IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, GATEMBU & MOHAMMED, JJ.A.

CRIMINAL APPEAL NO 188 OF 2009

BETWEEN

JOSEPHAT KARANJA ……..…….…..….....APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang & Warsame, JJ) dated 15th July, 2008

in

HCCR.A NO. 190 OF 2007)

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JUDGMENT OF THE COURT

Background

This is a second appeal by *JOSEPHAT KARANJA*, (hereinafter referred to as the appellant) who was charged before the Chief Magistrate's Court at Kibera with the offence of attempted robbery with violence contrary to *section 297 (2) of the Penal Code*.

The particulars of the offence were that on the 17th day of December 2005, at Kibera, Makina within Nairobi province, the appellant, jointly with another not before the court, while armed with a dangerous and offensive weapon, namely a *panga*, attempted to rob *SAMUEL ATUKI ONYIEGO* of KShs.3,000/- and some documents, and at or immediately before or immediately after the time of such attempted robbery used actual violence against the said *Samuel Atuki Onyiego*.

At the trial, *Samuel Atuki Onyiego* (PW1), testified that on his way home on 17th December, 2005, at about 11:20pm, he was confronted by two people, among them the appellant, who asked him to

surrender everything that he had on him. One of the assailants had a panga, and attacked PW1 with it, cutting him on the forehead. A struggle ensued between them, and PW1 screamed for help, which drew members of the public to the scene. When they arrived, they found PW1 still holding onto the appellant who had the *panga*, but the other assailant had escaped. There were police officers on patrol nearby who came along and arrested the appellant.

The appellant was also identified by *Daniel Kiptoo Tauni* (PW2), who was PW1's neighbour. PW2 testified that on the material night, he was woken up by PW1's screams and that he was one of the members of the public who went to PW1's rescue. When he arrived at the scene of the incident, he found that the appellant was holding a *panga*, and PW1 had a cut on his forehead. After he arrived at the scene, other neighbours and the police arrived at the scene soon thereafter. The police arrested the appellant, and PW1 was taken to hospital.

The evidence of PW1 and PW2 was corroborated by *Evanson Julius Lagat* (PW3) who testified that on the night of 17th December, 2005, he was at home when he heard screams. He went out and found that PW1 had been attacked and had been injured. He also saw the appellant was being held by PW1. The police had already arrived, and a police officer was holding a *panga*. The police took away the appellant, and he, (PW3) together with other neighbours took PW1 to get medical attention for his wound. He further testified that he recognised the appellant as someone he used to see in Makina area, Kibera.

The incident in question was investigated by *PC 56181 Peter Rusera Mose* (PW4). On 18th December, 2005, PW4 was called by his superior and instructed to investigate a case of attempted robbery where the complainant had been injured and taken to hospital. He testified that the complainant (PW1) informed him that on 17th December, 2005, when he was on his way home, he had been attacked by robbers. PW1 was able to grab the one of the people who attacked him. Shortly thereafter, the police arrived on the scene and arrested one of the assailants. PW1 had been injured on the forehead, and the wound had been stitched. PW4 produced the *panga* which PW1 was assaulted with, as well as a cap which he was wearing which also had a cut on it. The person who had been arrested by the police was still in police custody, and PW4 was able to identify him as the appellant.

PW1 was examined by *Dr. Zephania Kamau* (PW5) on 22nd December 2005. PW5 found that PW1 had a traverse wound on the forehead that had been stitched. His observation was that the wound was about 5 days old and that the degree of injury suffered by PW1 was harm.

The final prosecution witness was *No. 61556 PC Ayub Otieno* (PW6), who testified that on the night of the attack, he and three other officers were on patrol along Ngong road. When they reached the Makina area, they found a large crowd of people, and they sought to confirm what was going on. They confirmed that the appellant had been arrested by members of the public. PW6 further testified that they were informed that the appellant and another person had attempted to rob PW1. PW6 and the other officers arrested the appellant and also took possession of the *panga* which the appellant was said to have attacked PW1 with.

At the close of the prosecution case, the appellant was placed on his defence and gave unsworn testimony. In his defence, the appellant testified that he had been working in his butchery when PW1 asked him to sell him some meat. The appellant agreed, but PW1 stated that he had not carried any money, but that he had money in his house. He requested the appellant to accompany him to his house for the purpose of collecting money, a request that the appellant acquiesced to.

The appellant further testified that when they reached PW1's house, PW1 went into the house, then came out screaming. The appellant testified that he asked PW1 to pay him so that he could leave, but PW1 continued screaming, which attracted his neighbours. When his neighbours came to the scene, PW1 claimed that the appellant wanted to rob him, which led to a commotion and the appellant's eventual arrest. The police arrested the appellant in spite of his attempts to give his side of the story.

The trial court, being satisfied of the appellant's guilt, found that the prosecution had proved its case

beyond reasonable doubt and convicted the appellant and sentenced him to death.

Aggrieved by the judgment, the appellant preferred an appeal to the High Court in which he faulted the trial court on the following grounds: not affording him an opportunity to prepare for his defence contrary to *section*

77 of the retired Constitution; the identification of the appellant by witnesses yet there was no identification parade; and that the evidence relied on was contradictory and did not prove the prosecution's case to the required standard.

The appeal was opposed by the State, who argued that the burden of proof was properly discharged. Counsel for the state argued that the appellant received a fair trial, and that there was strong evidence in support of the conviction.

The first appellate court, after re-evaluating the evidence on record, was satisfied that the prosecution had proved its case beyond reasonable doubt, that it was indeed the appellant, together with another, while armed with a *panga* who attempted to rob PW1 and during the course of the attempted robbery, injured the complainant. The court upheld the conviction and sentence in the following terms:

> *"in the instant case it cannot be said that the appellant was convicted on pieces of disjointed and discredited evidence. The quality of the evidence detects, that we sustain the conviction entered by the trial court. In conclusion, therefore, is that the appellant was convicted on cogent and credible evidence and that the evidence on record is sufficient to sustain the conviction that was entered by the trial court. We make a finding that the appeal has no merit and it is hereby dismissed."*

Aggrieved by this judgment, the appellant preferred this second appeal. He relied on the Supplementary Memorandum of Appeal dated 24th June, 2013 which sets out the following five grounds of appeal:

i. That appellate judges erred in law in failing to note that the language of the court was not recorded;

ii. The appellate judges erred in laws in failing to note that that section 150 of the Criminal Procedure Code was not complied with;

iii. The appellate judges erred in law by failing to note that the provision under section 169 of the Criminal Procedure Code was not complied with;

iv. The learned appellate judges erred in law in failing to fully re- analyse and re-evaluate the entire evidence as bound by law; and

v. The learned appellate judges erred in law in concluding that the prosecution case was proved beyond a reasonable doubt and filed to note that the same remained unproved as required by law.

Submissions By Counsel At the hearing of the appeal, Mr J.R. Amutallah, learned counsel represented the appellant while Mrs F. Njeru, learned Senior Prosecution Counsel, represented the respondent.

Learned counsel for the appellant argued that the court did not record the language of the trial court and that there was no interpreter. He, therefore, urged the court to find that since there was no interpreter, this was fatal to the trial and as such, a violation of his right to a fair trial.

The appellant relied on the authority of *ABDALLA V R, [1989] KLR 456.*

The second ground relied upon by the appellant is that there were material witnesses who were not

called by the prosecution to strengthen the case of the accused. He cited as an example, the wife of the complainant who was not called to give evidence, yet in his view, she was a critical witness. Counsel argued that this witness and others would have given adverse evidence or could have aided the court establish the truth. Counsel

further submitted that the charge sheet alleged that the appellant attempted to rob the complainant of KShs.3,000/- and assorted documents and yet these were never produced. Further, that the *panga* with which the complainant was alleged to have been assaulted with was never dusted for fingerprints and it was never clear that the bloodstains found thereon belonged to the appellant. Further, counsel submitted that there was also doubt as to whether the appellant was actually attacked as the P3 report indicated that the degree of injury was *'harm'*.

The further ground that counsel relied on was that *section 169 of the Criminal Procedure Code* which provides for the contents of a judgment was not complied with. In his view, the only evidence factored into the judgment of the trial court was the evidence of PW1, and that there was no mention of the other witnesses. He contended that the law requires that a judgment should capture all the evidence on record. In counsel's view, the trial court was selective and produced an unprocedural judgment.

Counsel further argued that the first appellate court failed to re- evaluate and analyse the evidence. He argued that the testimony given before the trial court was contradictory and that the nature of the contradictions went to the root of the case and should be resolved in the appellant's favour.

The final argument by Counsel for the appellant was that there was a violation of the appellant's rights as he had indicated that he was unwell, and yet the court elected to proceed with the trial. His submission was that this amounted to a violation of his constitutional right to prepare for his trial. Counsel urged us to allow the appeal.

The appeal was opposed by Mrs F Njeru. In response to the first ground on language, she submitted that the appellant at all times understood the plea. In addition, she stated that all the witnesses gave evidence in *Kiswahili*, and the appellant cross examined the witnesses in *Kiswahili*. In the cross examination, there was evidence indicating that the appellant understood the language of the court. In addition, the appellant gave evidence in *Kiswahili* and at no time did he complain that he did not understand the proceedings.

In response to the issue that vital witnesses were not called, counsel submitted that *section 150 of the Criminal Procedure Code* allows a court to call witnesses that it is of the view would be material to the trial. She submitted that all the vital witnesses were called, and that even if PW1's wife had been called, her evidence would not have been any different from that of the other prosecution witnesses. In her view, all the material witnesses who saw and arrested the appellant gave evidence. Counsel further submitted that the injury on the complaint was testified to by the clinical officer and it could not, therefore, be denied that the complainant was attacked.

In response on the issue of the judgment, counsel submitted that *section 169 of the Criminal Procedure Code* was fully complied with by the trial court, and that the judgment produced by the court contained all the points of determination, the decision of the court as well as the reasons for the decision. Counsel further submitted that the trial court fully re- evaluated and re-analysed the evidence on record, and reached a conclusion that the appeal had no merit, and that the prosecution had proved the charge against the appellant beyond any reasonable doubt.

Counsel submitted that there was no prejudice to the appellant in the trial court continuing with trial on the day when the appellant stated that he was unwell. She submitted that the appellant was given a different date on which to present his defence and did not have to testify on the day when he said that he was unwell. Mrs Njeru urged us to dismiss this appeal.

Analysis

This is a second appeal, and by dint of *section 361 of the Criminal Procedure Code*, the Court has jurisdiction only to deal with matters of law. This Court is guided by *KARINGO V R, (1982) KLR 213 at* page 219 where

this Court held 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."*

See also *THIAKA V R, [2006] eKLR*, the court dealing with a second

appeal on a criminal matter. On whether this Court can interfere with the findings made at the lower courts, it was stated:

> *"…As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings."*

On the issue of whether an interpreter is mandatory, the retired Constitution, which was in force at the time the appellant underwent trial provided at *section 77 (2)* that:

> *"Every person who is charged with a criminal*
>
> *offence … shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge."*

We note from the record that the issue of the language was never canvassed at the first appeal. A perusal of the record does not indicate what language the trial was conducted in. It, however, indicates that the appellant cross examined each of the prosecution witnesses, with the exception of the police surgeon, PW5. It is, therefore, apparent that the appellant understood the evidence presented before the court. In addition, the appellant was able to give his evidence in *Kiswahili*, indicating that he

understood that he had been asked to mount his defence. In *GEORGE*

MBUGUA THIONGO V R, CR.A NO. 302 OF 2007, this Court stated that:

> *"For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not understand what went on during his trial."*

It is clear in this case that the appellant was fully aware of the case against him and that he understood what went on during his trial. A similar

view had been taken in the case of *DAVID NJUGUNA WAIRIMU V R, [2010]*

eKLR (CR.A NO. 28 OF 2009) in which this Court, faced with a similar argument stated that:

> *"The record clearly reflects that the appellant fully participated in the proceedings, asked*

questions in cross-examination, himself gave evidence in his defence."

Similarly, in this case, it is clear that the appellant was able to fully participate in the hearing. He even

mounted his own defence, and had he not understood what was happening, then he would not have been able to defend himself.

On the allegation that crucial witnesses were not called, it is common course that there is no set number of witnesses required to prove any fact. *Section 143 of the Evidence Act* provides that:

> *"no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

See also the authority of *ALEXANDER NGUGI NJERI V R*, *CR.A NO. 4 OF 2009 (unreported)* where the Court stated that:

> *"In an appropriate case, conviction can be based even on the evidence of a single witness."*

Whether or not a witness is material to a case is a question for the trial court to determine. The possible materiality of the evidence of the uncalled witness was not shown in the appeal and the absence of any witnesses or evidence was not prejudicial to the prosecution's case. In addition, the appellant was caught at the scene, and all the evidence points to him as being the person who injured PW1.

This court is guided by the case of *MWANGI V R*, *[1984] KLR 595*, where this Court stated:

> *"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecutor and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."*

The appellant has not suggested such motive in the non calling of some witnesses. The prosecution's election to call no other witnesses cannot, therefore, be faulted.

Further, to sustain a charge under *section 297 (2) of the Penal Code*, the prosecution is required to show that the accused has:

> *"assaulted any person with the intention to steal anything, and immediately before or immediately after the time of the assault, uses violence*, AND is:
>
> > *armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person"*.

In the present appeal, testimony was led to the effect that the appellant assaulted PW1 and demanded KShs.3,000/-. During this attack, PW1 sustained a cut on his head. There was never any doubt as to the identity of the attacker as he was held by PW1 until PW2 and PW3 arrived at the scene. Nothing was said to dislodge this evidence, and both the trial court and the first appellate court were right to accept it. It is apparent that the charge was proved to the required standard.

As to whether the judgment of the trial court complied with *Section 169 of the Criminal Procedure Code*, we hold that the judgment of the trial court cannot be faulted. A perusal of the record shows that the trial court set out all the evidence tendered before it, the issue for its determination and the reasons leading to the finding of guilty. In any event, as has been stated by this Court in *HAWAGA JOSEPH ANUANGA V R*, *(CR.A NO. 84 OF 2001) (unreported)* that:

> *"Failure to prepare a judgment in „strict accordance with section 169 of the Criminal Procedure Code, … would not mean that the conviction of the appellant was wrong or to be invalidated."*

On the issue of whether there was a violation of the appellant's rights in that the trial proceeded on a day when he informed the court that he was unwell, the record shows that on 15th August 2006, the trial court elected to proceed with the trial in view of the fact that PW6, the witness who was to testify, had come from Meru. On this day, the appellant had applied for an adjournment on the ground that he was unwell; the court noted that the appellant did not look sick, and since the witness had travelled a long distance, allowed him to testify. The appellant cannot allege that he was prejudiced in any way because after PW6 testified, the appellant cross examined him on almost every element of his testimony. This issue was also canvassed before the first appellate court, who after considering the arguments stated as follows:

> *"We agree that in capital offences, the sentence is death and it is the obligation of the trial court to comply with all the requirement (sic) of the law. However, having gone through the proceedings and having seen the cross examination mounted by the appellant, we see no violation or prejudice that was occasioned by failure of the trial court to adjourn the matter when the appellant made allegation (sic) of sickness. We think a judicial officer, though not a doctor, is mandated to make an observation as to any allegation put forward by*
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> *a party on any issue. On observation and scrutiny, the trial court formed an opinion that the appellant did not look sickly. On our part, we think the trial court was justified in making that decision … and we see no prejudice that may have resulted from that decision. Nothing therefore, attaches to allegation (sic) that the matter proceeded at a time when the appellant was sick."*

We also note from the record that the appellant was not required to testify on the day that he claimed to be sick. The appellant testified at a later date. We find that his rights were, therefore, not violated.

We find that the findings of the trial court and the High Court were based on sound evidence. In the circumstances, there is no basis for interfering with those findings. We accordingly dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 4th day of April, 2014.

J. W. MWERA

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR