



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & GATEMBU JJ.A)

CRIMINAL APPEAL NO. 559 OF 2010

BETWEEN

- PETER KAMANDE..... 1ST APPELLANT
FRANCIS WAWERU NGARUIYA..... 2ND APPELLANT
JAMES MUTHAMA NGAI 3RD APPELLANT
FRANCIS CHEGE KAMAU 4TH APPELLANT
SAMUEL MBURU MWANZA.....5TH APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Khaminwa & Warsame JJ) dated 11th October 2010

in

HC. CRA. NO.S. 639, 641, 642, 645 AND 646/06)

JUDGMENT OF THE COURT

This is a second appeal by the appellants whose appeals to this Court were consolidated before hearing. The appeal has its origin in the proceedings in the Chief Magistrates Court at Thika in Criminal Case No. 2508 of 2005 in which all the appellants faced three counts of robbery with violence contrary to section 296(2) of the Penal Code in that on the 30th and 31st day of March, 2004 at 11.00 a.m. and 1.00 a.m respectively, at Kiandutu village in Thika, jointly with others not before court, while armed with pistols and pangas, robbed Jane Njeri Mugo cash of Kshs. 20,000.00, Radio, Stereotype, all valued at Kshs. 24,000.00. It was alleged that on 31st March 2004, they also robbed Julius Karuiru Wanjiru (Julius) of cash of Kshs. 4,400 and one torch all valued at Kshs. 4,500. The appellants are said to have used actual violence to their victims. The first appellant Peter Kamande Wainanina faced a third account alone of being in possession of (two) 2 ammunition of fire arm contrary to section 21(1) of the

Firearms Act Cap 114 laws of Kenya, in that on the 31st day of March, 2004 at Kiandutu Village in Thika, he was found in possession of two (2) ammunition fire arms and one metallic device without authority. The trial court found no evidence to support this charge and acquitted him.

The appellants were tried. The prosecution called nine (9) witnesses namely **(PW1) Jane Njeri Mugo, (PW2) John Mugo Kamau, (PW3) Julius Nganga Nanjani, (PW4) No 7939AG.IP Otieno, (PW5) Lydia Muthoni Wanjiku (PW6) No.36190 CPC Kenneth Kamathi, (PW7) Christopher Munyao Muasya, (PW8) George Maingi ,and (PW9) No.55491 P.C. Charles Muli**. All the appellants elected to give unsworn evidence in their defences and called no witnesses.

It was the case for the prosecution at the trial that after the robberies in which cash and personal items were stolen the police were involved and the 1st and 2nd appellant arrested that very morning from their houses.

During the arrest, **PW6, Cpl. Kenneth Mwachii** recovered toy pistols, a *panga* stained with fresh blood and wet clothes. The 3rd and 4th appellants were arrested one year later on 7th May 2005, while the 5th appellant was subsequently arrested on 8th July 2005. Following this arrest, an identification parade was conducted in respect of the 4th appellant at which he was identified by two witnesses, Lydia Muthoni (Lydia) and Julius. The 5th appellant refused to participate in the parade. The appellants were then charged as explained earlier.

The trial Court after rejecting the appellants' unsworn testimonies found that the offence of robbery with violence contrary to section 296 (2) of the Penal Code was proved beyond any reasonable doubt and upon conviction the trial magistrate sentenced them to death on both counts.

The appellants were aggrieved by the learned trial magistrate's decision and appealed to the High Court in Criminal Appeal, numbers 645,641,642,639 and 646 of 2006 raising various grounds of appeal. The High Court appeals were consolidated and heard together. The High Court after re-evaluating the evidence, dismissed the appeals holding that the appellants were properly convicted on sufficient evidence.

In their second appeal to this court; **Mr.F.N. Njanja** learned counsel for the 1st, 2nd and 3rd appellants relied on supplementary grounds of appeal filed on 10th day of February, 2012, whereas **Mr. Ogesa Onalo** for the 4th and 5th appellants relied on grounds of appeal filed by the appellants in person.

The appellants through their counsel have argued:-

- i. That the learned Judges of the High Court erred in overlooking the *failure by the prosecution to produce the Occurrence Book (OB) during the trial and in the High Court*.
- ii. *That the learned Judges failed to appreciate that the language of the trial was not disclosed in the proceedings.*
- iii. *That they failed to warn themselves of the danger of relying on the evidence of recognition.*
- iv. *That the learned Judges failed to re-evaluate the evidence and to note the contradictions in the prosecution case, the flaws in the identification parade as well as the variance between the charges and the evidence with regard to the name of the complainant in count II.*

Learned counsel for the appellants also relied on authorities to support his arguments, which we have considered in this Judgment. In opposing the appeal, learned counsel for the respondent submitted that there was sufficient evidence of identification and further that failure to avail the O.B. did not occasion any prejudice to the appellants. Regarding the language of the trial, counsel argued that the appellants fully participated in the trial, pleading to the charges and examining witnesses. Counsel maintained that the variance in the name of the complainant in count II was a typographical error which was curable under **Section 382** of the Criminal Procedure Code.

This being a second appeal, only matters of law fall for our consideration. **Section 361 (1)** of the

Criminal Procedure Code provides:

“A party to an appeal from a subordinate Court may subject to subsection 87 appeal against a decision of the High Court in its appellate jurisdiction on a matter of law....”

See the case of ***Chemagong versus Republic (1984) KLR611*** wherein the Court of Appeal held inter alia that:

“A court on appeal will not normally interfere with a finding of fact by the trial Court whether in a Civil or Criminal case unless it is based on no evidence or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted in wrong principles in reaching the findings he do.”

There were concurrent findings by the two courts below that the evidence demonstrated that the appellants were known to both Lydia and Julius, being neighbours; that the attack occurred at night (11.30 pm and 1.00 am, respectively); that the robbers were six, armed and injured their victims, thereby committing the offence of robbery with violence in terms of **Section 296 (2)** of the Penal Code.

The broad issue that fell for determination by the two courts below and which is also the crux of this appeal is whether the appellants were properly identified as the suspects who committed this crime. The issue of identification is always a question of law. This court has on numerous occasions underscored the necessity of careful consideration of the evidence of identification, particularly where the conviction is dependent on it. We need only to refer to one of this court's decision to emphasize this point; ***Paul Etole & Another V. Republic*** Criminal Appeal No. 24 of 2000, where it was stated **that:-**

“The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened: but the poorer the quality, the greater the danger.”

In the first count, the appellants are alleged to have robbed Jane Njeri Mugo (the complainant in count I – (Njeri)) and her husband PW2, John Mugo Kamau (Kamau). In her first testimony, Njeri said:-

“I did not notice the number that got inside. They had a weapon which I could not identify.....The attackers had torches..... I did not identify anyone on the date of the incident.”

For his part, Kamau categorically told the court that he did not see those who attacked them. There is evidence on record that as the robbers entered the couple's house, Kamau disappeared leaving his wife (Njeri) at the mercy of the robbers. But there is also evidence that a radio stolen from Njeri and Kamau was found a few minutes after it was stolen having been left (forgotten) at the house of Julius where the robbers appear to have gone to after the first robbery. Njeri positively identified the radio as belonging to her and Kamau. That was clear evidence of recent possession and both the courts below properly so found.

On count II, the complainant, according to the charge sheet is **Julius Karuiru Wanjiru (Julius)**. But the proceedings of 29th December 2005, **Julius Nga'nga Nanjani** is recorded as the complainant. We have looked at the original record in which the complainant is recorded as **Julius Nga'nga Wanjiru**. On our own assessment of the evidence in totality, we find no difficulty in coming to the conclusion that the confusion in the name of the complainant in court II is a typographical error and is curable by **Section 382** of the Criminal Procedure Code. This is obvious from the Medical Examination Report (P3) and the identification parade form in which **Julius Karuiru Wanjiru** is named either as the patient or the identifying witness respectively.

Julius testified that although he and his wife, Lydia were robbed at night (1.00 am), with the aid of light from the torches the robbers had, they were able to recognize the appellants, who were known to them before this date. He maintained that they told their neighbours who responded to their distress call and the police that they knew the robbers.

We have been asked by learned counsel for the appellants to disregard this evidence as the circumstances for positive identification were difficult; that the witnesses did not tell the police that they knew the robbers because if they did, it would have been recorded in the O.B., which the prosecution failed to produce; that failure to produce the O.B. should be held to be fatal to the appellants' conviction.

The evidence of **Julius (PW3) and Lydia (PW5)** is that of recognition by voice and physical appearance. This enjoined the first two courts to test the reliability of this evidence on identification by making an inquiry of such matters as to the nature of the light, the strength of the light its size, its position relative to the appellants (see the case of **Kiarie versus Republic (1984) KLR739** and **Maitanyi V. Republic (1986) KLR 198 Joseph Ngumbao Nzoro versus Republic (1991) 2KAR 2121**). On the basis of the record before us we are satisfied that both the learned trial Magistrate and the first appellate Judges were alive to their duty to reconsider and re-evaluate the evidence on identification. We appreciate the record does not bear evidence of explicit inquiry into the nature of the light, its strength, size and position relative to the appeal but there is evidence that the two courts indeed exercised caution in relying on the evidence of identification in view of the circumstances under which the offence was alleged to have been committed. Our reason for finding so is that the evidence tendered demonstrated clearly that the appellants were known to both **Lydia and Julius**; that the witness saw the appellants face with the help of torch light and also heard their voices; that the appellants spent considerable time with the two witnesses during the robbery. The appellants first struck, took Kshs. 4,000/= and left but shortly returned having disagreed over the amount of money they had stolen from their victims. In the first instance, according to Julius, they spent 5 minutes with them and 20 minutes when they returned a second time. The two witnesses consistently explained what role each appellant played in the course of the robbery.

In view of the above facts coupled with the size of the room (10 x 10), we have no doubt that the witnesses had no difficulty in recognizing the appellants from their voices which they were familiar with and physical appearance with the aid of the lights from their torches. The test in **R. versus Turnbull (1976) 3ALER 549** was thus satisfied.

We are satisfied that, that very night the witnesses told their neighbours and the police that they had been robbed by the appellants, persons known to them. Indeed, by morning break, Lydia led the police to arrest the 1st and 2nd appellant from their respective houses. On this point, we reiterate what was said in **Terekali & Another V. Republic [1952] E.A. C.A. Page 259**, that:-

“Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. The truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others.”

There is evidence that the 3rd and 5th appellants had fled from the area after the incident hence their arrest one year later. The toy pistols and *panga* used during the robbery were recovered that very

morning from the 1st and 2nd appellants. Also recovered were wet and muddy clothes which the 1st appellant had worn on the rainy night of the robbery. In the result, we come to the conclusion, on the question of identification (indeed recognition), that no purpose was served in holding an identification parade as there was sufficient evidence of recognition that required no confirmation by conducting the parade.

Regarding the language of the trial court, at the time of the trial, **Section 77 (2) (b)** of the former Constitution provided for the manner an accused person who did not understand the language of the court was to be treated. It provide in part:-

“Every person who is charged with a criminal offence shall be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence”

A similar provision exists in **Article 50 (2) (m)** of the present Constitution and **Section 198** of the Criminal Procedure Code.

In the case of **Antony C. Kibatha versus Republic** Criminal Appeal No.109 of 2005 (UR) The Court of Appeal when faced with a similar challenge drew from its own decision in the case of **Jackson Leskei versus Republic** Criminal Appeal No.313 of 2005 (UR) and observed thus:-

“By entrenching in the Constitution the right to interpretation in a criminal trial the framers of the Constitution appreciated that it is fundamental for an accused person to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independence and impartial court. It is the court’s duty to ensure that the accused right to interpretation is safeguarded and to demonstrably show its protection”

It is clear from the record that the learned trial magistrate overlooked the requirement that the language preferred by an accused person must be recorded. The language used by the appellant was not recorded. The record simply reads:-

***“The substance of the charge and every element thereof has been stated by the court to the accused person in a language that he/she (sic) understands who being asked whether he admits or denies the truth of the charge replies:-
.....”***

The language is thus not specified.

As observed in the **Antony Kibatha** case (Supra),this court has continually held that an accused person is entitled to choose a particular language to use in the proceedings and there is a duty to provide an interpreter to him in that language – **Degow Degane Nunow V. Republic** Criminal Appeal 223 of 2005 (UR) followed with approval. Out of the nine prosecution witnesses, six are shown to have testified in Kiswahili language, two in English but translated to Kiswahili and one in Kikuyu language with Kiswahili translation. When placed on their defence, the appellants explained their circumstances in some detail, leaving us in no doubt that they understood the proceedings. Throughout the trial, there was a court clerk. We have counted no less than three clerks (***Chiera, Lydia and Wamae***) who were present at all times during the trial. This court in **Said Hassan Nuno V. Republic** Criminal Appeal No. 322 of 2006 which presents a striking similarity to this appeal stated the law in this area as follows:-

“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.”

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.

Having satisfied ourselves that the issues of law raised in this appeal are not meritorious and that the appellants were convicted on clear and cogent evidence which displaced their defences, we accordingly dismiss the appeal in its entirety.

Dated and delivered at Nairobi this 5th day of July 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR