IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, M'INOTI & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 283 OF 2005

BETWEEN

VINCENT ODUOR…….……..APPELLANT

AND

REPUBLIC.....….....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 18th October, 2005

in

HC.CR.A.NO.849 OF 2005)

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JUDGMENT OF THE COURT

The appellant, ***Vincent Oduor***, was charged at the first instance with ***Daniel Wanyoike Warui***, with three counts of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the charge were that,

> ***"Count 1, on the 7th day of September 2001 at about 9.00pm at Uhuru Estate in Nairobi within the Nairobi area jointly with others not before the court, while armed with a dangerous weapon a toy pistol robbed JOSEPH KIMANI MWANGI a motor vehicle registration number KAJ 921 F Isuzu matatu and Kshs 6000/- and at or immediately before or immediately after the time of the robbery used actual violence against the said JOSEPH KIMANI MWANGI by threatening to shoot him with a pistol.***
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> ***Count 2, on the 7th day of September 2001 at about 9.00pm at Uhuru Estate in Nairobi within the Nairobi area jointly with others not before the court, while armed with a dangerous weapon a toy pistol robbed LUMWAJI SETH of1,700/- cash and at or immediately before or immediately after the time of the robbery used actual violence against the said SETH LUMWAJI by threatening to shoot him with a pistol.***
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> ***Count 3, on the 7th day of September 2001 at about 9.00pm at Uhuru Estate in Nairobi within the Nairobi area jointly with others not before the court, while armed with a dangerous weapon***

a toy pistol robbed JOSEPH KIMANI MWANGI of cash 3000/- and at or immediately before or immediately after the time of the robbery used actual violence against the said JOSEPH KIMANI MWANGI by threatening to shoot him with a pistol."

The appellant was acquitted by the trial magistrate of counts one and two but was found guilty and sentenced to death on count three of robbery with violence. The appellant's co-accused was not found guilty of any of the three counts and was accordingly acquitted.

Being aggrieved by the decision of the trial magistrate's court, the appellant lodged an appeal in the High Court.

The High Court upon evaluation of the evidence on record was satisfied with the appellant's conviction, upheld the decision of the lower court and dismissed the appeal. In it's judgment the High Court stated thus,

"***The totality of the forgoing evidence is that the appellant was arrested at the scene of the crime. There is evidence that the appellant opened the door and jumped out. However he was not lucky as members of the public arrested him right on the spot. The irresistible conclusion is that appellant was arrested by members of the public as he tried to escape. Even if we were to buy the appellant's story that he was mistakenly arrested at the bus stage and had nothing to do with the robbery, there is overwhelming evidence on the record to show that the appellant was part of a the gang. All the witnesses said how he was arrested at the scene of the crime a fact which appellant did not deny in his sworn defence. All of them surely could not have mistaken the appellant.***

The appellant being further aggrieved by the decision of the High Court lodged this appeal which is before us, and relying on the supplementary ground of appeal, set out five grounds of appeal to the effect that;

i. the first Appellate court failed to evaluate the evidence;
ii. the prosecutor's rank was not specified;
iii. the language of the court was not identified; and
iv. the first Appellate court failed to properly identify the appellant.

Briefly, the facts of the case were that, on the 7th September, 2001, at about 8.45 p.m. ***James Kagwe***, PW2 was driving a matatu motor vehicle registration No.KAJ 921F, transporting passengers from the City Centre.

Upon reaching Maringo Bus Stage, some passengers alighted. Soon thereafter, a passenger came from the rear seat of the matatu and ordered the touts (conductors) to sit down. The person was holding a toy pistol. The conductors realized that the person was not alone but in a group. They demanded money and were given Kshs.450/= by ***Joseph Kimani Mwangi***, PW1 and one of the conductors gave them Kshs.3000/=. They demanded more money, and PW1 gave them a further Kshs.5,000/= and Kshs.1,450/= in coins. They also took PW2's mobile phone and wrist watch. The robbers then directed the motor vehicle towards Outer Ring and Rabai Road.

At the Rabai Road Junction PW2, noticed a police vehicle and began shouting *"Thief! Thief!"* thereby attracting the attention of the police officers, who upon hearing the commotion shot in the air. The matatu motor vehicle stopped. At this point, four of the robbers alighted and fled into the darkness. The appellant, was soon thereafter arrested by members of the public and taken to Jogoo Police Station. He was interrogated and subsequently charged with the offences set out above.

Learned counsel for the appellant, ***Ms. Khaemba***, whilst relying on the supplementary grounds of appeal contended that, with respect to the first issue, the charge did not conform to the facts, in that one of the witnesses had indicated that a knife was used to threaten the driver and conductors, whilst the charge sheet made reference to a toy pistol. The second issue was that the rank of the prosecutor was not

indicated in the coram at the time of taking the plea contrary to the law. The third issue was that the language of the court was not specified, to the prejudice of the appellant. The fourth issue was that there was no proper identification of the appellant, as the appellant was not subjected to an identification parade. She also contended that the appellant's defence had not been considered by the appellate court, which had failed to evaluate the evidence and reach a conclusive finding.

Principal prosecution counsel ***Ms. Oundo,*** though submitting that the appeal was not opposed, began by responding to the grounds of appeal, and thereafter, submitted on the reasons for not opposing the appeal.She submitted that, in a charge of robbery with violence, any of the ingredients present would be sufficient to secure a conviction. The prosecution had relied on the fact that there was more than one robber involved in the robbery in the matatu motor vehicle. On the first issue, she stated that, the weapon used was not material, as this had not been the basis of the prosecution's case. In response to the identification of the appellant, she submitted that it was trite law that any number of witnesses could be summoned to prove a fact. On the issue of the language, ***Ms. Oundo*** submitted that there was no evidence to show that the appellant had not understood the proceedings. In conceding the appeal, learned prosecution counsel contended that, the rank of the prosecutor had not been specified on the record; that the judgment referred to a pistol, while in the evidence the witnesses made reference to a knife. On the issue of identification, ***Ms Oundo*** asserted that there had been no proper identification of the appellant, as no identification parade had been conducted, and none the members of the public who had arrested the appellant had been summoned to testify.

We have anxiously and critically examined the record and the submission of counsel to determine the issues as submitted in this second appeal.

This being a second appeal we remind ourselves that under ***section 361(5)*** of the **Criminal Procedure Code** and as stated in the case of ***Njoroge vs Republic (1982) KLR 388***, that,

> ***On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on the evidence."***

We will begin first with the issue of the weapon used. From the record, the charge sheet specified that the weapon used was a toy pistol. PW1 testified that he saw a knife. PW2 and ***Josephat Kimotho Mwangi***, PW3 stated that they saw a pistol.

When analyzing the issue, the learned Judges concluded that, the appellant was not found with a pistol or the toy pistol, but that in any event, the prosecution's case was not based on the presence of the weapon, but on the fact that the robbers were more than one. We would therefore agree with the High Court that, this issue was not material to the case and find that there is no merit in this ground.

Turning to the second issue of the rank of the prosecutor during the trial, we consider that this was adequately addressed by the High Court which found that the failure to show the name and rank of the prosecutor in the proceedings was a typographical error, and as a consequence, we are satisfied that this ground of appeal has no merit.

With regard to the third issue of the proper language of the trial, ***Ms. Oundo***, submitted that, there was no evidence to prove that the appellant did not understand the proceedings. Indeed, he cross-examined the witnesses in English, and that this was an afterthought. From the record, we have established that throughout the proceedings the issue of language did not arise, and therefore this ground is an afterthought and accordingly fails.

Finally, the issue of the identification of the appellant is of more concern to us.

In their judgment the learned Judges stated,

> ***"All the witnesses said how he was arrested at the scene of the crime a fact which appellant did***

not deny in his sworn defence. ***All of them surely could not have mistaken the appellant. (emphasis ours)"***

When we consider the sequence of events, we find that the evidence cannot support this finding, for reasons that firstly, from the evidence of PW1, PW2, PW3 and ***George Githinji***, PW7, a police officer, it is clear that, the appellant was arrested by members of the public, and not the witnesses who testified. Neither PW1, PW2or PW3 personally participated in the arrest of the appellant. They testified that, it was the members of the public that had chased and apprehended the robbers. PW7 also confirmed that, it was the members of the public that arrested the appellant and handed him over to the police. The question that then arises is, who arrested the appellant? From the evidence, it is uncontroverted that, he was just arrested by members of the public.

Secondly, on the identification of the robbers, we are not able to discern from the record whether any of the robbers were properly identified by the witnesses whilst the robbery was taking place in the matatu vehicle. The robbery took place after 8.30 p.m., when it was dark. There is no evidence on the type or the suitability of the lighting in the matatu vehicle that would have enabled the witnesses identify any of the robbers.

Thirdly, it is clear that there were many robbers yet, PW1, PW2 and PW3,did not identify any of the robbers, indeed, no description of any of the robbers is provided. Therefore, if none of the robbers in the matatu vehicle was identified, how was the identity of the appellant established?

Fourthly, a chase took place into the darkness, following which the appellant was arrested, the record does not state how the arrest by the members of the public took place, who the members of the public were, where the arrest took place, or the lighting conditions of the area of the arrest. Consequently, since it was not the witnesses or the passengers that arrested the appellant, but unknown and unidentified members of the public, was the appellant properly identified?

Fifthly, if none of the passengers in the matatu vehicle, or members of the public who participated in the arrest were summoned to testify, or indeed to identify the appellant, was a secure connection established between the passengers, the robbery and the appellant? Additionally, if none of the stolen items were found in the appellant's possession, how would it have been possible to link the appellant to the robbery? Clearly, from the evidence, the chain of events between the robbery and the arrest was broken.

This being the case, an identification parade was necessary to determine whether the appellant was amongst the robbers when the robbery in the motor vehicle took place. It was also essential that the specific individuals who arrested the appellant were summoned to properly identify, the appellant, so as to secure his connection to the robbery and the arrest. Since no identification parade was conducted, and considering that, none of the members of the public who carried out the arrest identified the appellant, or testified in Court, was it possible to conclusively find that the appellant was involved in the robbery?

In the case of ***Peter Irungu Kinuthia V Republic*** **[2011] eKLR** this Court referred to the judgment of the superior court in that case, where the learned Judges had this to say:

> ***"In the circumstances of the appellant's arrest, we find that even though the police did not carry out an identification parade for witnesses, however there is no doubt at all in our minds the appellant was one of the 3 men who robbed the complainant in this case. Since the 3 witnesses followed in the chase until the time the appellant was arrested all in one long sequence of events that were not broken, it was absolutely unnecessary to conduct the identification parades.***

Given these material discrepancies in the record, we do not agree with the trial court and the High Court that the appellant was properly identified by the witnesses. We consider that all the necessary elements for proper identification of the appellant were blatantly missing from the evidence, including the evidence of the arresting members of the public, and this resulted in the chain of events being broken. As a consequence, the ability of the prosecution to connect the appellant to the robbery was negated, thus

rendering the appellant's conviction unsafe.

The appellant did not deny that he was found at the scene. He stated:

> ***"I did not run away because I was innocent. I was arrested by members of the public and not the police."***

When we re-examine the appellant's defence, we consider that it was not beyond the realms of possibility that this was a true case of mistaken identity, particularly as the material ingredients in the identification process were overlooked by both Courts.

With respect to the fourth issue on the failure of the High Court to evaluate the evidence, we are satisfied that the first appellate court misdirected itself on the evidence before it, which warrants our interference with the findings.

In the circumstances of the instant case, we are not satisfied that the prosecution proved its case beyond reasonable doubt. We also take cognizance of the fact that, ***Ms. Oundo*** was not opposed to the appeal being allowed for this reason. We would therefore allow the appeal on this ground.

For the reasons above stated, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty from prison forthwith unless otherwise held for some other lawful cause.

Dated and Delivered at Nairobi this 12th day of JULY, 2013

G. B. M. KARIUKI

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JUDGE OF APPEAL

K. M'INOTI

….....

JUDGE OF APPEAL

A. **K. MURGOR**

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR