



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MWERA & GATEMBU JJ.A)**

**CRIMINAL APPEAL NO. 302 OF 2007**

**BETWEEN**

**GEORGE MBUGUA THIONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya*

*at Nairobi Lesiit & Makhandia JJ. dated 19<sup>th</sup> September, 2006*

*in*

***H.C.R.A. NO. 10 OF 2004***

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**JUDGMENT OF THE COURT**

1. The 23rd day of September 2003 was not an ordinary day in the life of the complainant, Nancy Nkatha (PW1) to whom we shall hereafter refer as Nancy. Nancy worked for the Tea Board of Kenya and her place of work was located at Dagoretti Corner, in the outskirts of Nairobi. She resided in Jamhuri Estate, Nairobi.
2. On that date, at about 7.40 a.m., Nancy was on her way to her place of work. She was walking from her residence in Jamhuri Estate towards Ngong road, Nairobi. Her friend and neighbor, Salam Chipa (PW 2) accompanied her. To get to Ngong road, from Jamhuri Estate, they had to cross a field.
3. In the course of crossing that field, Nancy was accosted by a robber, who she claims is the appellant, who drew a knife from his jacket and demanded Nancy's cell phone and an envelope which Nancy was holding. Nancy resisted and took to her heels while screaming for help. Salam joined in the screaming.
4. In the process of running, Nancy tripped and fell. The cell phone and the envelope dropped. The robber picked it up and ran away. As the robber attempted to go over a gate, Salam caught up with him. The robber then surrendered the cell phone back to Nancy and ran away.

5. Members of the public who had responded to the screams chased the robber and arrested him. He was severely beaten by the members of the public and thereafter taken to Kenyatta National Hospital for treatment. Nancy then reported the incident to Kilimani Police Station.
6. On receiving the report from Nancy, Police Constable Zakayo Ekirapa of Kilimani Police Station proceeded to the scene where the incident took place and thereafter to Kenyatta National Hospital where the appellant was receiving treatment. Subsequently the appellant was arrested and charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in that on the 23<sup>rd</sup> September, 2003 at League Ndogo in Nairobi within Nairobi area province while armed with a dangerous weapon namely knife, robbed Nancy Nkatha off one mobile phone make Nokia 5210 valued at Kshs. 15,000.00 and at or immediately after such robbery used actual violence to said Nancy Nkatha.
7. He was tried and convicted by the Magistrate's Court at Kibera in Criminal Case No. 7233 of 2003. On 5th January 2004 he was sentenced to death.
8. The appellant appealed against the conviction and sentence to the High Court of Kenya at Nairobi in Criminal Appeal No. 10 of 2004. His complaints before the High Court were that the trial magistrate failed to consider his defence that he was framed by the complainant who he claimed was his former girlfriend; that the knife allegedly used to commit the offence was planted on him; that essential witnesses were not called; that there were contradictions in the prosecutions' evidence which should have been resolved in his favour.
9. In a judgment delivered on 19th September 2006, Lesiit and Makhandia, JJ. upheld the conviction and sentence and dismissed the appeal.
10. Dissatisfied with the decision of the High Court dismissing his appeal, the appellant has appealed to this Court.
11. His grounds of appeal are set out in the petition of appeal, supplementary grounds of appeal filed on 10th May 2012 and supplementary memorandum of appeal filed on 24th May 2013, mostly centering on allegations of the charge laid being at variance with the offence charged, failure to note and reconcile contradictions in the prosecution evidence and lastly failure re-evaluate the evidence properly and in the process fell into an error by upholding the conviction by the trial court.
12. At the hearing of the appeal before us on 27th May 2013, Ms. Mwangi, learned counsel for the appellant submitted that the appellant was challenging the conviction and sentence on the grounds that: the charge of robbery with violence was not proved; that there was a disparity between the charge and the evidence and that the charge should have been amended to attempted robbery in order for the charge to accord with the evidence; that the ingredients of the offence of robbery with violence were not proved; that the provisions of Section 198(4) of the Criminal Procedure Code, with regard to language, were violated.
13. Although the issue of identification did not arise, Ms. Mwangi referred us to the case of **Kennedy Ochieng Arongo and Another v R Criminal Appeal No. 193 of 2006** where the High Court emphasized that where the evidence to implicate an accused person is entirely based on identification, such evidence should be watertight and must be free of any possibility of error.
14. With regard to the complaint that the language used by witnesses was not stated in the court record, Ms. Mwangi referred us to the case of **Joseph Maina Gacheru v R Criminal Appeal 175 of 2005** and submitted that the omission to do so should result in a mistrial.
15. On his part, Mr. Monda, senior principal prosecution counsel opposed the appeal and submitted that the issue of language raised by the appellant before us is clearly an afterthought and was never raised in the lower courts; that the appellant clearly conducted the proceedings in English language including

conducting cross examination of witnesses; that his written closing submissions were in English; that the offence of robbery with violence was proved and the evidence fitted the ingredients of the offence and that the appellant's defence was duly considered and the lower courts properly found the appellant guilty.

16. This being a second appeal, this Court is only concerned, with points of law and is bound by the concurrent findings of fact made by the lower courts unless those findings are shown not to be based on evidence. See the decision of this Court in the case of **Njoroge v Republic [1982] KLR 389** and as reiterated in the case of **David Njoroge Macharia v Republic [2011] eKLR**, where this Court stated, inter alia, that on a second and final appeal to this Court under Section 361 of the Criminal Procedure Code:-

***“Only matters of law fall for consideration”*** and the Court ***“will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or 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.”***

17. Based on the appellant's grounds of appeal, only two matters complained of are matters of law. The first is that the ingredients for the offence of robbery with violence were not met and that the offence was not proved. The second is that Section 77(2) of the retired Constitution of Kenya and Section 198(1) of the Criminal Procedure Code were violated as regards language during the trial.

18. As regards the complaint that the ingredients for the offence of robbery

with violence were not met and that the charge of robbery with violence was not proved, both lower courts were satisfied, as we are, that the prosecution discharged its burden of proof. The High Court had this to say:

***“In the present case, the evidence adduced and accepted by the trial Court was to the effect that the appellant was armed with a knife with which he threatened the complainant. A knife is not ordinarily an offensive or dangerous weapon. It becomes offensive or dangerous depending on what use it is put to and the circumstances under which it is used. In the instant case, the appellant used the knife to force the complainant to part with her mobile. He threatened to harm her with the knife. In those circumstances the knife was dangerous and offensive weapon. The case falls in the first category of the ingredients of robbery with violence. Clearly, the offence of robbery with violence was committed. It matters not that the robber acted alone or that no violence was visited upon the complainant. The evidence on record shows that no actual physical violence in the nature of battery was visited upon the complainant in the course of the robbery. The complainant was merely threatened with violence by the Appellant knife pointing at her. She was apprehensive that violence was about to be visited upon her. That was sufficient violence. On the whole, we think that this variance did not occasion the appellant any prejudice. Clearly the prosecution set out to prove the appellant was armed with a dangerous or offensive weapon during the robbery.”***

19. We respectfully agree. It was established that the appellant was armed with a dangerous or offensive instrument and the offence

of robbery with violence under section 296(2) of the Penal Code proved.

20. With regard to the issue of language, the appellant has complained that the language used by PW 1 and 3 contravened Section 77(2)(f) of the retired Constitution and Section 198(1) of the Criminal Procedure Code. **Section 77 (2) (b)** of the former Constitution provided specifically that every person who is charged with a criminal offence shall be informed as soon as practicable in a language that he understands and in detail of the nature of the offence with which he is charged; and (f) that “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.” Based on the record of proceedings, when the appellant first appeared in court for plea, there were English/Swahili interpretation and the charge was stated in a language that the appellant understood. The record does not, however, show that prior to the evidence being taken the

learned trial magistrate enquired from the appellant the preferred language and no record is made in that regard.

21. The language in which the witnesses testified is not indicated either throughout the trial, however, there was a court clerk. In the case of **Said Hassan Nuno V. Republic** Criminal Appeal No. 322 of 2006 this Court stated:-

***“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.”***

22. 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.

23. In the result, the appeal has no merit and is hereby dismissed in its entirety.

***Dated at Nairobi this 26th day of July 2013.***

**R. N. NAMBUYE**

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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**