



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWERA & GATEMBU J.J.A.)

CRIMINAL APPEAL NO. 330 OF 2007

BETWEEN

ANTHONY KAMAU GITHUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi

Lesiit & Makhandia JJ.) dated 14th December, 2005

in

HC.CR.A. NO. 708 OF 2003)

JUDGMENT OF THE COURT

1. The appellant, Antony Kamau Githuka, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge are that on the 5th day of May, 2003 along Mfangano Street Nairobi Area, jointly with others not before court while armed with a dangerous weapon namely a knife robbed Gabriel Ngor Juash of kshs. 13,050/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Gabriel Ngor Juash.
2. The appellant was tried before the Chief Magistrate's court at Nairobi, convicted of the offence and sentenced to death.
3. The appellant's appeal to the High Court on the grounds that his conviction by the trial court was based on insufficient evidence of identification by a single witness and that his defence was not given due consideration was dismissed in a judgment delivered Court on 14th December 2005.
4. Dissatisfied, the appellant has appealed to this Court from the decision of the High Court on the grounds that the High Court erred in failing to make a finding that sections 150, 169 and 214 of the Criminal Procedure Code were not complied with and in failing to re- evaluate and analyze the evidence.

5. When the appeal came up for hearing before this Court on 30th May 2013 Mr. Amutallah, learned counsel for the appellant, abandoned the complaint founded on section 214 of the Criminal Procedure Code and submitted that the trial court erred in failing to exercise its power under section 150 of the Criminal Procedure Code to summon and examine witnesses to wit the investigating officer and arresting officer who were not called as witnesses and that on the strength of the case **Bukenya and others vs. Uganda [1972] E A 549** an inference should be drawn that their testimony would have been adverse to the prosecution case.
6. Citing the High Court decisions of **John Itoyi v Republic [2008] eKLR** and **James Tumai Epur & Anor v R [2006] eKLR** counsel further submitted that the omission to call the arresting officer in this case was prejudicial to the appellant in the light of the evidence by PW 2 and PW 3 to the effect that they advised the complainant, PW 1, to go back to the scene of crime and look out for the suspect and inform any uniformed officers on duty. Counsel submitted that the matter was not investigated and that unknown people arrested the appellant and that the omission to record the evidence of the investigating officer was a serious omission.
7. The appellant's next complaint is that the trial court did not comply with section 169 of the Criminal Procedure Code, as the judgment did not capture the points for determination, the decision thereof and the reasons for the decision. Counsel also submitted that on convicting the appellant, the trial court should have set out the offence and the provision of the Penal Code and by merely stating that the court found the appellant guilty as charged, there was no compliance with section 169(2) of the Criminal Procedure Code. Neither did the court, counsel went on to say, cite the provision under which it imposed the sentence. In that regard counsel cited the High Court decisions of **Abdi Isaac Osman and others v R [2008] eKLR**, **George Kihara Ndungu v R [2005] eKLR** and **Senga Kingoo Mwasia v R [2006] eKLR** and submitted that the court did not to give reasons for its decision and that compliance with section 169 is mandatory.
8. Counsel also submitted that the High Court failed to re-evaluate the evidence. Had it done so, it would have noted that section 198(1) of the Criminal Procedure Code was violated in that the complainant, PW 1, is a Sudanese who gave evidence in English and yet there was no interpretation from English to Swahili.
9. Counsel further submitted that the observation by the trial court at the close of the prosecution case that section 211 of the Criminal Procedure Code had been complied with is insufficient as the court was supposed to explain to the appellant the import of that provision and further that the evidence of PW 1, who was a minor, was not corroborated. Counsel urged us to allow the appeal.
10. Mr. Jacob Ondari, learned Senior Assistant Deputy Public Prosecutor, opposed the appeal and submitted that the court was entitled to convict the appellant on the evidence of one witness and that PW 1, the complainant, was alone when the crime was committed; that when the complainant reported the crime to the police he was told to go back to the police if he saw the appellant; that the appellant was trying to run away when he was apprehended; that it is clear from the evidence of PW 2 that he is the one who booked the appellant subsequent to his arrest and that the evidence of the arresting officer would not have added any value to the case.
11. Counsel submitted that it is not in doubt that the appellant was arrested and was wearing the same clothes when arrested and that unlike the situation in the case of **John Itoyi v Republic** (supra) the circumstances of arrest in this case are clear.
12. As regards the complaint that no investigations were conducted, counsel submitted that no investigations were necessary in the circumstances of this case as the complainant was the only witness.
13. On the alleged non-compliance with Section 169 of the Criminal Procedure Code, counsel distinguished the case of **Abdi Isaac Osman and others v R** (supra) and submitted that the provision under which the appellant was charged is clearly indicated at the onset of the judgment

and the particulars given and section 169 was therefore complied with.

14. As regards the complaint regarding non-compliance with section 211 of the Criminal Procedure Code counsel submitted that the learned trial magistrate clearly indicated in the record that section 211 was complied with. Counsel further submitted that the evidence of the complainant did not, in the circumstances of the case, require corroboration.
15. In his brief reply counsel for the appellant reiterated his submissions and contended that there was no evidence before the trial magistrate as to who committed the offence.
16. Those are the arguments canvassed before us. The first issue for our determination is whether, as contended by the appellant, the High Court erred in failing to make a finding that Section 150 of the Criminal Procedure Code was not complied with. That section makes provision for the summoning and examination of witnesses and provides that the court may summon or call any person as a witness. In **Bukenya and others vs. Uganda** (supra) the predecessor of this Court held that the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be prejudicial to its case and that the court has duty to call witnesses whose evidence appears essential to the just decision of the case and that where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.
17. Counsel for the appellant submitted that the investigating and arresting officers should have been called as witnesses. To that we ask ourselves whether their evidence was essential to the just decision of the case. The circumstances of this case are that there were no witnesses to the crime other than the complainant himself. When he reported the robbery to the police station he was advised to be on the look out for the suspects and seek the help of any uniformed police officers should he spot them. And that is precisely what the complainant did. On spotting the appellant, whom he identified as one of the attackers, he approached a traffic police officer who apprehended the appellant and escorted him to the police station and then left. The appellant was thereafter charged. On the complaint that the traffic police officer should have been summoned to testify, the High Court had this to say:

“The underlying implication are (sic) that whoever physically arrested the accused has to come to testify but if he had in fact come, his evidence would have been limited to the fact that a suspect was merely pointed out to him. The complainant was alone when he was robbed therefore it is merely his evidence against that of the accused.”

18. We agree. We do not think that the evidence of the arresting officer or the investigating officer was essential to the just decision of the case. Unlike the situation in the case of **John Itoyi v Republic** (supra) where the court found there were gaping holes in the evidence that required to be filled, in this case the evidence of the complainant, the victim and only witness to the robbery, was adequate to establish the offence. We are therefore not persuaded that the High Court erred in not calling the arresting or investigating officer.
19. The next issue is whether trial Court and the High Court erred in failing to find that section 169 of the Criminal Procedure Code, which prescribes the contents of a judgment, was not complied with. We have carefully reviewed the judgment of the High Court. It identified the issues for determination as follows: ***“in essence the appellant raised only two issues in his appeal; one that the evidence of the prosecution was that of visual identification by a single witness and was insufficient to sustain a conviction; two that his defence was not given due consideration.”*** The High Court then re - evaluated and analyzed the evidence and drew its own conclusions and pronounced itself on those issues giving reasons for the determination.
20. We also agree with counsel for the state that unlike the situation in the case of **Abdi Isaac Osman and others v R**, (supra) the provision under which the appellant was charged is clearly indicated at the onset of the judgment of the trial court and the particulars given. At the conclusion of that

judgment the trial magistrate finds the appellant guilty as charged and convicts him accordingly. In our view section 169 of the Criminal Procedure Code was therefore complied with.

21. The next issue is whether section 198(1) of the Criminal Procedure Code was violated. Counsel for the appellant submitted that the complainant, PW 1, is a Sudanese who gave evidence in English and there was no interpretation of his evidence from English to Swahili.

22. We observe from the record, that a court clerk was present throughout the trial. On 9th May 2003 when the appellant's plea was taken, it is indicated that "interpretation English/Kiswahili". On the date when PW 1 testified, it is indicated that the appellant was reminded of the charge in Kiswahili. After the testimony of PW 1, the appellant cross-examined him in the same way that he cross-examined PW 2 and PW 3. As this Court observed in **Said Hassan Nuno v R Criminal Appeal No. 322 of 2006**:

"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."

23. In a recent decision of this Court in the case of **Peter Kamande and other vs. R Criminal Appeal No. 559 of 2010** this Court stated:

"We emphasize that each case must turn on its own peculiar facts. For the court to nullify proceedings on account of lack of language used during the trial, it must be clear from the record, beyond doubt that the accused did not at all understand what went on during his trial. We are not so satisfied in the circumstances of this case. In fact the converse is true that the appellants understood the proceedings and took part in the proceedings throughout the trial."

24. These passages applied to the present appeal. We are satisfied that the proceedings were duly interpreted to the appellant.

25. The last issue is whether the trial court complied with section 211 of the Criminal Procedure Code. We agree with counsel for the respondent that the learned trial magistrate clearly indicated in the record that section 211 was complied with. Although it may be desirable for the trial court to indicate that it had again explained the substance of the charge to the accused and that the accused was informed of his rights as stipulated under Section 211 of the Criminal Procedure Code, we do not think that the appellant suffered any prejudice by the summary indication that that section had been complied with.

26. The effect of the foregoing is that the appeal fails in its entirety and is hereby dismissed.

Dated and delivered at Nairobi this 26th day of July 2013.

D. K. MARAGA

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JUDGE OF APPEAL

J. W. MWERA

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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