IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, OUKO & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 217 OF 2008

BETWEEN

BENJAMIN KARIUKI WAIRIMU …….……..……..……..... APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Appeal from the conviction & sentence of the High Court of Kenya at Nairobi (Ojwang & Omondi, JJ) dated 14th October, 2008 in HC CR A NO. 524 OF 2006)

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JUDGMENT OF THE COURT

This is a second appeal against both conviction and sentence of the High Court of Kenya at Nairobi, (Ojwang & Omondi, JJ) dated 14th October, 2008 in High Court Criminal Appeal No. 524 of 2006.

The appellant, ***BENJAMIN KARIUKI WAIRIMU***, was charged in the Chief Magistrate's Court at Kibera, in Criminal Case No. 7746 of 2005, with the offence of robbery with violence contrary to ***Section 296 (2) of the Penal Code*** and sentenced to death. Particulars of the offence were that:

> *"On the 5th day of November, 2005 at Ngong Township in Kajiado Distrtict within the Rift Valley Province, jointly with another not before the court robbed Ruth Wambui of KShs.300/= and at or immediately after the time of such robbery used actual violence."*

The record before us shows that the appellant pleaded *"not guilty"* to the charge and was granted bond by the trial court. At the end of the trial, the Principal Magistrate, Mrs Wasilwa, found him guilty of the offence charged, convicted him under ***Section 215 of the Criminal Procedure Code [CPC]*** and sentenced him to death.

Dissatisfied with that conviction and sentence, the appellant, acting in person, appealed to the High Court in Criminal Appeal No. 524 of 2006. The learned Judges of the High Court, after hearing the appeal dismissed it stating in the pertinent part as follows:

> *"We are convinced that the learned Principal Magistrate conducted the trial well and properly analysed the law and the evidence, coming to the only correct conclusion: that*

the appellant was guilty as charged. The appellant was correctly sentenced, as ordained under S 296 (2) of the Penal Code. We dismiss the appeal, uphold the conviction entered by the trial court and affirm the sentence imposed by that court."

The appellant was still not satisfied with that decision and filed the instant appeal premised on five [5] grounds of appeal.

When the appeal came up for hearing, learned counsel for the appellant, Ms Betty Rashid submitted that this appeal turns on the issue of whether the appellant ever took a plea. Ms Rashid told the Court that her perusal of the original record of appeal revealed that the appellant had been charged before the court with the offence of robbery contrary to ***Section 296 (1) of the Penal Code*** but the particulars were for robbery with violence contrary to ***Section 296 (2) of the Penal Code***. She referred the Court to the proceedings at the Resident Magistrate's court where the prosecutor stated on 27th January, 2006:

"I have 4 witnesses. However particulars are for Section 296 (2) and not 296 (1) as charged. I need time to get proper charge sheet. Mention on 31/1/06 for proper charge sheet."

The record shows that on 31st January, 2006, the prosecutor informed the court that:

"Accused is charged under Section 296 (2)."

The court responded:

"Accused sent to court 3 to take plea."

It follows that on 31st January, 2006, the appellant was not asked to take a plea for the offence of robbery with violence contrary to ***section 296 (2) of the Penal Code***. A hearing date of 30th March, 2006 was taken on that day and the case proceeded to hearing without plea being taken. Ms Rashid relying on ground 4 of the memorandum of appeal filed by the appellant on 22nd September, 2006, submitted that the High Court judges erred in law by failing to re-evaluate and analyse the evidence on record as the law required; that had the learned Judges re-evaluated and analysed the evidence on record, they would have observed that the appellant did not take plea contrary to ***Section 207 of the CPC***. She submitted that ***Section 214, CPC*** requires that where there is a substitution of the charge, the substituted charge should be read to the accused person and he should plead afresh. In her view, the failure of the accused to take plea to the fresh charges was fatal and rendered the proceedings a nullity as the said provision is mandatory. She maintained that such an omission was not capable of being cured under ***Section 382 of the CPC***. Ms Rashid relied on the authority of ***HARRISON MURUNGU NJUGUNA V R, CR NO. 90 OF 2004***.

Ms Rashid further submitted that this was not a proper case for retrial since the appellant has been in custody since 5th November, 2005. She relied on ***JOSEPH ISMIS ECHOKULE, EDWARD ECHAGAN LOKITOI & SOLOMON LOKWAI LOKUM V R, CR NOS. 205 & 312 OF 2006***.

She submitted further that the High Court failed to note that the evidence adduced at the trial court had contradictions and therefore, did not address its mind on the said contradictions contrary to the law. She pointed out that PW 2, ***RUTH WAMBUI***, had testified that the appellant was arrested on the spot [at the scene of the robbery] while PW 3 and PW 4 testified that the appellant was arrested in a *chang'aa* den near the scene of the robbery. She pointed out that the evidence by the said witnesses could be interpreted that two different people were arrested in connection with the robbery.

Ms Rashid, also submitted that the identification of the appellant was not proper. She pointed out that PW 2 had testified that she was able to identify the appellant as one of the robbers from the electricity lights; however, the said witness did not give any evidence as to the intensity of the light. Since the incident took place at about 2.30 am, she pointed out that chances of mistaken identity were quite high.

She urged this Court to allow the appeal.

Mr Ondari, Senior Assistant Director of Public Prosecutions, submitted that the issue of plea not being taken was never raised by the appellant in the High Court and therefore, it ought not to be raised before this Court. He admitted that the appellant did not take plea in respect of the amended charge of robbery with violence but maintained that such omission is capable of being cured by ***Section 382 of the CPC***. He further maintained that since the appellant pleaded not guilty to the charge of robbery that was based on the same facts as the charge of robbery with violence, the failure to take plea on the amended charge did not amount to a miscarriage of justice.

He also stated that the failure to take the plea did not have any effect on the findings by the trial court. He submitted that the issue of contradictory evidence was considered by the High Court and the same was dismissed; that the contradiction raised by the appellant was not material because the appellant was arrested within the general area of the robbery. He also stated that the circumstances leading to the identification of the appellant by PW 2 were also corroborated by her husband [PW 3]. For those reasons, he urged this Court to dismiss this appeal.

We have carefully considered the grounds of appeal, the submissions by the learned counsel and the law.

The Court of Appeal on a second appeal is restricted to consider only points of law. See ***section 361 of the CPC, Cap 75, Laws of Kenya***. In ***NJOROGE V R, (1982) KLR 388***, this Court restated at page 389 that:

> *"… On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence. …"*
>
> *See also* ***M'RIUNGU V R, (1985) KLR 455***.

It is the duty of the first appellate court *[in this case, the High Court]* to reconsider the evidence tendered in the lower court, evaluate it and draw its own conclusions. In ***OKENO V R, (1972) EA 32***, the court at page 36 held:

> *"… it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported."*

Therefore, if the High Court did not carry out its duty as a first appellate court it becomes a matter of law on second appeal. See ***PANDYA V R, (1951) EA 336***.

It is not in dispute that the appellant did not take a fresh plea in respect of the amended charge of robbery with violence. The issue that falls for consideration by this Court is whether that omission renders the proceedings in the trial court a nullity or whether it is capable of being cured by ***section 382 of the CPC.***

Section 207 (1) of the CPC provides:

> *"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty."*

Section 214 (1) provides:

> *"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make*

such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

1. *Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*

2. *Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."*

Section 382 of the CPC provides:

> *"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice."*

In the instant case, the appellant pleaded not guilty to the offence of simple robbery whose particulars were similar to the amended charge of robbery with violence. It is notable that the amendment was made before the matter proceeded for hearing. It is quite clear from the proceedings of the trial court that the appellant knew the offence he was charged with, therefore, failure to take plea on the amended charge did not in any way affect his defence on the evidence tendered.

The case of ***HARRISON MUNGU NJUGUNA V R, [supra]*** can be distinguished from the instant case in view of the fact that the charge was amended after some of the prosecution witnesses had testified and the appellant therein was not given an opportunity to recall those witnesses after amendment. In the instant case, as we have said, the amendment to the charge was done at the commencement of the trial.

This Court is guided by its decision in the case of ***JULIUS OREMO V R, CR NO. 176 OF 2010 [Unreported]***, in which it stated:

> *"As correctly observed by Ms Nyamosi, the trial proceeded as if a plea of not guilty had been entered and the appellant was given full opportunity to cross examine all the witnesses and to testify on his own behalf. At no stage of the trial was there any indication that the appellant was ready to plead guilty nor was any complaint raised at all. We think in all the circumstances, therefore, that there was no failure of justice occasioned by the irregularity belatedly complained of and we find it was curable under* ***section 382 of the CPC****."*

In the case of ***DAVID IRUNGU MURAGE & ANTONY KARIUKI KARURI V R, CR NO. 184 OF 2004***, the Court stated:

> *"We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the CPC."*

In the circumstances of the instant appeal, we find like in the above, that the lack of opportunity to plead did not occasion a failure of justice and any irregularities arising therefrom were curable under ***Section 382 of the CPC***. This ground of appeal, therefore, fails.

Learned counsel for the appellant also raised the grounds of contradictions and credibility of PW 2. We agree with Mr Ondari that the contradictions were not material because the appellant was arrested in the general area of the robbery. This ground also fails.

On the issue of whether the identification of the appellant was proper and free from error, it is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In ***WAMUNGA V R, (1989) KLR 424***, this Court held at page 426:

> *"… it is trite law that where the only evidence against a defendant is evidence of identification or 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."*

In the instant case, the trial court was satisfied that the appellant's identification was positive. Despite the appellant raising an issue over his identification in his first appeal, the High Court did not address itself on the issue. The High Court simply set out the prosecution's case on identification and held at page 8 of the judgment:

> *"We are convinced that the learned principal magistrate conducted the trial well, and properly analysed the law and evidence, coming to the only correct conclusion that the appellant was guilty as charged. The appellant was correctly sentenced as ordained under section 296 (2) of the Penal Code."*

This Court in considering whether the identification of the appellant was free from error should take into account the quality of light, the distance between the identifying witness and the person identified and whether the circumstances surrounding the incident could warrant a positive identification.

In the case of ***MAITANYI V R, (1986) KLR 198***, this Court held:

> *"It is at least essential to ascertain the nature of light available. What sort of light, size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into." See* ***WANJOHI & OTHERS V R, (1980) KLR 415****.*

In the instant appeal, in our view, the identification of the appellant was proper and free from error. This is evident from the evidence of PW 2 and PW 3 who testified that the robbery took place next to a hospital and the scene was well lit by electricity lights which were about three metres away. PW 2 was also able to identify the appellant with aid of the said light and also because the robbery took about ten minutes. PW 3 on the other hand, testified that he had seen the appellant a few months before the robbery when he stopped to give the appellant a cigarette. PW 3 recognised the appellant since the appellant frequented the neighbourhood. Further, the fact that the appellant was arrested a few meters from the scene clearly points out that the identification was free from error as it was done a few minutes after the robbery. This ground of appeal also fails.

In the result, this appeal fails and we order that it be dismissed.

Dated and delivered at Nairobi this 21st day of June, 2013.

D. K. MUSINGA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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