the appellant's defence.

Submissions by counsel

11. At the hearing of the appeal before us, learned counsel Mr. Edward Rombo appeared for the appellant while Mrs. G. Murungi, Senior Assistant Director of Public Prosecutions, appeared for the respondent.

12. Mr. Edward Rombo submitted that the language in which the proceedings were conducted before the trial court was not indicated and that the appellant raised the matter in the High Court but no ruling was made in that regard; that at the time the plea was taken, there is

indication that there was an interpreter who interpreted from English to Swahili but that there is no such indication in reference to subsequent hearings; that even though the appellant participated in the proceedings, he was not comfortable and he was prejudiced and he did raise the matter; that despite having taken up the complaint, the High court did not address or make any finding on that fundamental issue of language.

13. Mr. Rombo further submitted that to sustain the charge against the appellant, it was necessary for the prosecution to prove ownership of the bicycle allegedly stolen and that in the absence of proof that the complainant owned the bicycle, the prosecution did no establish the offence.

14. Finally Mr. Rombo submitted that the defence advanced by the appellant that he was not found with the bicycle was not considered and the prosecution did not therefore prove the case beyond any reasonable doubt. For those reasons Mr. Rombo urged us to allow the appeal as the appellant's conviction was not safe.

15. Opposing the appeal Mrs. G. Murungi submitted that there was an interpreter throughout the trial; that the appellant understood the language of the proceedings as he cross-examined all the prosecution witnesses and filed written submissions in the English language.

16. On the contention by the appellant that the ownership of the bicycle was not established, counsel submitted that there was overwhelming evidence against the appellant; there was the testimony of the complainant that his bicycle was stolen; there was the evidence of PW3 who witnessed the recovery of the bicycle from the appellant in the same condition as it was before the theft and the appellant did not explain how he came into possession of the bicycle so soon after the robbery.

17. Finally Mrs. G. Murungi submitted that the appellant's defence was considered by the lower courts and rejected, with the High Court observed that the defence was a mere denial and the appellant did not explain possession of the bicycle.

18. In his brief reply Mr. Rombo argued that the submission of written submissions by the appellant in the English language was not an indication that he was familiar with the language as the submissions may well have been prepared for him.

Analysis and our determination

19. We have considered the appeal and the submissions by counsel. This is a second appeal. Our jurisdiction is limited to a consideration of points of law in accordance with section 361 of the Criminal Procedure Code. In **Kaingo -V- R (1982) KLR 213 at p. 219** this Court stated that:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R (1956) 17 EACA 146)"***

20. The issues that we have to determine for purposes of this appeal are firstly, whether the trial was conducted in a language that the appellant understood and whether the appellant's rights under section 77(2)(b) of the now repealed Constitution were violated. Secondly, whether the charge was proved to the required standard and thirdly, whether the lower courts considered the appellant's defence.

21.

complaint. The circumstances in the present case are not dissimilar to those in **Said** **Hassan Nuno V. Republic** **Criminal Appeal No. 322 of 2006** where this Court stated:

> "***Apart from the above, at each stage of the proceeding, a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused, his counsel, the court or to the witness.........................It is our view that there was a language in which the proceedings were conducted and with the appellant's admission that he understood the charge, we are in no doubt he followed the proceedings adequately.***"

22. For the court to nullify proceedings on this ground, it must be clear that the appellant did not understand what was happening during the proceedings. This was not the case here. The appellant actively participated in the trial. The charges against the appellant were read and explained to him. He pleaded to the charges. He extensively cross-examined he prosecution witnesses. He had no difficulty in offering his defence. He tendered written submissions in the High Court in English language. There is not the slightest indication based on the record that the appellant did not understand the proceedings or that he was in any way prejudiced.

23. We are of the view that the omission by the trial court to indicate in the court record at every session of the trial which language was used did not occasion a failure of justice. We therefore reject this ground of appeal.

24. As regards the question whether the charge was proved to the required standard, we are satisfied that it was. The trial court considered the evidence. The High Court carefully reviewed and analyzed the evidence and correctly drew the conclusion that the appellant was properly identified as the thief as he was seen by PW1 and PW3 as he left the scene of the crime riding PW1's bicycle and there was no break in the chain of events until his arrest. There are concurrent findings of the lower courts. There was no doubt in the mind of the complainant that the bicycle was his. It was distinct in the manner in which he had modified it for purposes of carrying milk crates. It was not necessary, as suggested by counsel for the appellant, for the complainant to produce receipt to establish his ownership of the bicycle.

25. Apart from having been identified, we think the fact that the appellant was found in possession of the bicycle further fortifies the conviction. In a matter of minutes after the robbery, the appellant was found in possession of the stolen bicycle. In **Odhiambo v R [2002] 1 KLR 241** this Court stated:

> "***it is settled in law, that evidence of recent possession, is circumstantial evidence, which, depending on the facts of each case, may support any charge, however penal***."

26. The identification of the appellant by the complainant and by PW3 was therefore buttressed by evidence of recent possession. The appellant did not offer explanation as to how he came into possession of the complainant's bicycle. The inevitable conclusion must be that the appellant was involved in the robbery.

27. In the circumstances, the lower courts were correct, having considered the defence advanced by the appellant, to reject it.

28. In the result, we do not consider that the appellant's appeal has merit. We dismiss it in its entirety.

DATED and DELIVERED at Nairobi this 7thday of February, 2014.

J. MWERA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR