IN THE COURT OF APPEAL AT NAIROBI

CORAM: GBM KARIUKI, MWILU & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 145 OF 2007

BETWEEN

PHILIP MBONDO KIOKO ………........................... APPELLANT

AND

REPUBLIC …... RESPONDENT

(An appeal from the judgment of the High Court at Nairobi

(Ojwang & Dulu, JJ) dated 31st July, 2007

in

H.C.CR.A NO. 223 OF 2005)

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JUDGMENT OF THE COURT

Background

This is a second appeal by *PHILIP MBONDO KIOKO* who was charged with two counts before the Senior Principal Magistrate’s Court in Nairobi with the offence of robbery with violence contrary to *Section 296 (2) of the Penal Code*.

He faced an alternative charge of handling stolen property contrary to *Section 322 (2) of the Penal Code*. In count 3, the appellant was charged with the offence of causing grievous bodily harm contrary to *Section 234 of*

the Penal Code and in count 4, he was charged with the offence of causing

bodily harm contrary to *Section 251 of the Penal Code*.

A summary of the prosecution case is that on 6th May, 2004, at 8pm, the complainant, Jessica Nduku Kioko (PW 1) was in her supermarket with four workers and two customers, when four men broke into her shop. One of the men while brandishing a pistol, ordered them to lie down while one of the assailants while brandishing a pistol uttered the words: *“mlale chini ama kila mtu akule mbili mbili”* which translates in English to *“lie down or you will be shot twice”*. PW1 who was in the cash office was ordered to open the cash box while one of the robbers grabbed her handbag. The robbers took PW1’s mobile phone, ATM card, Identity card and cash. The robbers grabbed KShs.3,000/= from the

cash box and alcoholic drinks from the counter and escaped. PW1 alerted shop owners in the neighbourhood.

In the meantime, the security guards caught a suspect and PW1 identified him as the robber who had brandished a gun in her supermarket. The suspect was still holding the alcoholic drink which had a label of PW1's supermarket. Police officers were called to the scene and recorded statements. PW1 identified the labelled alcoholic drink from her supermarket which was found in possession of the assailant and the gun which the assailant had while in the supermarket. PW1 testified that during the ordeal, she had the opportunity to clearly see the appellant when he ordered her to open the cashbox.

PW2, Everlyne Fridah Mbithe, testified that she was assisting in the

supermarket when robbers broke in and ordered everyone to lie down. One of the robbers ordered PW1 to stand up and open the till. The robbers stole cellphones and wines and escaped. A security guard came into the shop and when told of the robbery, alerted the other guards and they gave chase. After a short while, one of the guards returned to the supermarket and reported that one of the robbers had been arrested. The guards brought back the appellant herein and PW1 identified him as the robber who had been brandishing a gun. The guards had found the said gun on the appellant together with a bottle of wine in his hands. PW2 identified the gun in question when it was shown to her in court. One of the guards was injured on his arm in the process of arresting the appellant.

PW3, Jane Rose Kambua was a customer in the said supermarket when she saw four men marching into the shop. Two of the assailants moved towards the counter; one confronted her and showed her a gun saying in Kiswahili, *"hatu cheki"*, which translates to *"it's not a joke!"*. PW3 and the others in the shop were ordered to lie down. PW2 testified that the lights were on and that she had seen all the four robbers.

After she and her colleagues lay down, one of the robbers demanded money and cellphones. They grabbed the cellphones and a handbag and ran away. Shortly thereafter, she found the appellant herein being arrested. She testified that he was the assailant who had warned: *"hatu cheki na watu!"*, which translates to *"we are not here to laugh with anyone"*. PW3 testified that

the appellant had kept watch during the violent robbery to ensure that everyone in the shop heeded the order to lie down. She testified that when he was caught and returned to the shop, he had in his possession a bottle of red wine. PW3 identified the gun and the bottle of wine in court.

PW4, Samuel Ole Leisuye, a guard at Funguo Estate, testified that on 6th May, 2004, at 8.30 pm, he went to the complainant's supermarket and was informed that thieves had invaded the shop. Together with his fellow guards, they gave chase and caught up with the appellant who threatened to shoot PW4. PW4 continued to physically hold and arrest the appellant who hit and fractured his [PW4's] hand. The appellant hit another guard but the guards overpowered him and frogmarched him back to the supermarket. The guards recovered a gun and bottle of wine from the appellant. The appellant's fellow robbers escaped.

PW5, Francis Ole Lekesi, a guard who was injured on the elbow as he participated in the arrest of the appellant, confirmed PW4's testimony.

PW6, Ruth Wangui Kibathi, who runs a fast food outfit close to the complainant's supermarket, testified that she had earlier on seen the appellant, just before the robbery when the appellant and his companion had taken tea at her premises. She testified that the appellant had been at her premises four times before the material day.

PW7, PC Martin Wasike re-arrested the appellant following the robbery. He produced in court the recovered bottle of wine and toy pistol as exhibits.

PW8 Dr. Zephania Kamau, the police surgeon had examined PW4 and classified the injury caused to

PW4 during the chase of the robbers as grievous harm.

At the close of prosecution case the appellant was put on his defence and gave a sworn testimony. In his defence, the appellant testified that on 9th May,

2014, he went to a cafe adjoining a supermarket to have tea. Thereafter, he went and carried out his duties as a hawker until 6.00 pm. He returned to the same café, had a meal at about 7.00 pm on the same day. On his way home, he saw some five people running very fast. He stepped aside and took cover to enable those chasing to proceed with their pursuit; but as the group in chase approached him, they asked who he was and hit him with clubs. He testified that he lost consciousness and woke up in a police station. The appellant denied having been found in possession of a bottle of red wine and gun or weapon.

The trial court found the appellant guilty of the offence of robbery with violence as charged, convicted him and sentenced him to death as provided by the law.

Aggrieved by the conviction and sentence, the appellant first appealed to the High Court but the learned Judges found his appeal devoid of merit and dismissed it.

In his appeal to this court, the appellant challenged the decision of the

High Court on several grounds as captured in the Supplementary

Memorandum of Appeal filed on 28th October, 2011, by his previous Advocates, M/s Wamwayi & Company Advocates. These grounds can be summarized as follows:

1) *The proceedings were conducted in a language that the appellant did not understand and were therefore a nullity.*

2) *The sentence meted out was disproportionate to the offence as the appellant was a first offender and no actual violence was used during robbery.*

3) *The appellant was not given an opportunity to mitigate.*

Submissions by counsel

In his submissions before us, Mr A. O. Oyalo, learned counsel for the appellant contended that the proceedings were conducted in a language that the appellant did not understand. Accordingly, counsel argued, the appellant's rights under *Section 77 (1) (f) of the retired Constitution* as read with *Section 198 of the Criminal Procedure Code* were contravened and there was therefore no proper trial.

Mr Oyalo further argued that the sentence which was meted out to the appellant was disproportionate to the offence as the appellant was a first offender. He argued that it is a cardinal principle of law that a first offender should not be given a maximum sentence. Mr Oyalo further argued that from the record it is not clear whether the appellant was given an opportunity to mitigate. Mr Oyalo urged us to allow the appeal.

Mrs T. Ouya, Senior Assistant Director of Public Prosecutions [SADPP], opposed the appeal. On the issue of language, Mrs Ouya submitted that the essence of the matter is for the court to determine whether there was communication. Mrs Ouya submitted that the record indicates that there was interpretation of English to Kiswahili. She further submitted that from the record it was clear that the appellant followed the trial very well and ably carried out cross-examination of all the witnesses. In her view, this was a clear indication that he knew the offence for which he was charged and he participated fully at every stage of the trial. Mrs Ouya argued that at no time were the appellant's rights violated contrary to Mr Oyalo's submissions.

On the appellant's counsel's assertion that the sentence meted out was disproportionate as there was no actual violence used during the robbery, Mrs Ouya argued that this was clearly a case of robbery with violence and all the ingredients of the offence were present. The offender was armed with an offensive weapon, namely a gun, and was in the company of three other persons, and they threatened the owner of the supermarket and others inside the supermarket making them believe by word and deed that they would be killed. Mrs Ouya submitted that the sentence which was handed down to the appellant was proper as every element of the offence of robbery with violence was present and proved. Mrs Ouya urged us to dismiss the appeal.

In reply, Mr Oyalo reiterated that the magnitude of the violence used was not proportionate to the sentence handed down.

Analysis

As a second appellate court, our jurisdiction is limited by *Section 361(1) of the Criminal Procedure Code* to hearing appeals on matters of law. We are therefore slow to disturb the factual findings of the two courts below. We

endorse the position taken by this court in *KARINGO V R*, *[1982] KLR 213 at219*:

> "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."

On the question whether the trial was conducted in a language that the appellant did not understand, counsel for the appellant directed us to *Section*

77 (2) (f) of the former Constitution which provided:

> *"(f) 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."*

Counsel for the appellant also made reference to *Section 198 (1) of the*

Criminal Procedure Code which provides:

> *"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."*

We have perused the court proceedings and we note that when the plea was taken, the court record indicates that the language was English/Kiswahili. During the hearing, the court record indicates the same languages were used. We note that the appellant cross-examined all the witnesses at length. It cannot therefore be said that he did not understand the proceedings. We are

guided by the decision in the case of *GEORGE MBUGUA THIONG'O V R*, *CR.*

NO. 302 OF 2007 in which 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 at all understand what went on during his trial. That is not the case here. The appellant cross- examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to*

record the language occasioned a miscarriage of justice." [Emphasis added]

See also *DAVID NJUGUNA WAIRIMU V R, [2010] eKLR, CR 28 OF 2009* and

MOSES MOHAMMED FADHILI V R, [2014] eKLR.

From the record, there is a clear indication that there was interpretation from English to Kiswahili. The appellant who was not represented, cross examined each and every one of the prosecution's eight witnesses. Considering the above decisions, it is clear that the appellant comprehended what was going on during the trial and that he fully participated in it.

In the circumstances, it is apparent that the appellant fully understood

and actively participated in the proceedings in the trial court and the omission by the learned trial magistrate to record the language did not occasion a miscarriage of justice. This ground of appeal, therefore, fails.

On the question that the appellant was not given a chance to mitigate, counsel for the appellant relied on *Section 329 of the Criminal Procedure Code* which provides:

> *"The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."*

The court was alive to the need to allow mitigation before sentence but it found that if a court dispenses with mitigation it is not fatal to a conviction where the applicable sentence is a mandatory one as in the instant appeal. We are in agreement. Accordingly, this ground of appeal fails.

On the issue that the sentence meted out was disproportionate to the offence as the appellant was a first offender and no actual violence was used during the robbery, we are guided by *Section 296 of the Penal Code* which states:

> *"296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.*
>
> *(2) If the offender 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."*

The ingredients of the offence of robbery with violence were further elaborated by the Court of Appeal in the case of *OLUOCH V R, (1985) KLR* where it was held that robbery with violence is committed in any of the following circumstances:

> *"(a) The offender is armed with any dangerous and offensive weapon or instrument; or*
>
> *(b) The offender is in company with one or more person or persons; or*
>
> *(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person….."*
>
> [Emphasis supplied]

The use of the word *"or"* implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

In the instant appeal, the appellant was in the company of others, they were in possession of a pistol,

robbed PW1 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon PW1, PW2 and PW3 and actually injured PW4 on his forearm.

We find that all the ingredients of the offence of robbery with violence were present and proved by the prosecution beyond reasonable doubt.

We are satisfied that the two courts below carefully scrutinised the evidence and arrived at the right conclusion that the appellant was properly identified and that there was no doubt at all of the identity of the appellant.

We find that the High Court correctly upheld the trial magistrate in rejecting the defence raised by the appellant.

The upshot of our examination is that the appeal is devoid of merit and is hereby dismissed.

Dated and delivered at Nairobi this 25th day of July, 2014.

G. B. M. KARIUKI

------------------------ JUDGE OF APPEAL

P. M. MWILU

------------------------ JUDGE OF APPEAL

J. MOHAMMED

------------------------ JUDGE OF APPEAL

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

DEPUTY REGISTRAR