IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 102 OF 2013

BETWEEN

JOHN GICHUKI NGATIA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Ougo & Abuodha, JJ.) delivered on 6th November, 2013

in

H.C.CR.A No. 17 of 2012)

****

JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court dated the 26th day of November, 2013, by Ougo and Abuodha, JJ. The appellant, John Gichuki Ngatia, was tried and convicted by the Senior Principal Magistrate's Court at Nanyuki on a charge of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. It was alleged that:

> ***"On the 27th day of November, 2009, at Gathuiru village in Nyeri North District within Central Province, being armed with a toy pistol robbed IBRAHIM WANJOHI MWANGI of a MOTOR BIKE make Captain Registration Number KMCF 1299C and of a mobile phone Motorolla C18 all valued at Kshs.83,800/= and at or immediately before or after the time of such robbery threatened to use actual violence to the said Ibrahim Wanjohi Mwangi".***

[2] The appellant pleaded not guilty and after trial, he was found guilty, convicted and sentenced to death. He appealed before the High Court at Nyeri but his appeal was unsuccessful. This is a second appeal, that being so, by dint of the provisions of ***Section 361(1) (a)*** of the ***Criminal Procedure Code***, only matters of law come up for consideration by this court unless it is demonstrated that the two courts below failed to consider matters they should have considered or that they considered matters they ought not to have considered or that looking at the entire case, their decision was plainly wrong in which case this court will consider such omissions or action as matters of law. See ***Chemagong vs. Republic, (1984)***

KLR 213 at page 219 where this Court held:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts 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 s/o Karanja vs. Republic, 17 EACA146)"***

[3] The brief facts giving rise to this appeal were as narrated by the complainant Ibrahim Wanjohi Mwangi (PW 1). He testified that on the material day, that was the 27th day of November 2009, he was operating a motor cycle for the business of transporting customers, at Gathiuru junction. At about 10.00am the appellant approached him while masquerading as an Administration Police Officer and requested to be taken at Gathiuru forest. He claimed that his father's lorry had been arrested while cutting logs at the forest. They agreed on a fare of Kshs. 200/= and set off for Gathiuru Forest. Along the way, the appellant pretended that he wanted to make some telephone calls and asked to alight from the motorcycle. He told PW 1 that he was informed the people he was going to meet at Gathiuru Forest were now headed for Ichuga Patrol Base; therefore, they should change the direction. PW 1 turned the motor bike and started going downhill but no sooner had they covered a distance of about 400 metres, than the appellant pretended to make another telephone call, and then as he was putting his hand in the pocket he produced a pistol and ordered the appellant to leave the ignition key and produce the mobile phone. PW 1 surrendered the motor bike Registration Number KMCF 129Q as well as the mobile phone. The appellant removed PW 1's sim card from the mobile phone, threw it away and as he rode off with the motor bike he dropped a cap. PW 1 picked the sim card and the cap and went up to Jeshi Camp where he borrowed another hand set and made some telephone calls. He was later informed that the person who robbed him of the motorcycle was arrested at Matanya area. PW 1 proceeded there and found the appellant and the motorcycle which he identified.

[4] The motorcycle belonged to Patrick Maina Mwangi who had employed PW1. The appellant was arrested by members of public at Wanaruaona Village, who were threatening to lynch him but he was luckily rescued by PC Robert Chuma PW 4. The appellant was re-arrested by PC Chuma and taken to Matanya Patrol Base. While at the police post, PW 1 came and identified himself as the one who had been robbed of the motorcycle at Gathiuru Forest; he also said he identified the appellant although there was no evidence that was led as to how the identification was done and none of the people who arrested the appellant gave evidence.

[5] The matter was investigated by PC Stephen Pulou, PW 3, who took over the matter from PC Chumma and also took possession of the exhibits namely the motorbike registration number KMCF 129Q and a cap that fell off from the appellant as he drove off the motorcycle. Both items were produced as exhibits. The appellant was found to have a case to answer and on being placed on his defence, he denied having committed the offence. He claimed that he was arrested by Corporal Simiyu due to a grudge emanating from a love triangle between the appellant over a certain woman. The appellant testified that he had visited his girlfriend who used to sell beer at Wanaruona Village. He slept in her house and the next day, they went to a club that is where they were found by Corporal Simiyu who accused him of stealing cattle. He claimed he was arrested and framed up with the present charge that he knew nothing about.

[5] Based on the above evidence, the learned trial magistrate was satisfied the prosecution proved the charge against the appellant. The appellant appealed before the High Court and after re-evaluating the evidence, Ougo and Abuodha, JJ., were in concurrence with the findings of the trial magistrate. This is what the Judges concluded in pertinent part of their judgment:

> ***"Any one of the three ingredients provided under Section 296(2) Penal Code, if present in a case, is enough to found a conviction for the offence of robbery with violence. PW 1's evidence is that the appellant approached him at 10.00 a.m., introduced himself and they negotiated at a fee of Kshs.200/= for the ride. That whilst on the way, he stopped him twice to make a call, and as the accused alighted, he went to the front and produced***

a pistol and pointed at him and ordered him to leave the key in ignition and also to give him the phone. The appellant rode the motorbike away. We find PW 1's evidence cogent, the appellant was armed with a dangerous weapon a pistol, he pointed it at PW 1, he threatened PW 1, the facts as they are, prove an offence of robbery with violence. From the foregoing reasons, we find that the appeal has no merit and uphold the conviction, we dismiss the appeal".

[6] The appellants appeal before this Court is predicated on some 11 grounds of appeal which in summary challenge the following:-

- ***The charge against the appellant did not define the weapon that was used to threaten the appellant.***
- ***Insufficient evidence of identification by a sole identifying witness.***
- ***Lack of evidence to proof the appellant was found in possession of the motorcycle.***
- ***Failure to call vital witnesses especially the Boda Boda riders who allegedly arrested the appellant with the stolen motorcycle***.

[7] The above grounds were elaborated further during the hearing of this appeal by Mr. Maragia, learned counsel for the appellant. He cited the cases of ***David Odhiambo & Another v R***, ***2005 eKLR*** and ***Juma v Republic***, ***2003 2 EA 471***, to support the argument that the charge of robbery with violence simply alleged that the appellant was armed with a toy pistol when he attacked the complainant. The charge did not describe the toy pistol as a dangerous weapon; and a toy pistol by

itself is not an inherently dangerous weapon. Moreover, the complainant was not armed, thus, the charge as drawn did not comply with the provisions of ***Section 296(2)*** of the ***Penal Code*** which state that:

"If the offender is armed with any dangerous or offensive weapon or instrument… he shall be sentenced to death".

[8] Counsel submitted that a toy pistol cannot be described as a dangerous weapon. Also, the weapon was not produced in Court for it to evaluate it and arrive at the conclusion that it was dangerous. The evidence of PW 1 did not state how the appellant threatened him or what kind of violence was used on him. On the issue of identification, PW 1 did not know the appellant prior to the incident, none of the *boda boda* operators who allegedly arrested him were called to testify. The Investigating Officer took over the matter from somebody else, thus, no identification parade was carried out. There was also no evidence from Ichuga Police Post where the first report was made, to test the veracity of the evidence by PW 1 regarding the identification of his attacker. Even if a cap was produced as evidence, none of the prosecution witnesses said they knew it belonged to the appellant, thus, it was of no evidential value.

[9] Mr. Maragia also faulted the trial court for failing to warn itself of the dangers of convicting based on the evidence of a sole identifying witness as set out in the case of-; ***Wamunga v R, [1984] KLR 424***, this Court held:

"It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".

[10] This appeal was opposed by Mr. Isaboke, learned Senior Prosecuting Counsel. He submitted that the two Courts below arrived at concurrent findings that the offence of robbery with violence was proved. The appellant was armed with a toy pistol which he pointed at the complainant. This amounted to a threat and the complainant left the ignition key of the motor cycle that the appellant rode away with it. The appellant was arrested after a short while, and although those who arrested him did not give evidence, he

was found by the complainant immediately after the arrest with the stolen motorcycle, thus there was proper identification.

[11] The issues of law raised in this appeal are three fold. They touch on the legality of the charge sheet, whether the evidence adduced proved the offence of robbery with violence as provided in the law and the identification of the appellant. The charge which is reproduced elsewhere in this judgment did not describe the toy pistol as a dangerous weapon. Like in the case of; - ***DAVID OTHIAMBO V R,*** (supra) the charge of robbery simply alleged that the appellant was armed with a *"toy pistol"* which he pointed at the complainant. There was no evidence that the complainant was injured or whether he felt threatened. This Court differently constituted in the case of;- ***JUMA V REPUBLIC, [2003] 2 EA 471*** held that where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or the instrument with which the appellant was armed with was a dangerous or offensive one. A toy pistol is not an inherently dangerous item, it is used for playing. So that if the toy pistol is alleged to have been put for dangerous or offensive purposes, it must be stated in the particulars of the charge under ***Section 296 (2)*** of the ***Penal Code***, in order to distinguish it from a charge under ***Section 295*** which is punishable under ***Section 296(1)***. To that extent we agree with counsel for the appellant that the charge of robbery with violence brought against the appellant was with tremendous respect to the two courts below, a defective one as it failed to allege a vital ingredient thereof, namely the toy pistol was a dangerous or offensive weapon.

[12] On the second issue we have considered the evidence on identification, it is not contested that none of the *boda boda* operators who allegedly arrested the appellant were called to testify, and the trial magistrate essentially relied on the evidence of the complainant. We nonetheless note that the High Court Judges, noted that the trial magistrate failed to caution herself on the dangers of convicting the appellant based on the evidence of a sole identifying witness and they went about to re evaluate the evidence with the caution and did so meticulously.

[13] On our part we find the evidence is clear that the offence occurred at about 10 am which was in broad day light. The complainant was with the appellant also for some time as they rode the motorbike to Gathuiru Forest and rode down the hill for about 400metres. Within that time the appellant alighted from the motorcycle twice, ostensively to make telephone calls before he pointed the toy pistol on the complainant. The appellant was also arrested only after one hour after the motorcycle was stolen from the complainant. The complainant found the appellant at Matanya police post after he had been arrested by *boda boda* operators and identified him as the person who had just robbed him a while ago. This in our view was a form of recognition as it happened almost instantaneously when the circumstances had not changed. We find that there were no chances of a mistaken identity, the appellant was found with the stolen motorcycle only after one hour. In the circumstances of this case, it was not necessary for the prosecution to conduct an identification parade as the complainant found the appellant at the police post and identified him as the person who robbed him of the motor cycle. An identification parade would not have added any value to the evidence.

[14] Had the two courts below considered the Information and particulars of the Charge, against the authorities that were cited, they would have arrived at the inevitable conclusion as we have done that there was no violence or threat of violence that was demonstrated by the evidence. The charge also failed to describe whether the toy pistol was a dangerous and offensive weapon. In the premises the offence that was proved by the evidence on record that the appellant could have been convicted of was that of simple robbery as provided for under ***Section 295*** and punishable under ***Section 296 (1)*** of the ***Penal Code***.

[15] Accordingly the conviction recorded against the appellant of robbery with violence is quashed and substituted with a conviction of a lesser charge of robbery under ***Section 295***. The death sentence imposed on the appellant is similarly set aside and substituted with a sentence of seven (7) years imprisonment from the date of conviction by the trial magistrate. The appeal by the appellant succeeds to that extent.

Dated and delivered at Nyeri this 15th day of July, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR