IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 251 OF 2008

BETWEEN

ZAKARIA OJIAMBO ODIANGO …… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (J. B. Ojwang & Omondi JJ.) dated 3rd June, 2008

in

H.C.CR.A. 360 OF 2005*)*

JUDGMENT OF THE COURT

1. On 30th April 2004 at about 10.30 in the morning, Frederick Macheti, the complainant (PW1), a pastor with Upendo Pentecostal Church, was walking home to Kangemi in Nairobi when he was attacked by two assailants, beaten and robed of his mobile telephone. After the attack the assailants ran away. Macheti screamed attracting members of the public who then apprehended the appellant. Macheti's mobile telephone was recovered from the appellant.

2. Thereafter the appellant was handed over to the police, charged,prsosecuted and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code by the Chief Magistrate's Court at Kibera Nairobi. He was sentenced to death.

3. The appellant appealed to the High Court of Kenya at Nairobi against the conviction and sentence on grounds that he was a victim of mistaken identification. In a judgment delivered on 3rd June 2008 the High Court rejected the appellant's appeal.

4. In this second appeal the appellant seeks to quash the conviction and set aside the sentence. The grounds of appeal are that the charge sheet was defective; that he was not positively identified; that the charge was not proved to the required standard; that his defence was not considered; that the High Court failed to re-evaluate the evidence on the first appeal; that the High Court erred in upholding the death sentence which is unconstitutional and that the judgment of the first court does not comply with the requirements of Section 169 of the Criminal Procedure Code.

5. Under Section 361 of the Criminal Procedure Code Cap 75, in a second appeal, we are concerned with matters of law only. The issues for our determination in this appeal are:

i. Whether the charge sheet is defective.

ii. Whether the lower courts erred in finding that the appellant was positively identified.

iii. Whether the charge was proved to the required legal standard.

iv. Whether, the High Court, as the first appellate court, re-evaluated the evidence.

v. Whether the death sentence is constitutional.

vi. Whether the judgment of the lower court accords with the requirements of Section 169 of the Criminal Procedure Code.

6. We will consider each of the grounds in turn. On the first issue, Mr. E. Ondieki, learned counsel for the appellant, submitted that the charge sheet is defective in that it does not accord with the evidence; that while the charge sheet referred to the appellant as having been armed with iron bars, the evidence tendered was that the appellant was armed with a stick. In support of his submission counsel cited the case of **Yongo vs. Republic [1983] KLR319**.

7. On his part, Mr. Kivihya learned counsel for the respondent, submitted that the charge accords with the requirements of Section 137 of the Criminal Procedure Code; that it came out in the evidence that the nature of weapon used was a stick; that in any event the intention of the appellant, irrespective of whether he wielded a stick or an iron bar, was to subdue and inflict pain and it does not therefore matter how the dangerous weapon was described. More so when there has been no allegation of any miscarriage of justice having been occasioned on to the appellant.

8. We do not consider the charge sheet to be defective. In the case of **Yongo vs. Republic** (supra) that was cited, the court interpreted the provisions of Section 214 of the Criminal Procedure Code that empowers the court to make an order for alteration by amendment or substitution or addition of a charge if it appears to the court that the charge is defective either in substance or form. In the event of alteration of the charge under that provision, the court should call upon the accused to plead to the altered charge. The accused may also demand the recalling of any witnesses to give evidence afresh or to be further cross-examined. We do not think Section 214 of the Criminal Procedure Code is applicable to the circumstances of this case as the charge as laid was at no time ever altered throughout the trial.

9. In our view, the description of the weapon in the charge sheet as an iron bar as opposed to a stick is not fatal. We do not see what prejudice the appellant suffered by reference in the charge sheet to an iron bar as opposed to a stick. We are fully in agreement with the learned judges of the High Court when they stated that:

> ***" As for the weapon-it is true that the charge sheet refers to metal bars yet the witness made reference to a "thick green stick" – Is this a fatal contradiction? Again we think not, the main ingredient is to show that the attacker was armed and that the object with which he was armed was used to visit or threaten violence and that in fact as a result of the use of that weapon, injury was occasioned."***

10. More care should obviously have been taken to ensure the particulars in the charge sheet are correct. However, the error in the description of the weapon was not shown to have occasioned the appellant any injustice. Indeed, no prejudice was occasioned to the appellant in putting up his defence on account of the mis-description of the weapon. We accordingly hold that the charge sheet was not defective.

11. The second issue is on identification. Mr. Ondieki submitted that the evidence of identification in this case is of the weakest kind. Counsel likened the situation in this case to the circumstances in the case of **Wanjohi & 2 others v Republic [1989] KLR415**. In that case the court took the view that where the attack is swift and the victim is rendered unconscious, the possibility of correct recognition is remote and that it may well be that the victim may be honest but mistaken about his attackers.

12. Counsel also submitted that the appellant was arrested some distance away from the locus in quo and the possibility of mistaken identity is increased. Counsel went on to say that the omission to call the people who chased and allegedly apprehended the appellant was prejudicial to the appellant

13. Counsel further submitted that as the evidence of identification was not sound, the circumstantial evidence on the basis of which the appellant was otherwise convicted was not in itself sufficient to prove the offence.

14. Learned counsel for the state submitted that the appellant was positively identified and the mobile telephone stolen from the complainant recovered from him shortly after the robbery.

15. There is, as stated by this Court in **Wanjohi & 2 others v Republic** (supra) special need for caution regarding the correctness of identification. In the instant case, however, there was no error, in our view, of identification of the appellant.

16. The robbery occurred at 10:30 a.m. The complainant PW1 got a good look at the appellant and even noticed that he was following him after the appellant greeted him. Shortly after, he was robbed and the appellant escaped. The appellant was caught shortly after and was identified by PW1 as his assailant and he was still in possession of the mobile tele- phone. In the circumstances we are satisfied that the appellant was positively identified. There are concurrent findings by both lower courts that the complainant had sufficient time to see and identify the appellant.

17. Unlike the situation in the case of **Wanjohi & 2 others v Republic** (supra) to which we were referred, the attack in the instant case was not sudden and neither was the complainant rendered unconscious. As we have observed, there was also the recovery of the mobile telephone from the appellant, which was hidden in his underclothing. We are satisfied that the appellant was correctly identified and no purpose would have been served, in our view, by calling as witnesses the members of the public who gave chase and apprehended the appellant when the complainant called for help. There is also no suggestion that had these persons been called, their testimonials would have been adverse to the prosecution's case. See the case of **Bukenya v Republic [1972] E. A. 494**.

18. We turn now to the questions whether the charge was proved to the required legal standard and whether, the High Court, as the first appellate court, re-evaluated the evidence. Our answer on both questions is in the affirmative.

19. The burden of proof in criminal cases is upon the prosecution to prove its case against the accused person beyond reasonable doubt. It was not for the appellant to prove his innocence. This was not, as contended by learned counsel for the appellant, a case where the conviction was hinged entirely on circumstantial evidence. The evidence presented against the appellant is direct. PW1 saw his attacker and identified him as the appellant. The appellant was apprehended soon after his attempted escape from the scene of the incident with PW1's mobile phone still on him and with PW1's SIM card still inside. The testimony of PW 1 was corroborated by that of PW 3 who searched the appellant upon his apprehension and recovered the mobile telephone from him. There was no doubt as to identification of the appellant. The appellants' defence which stated that PW1's mobile phone was planted on his person was rejected by the trial court.

20. In any event, even if the direct evidence was to be rejected, the circumstantial evidence pointed,

irresistibly, to the appellant. As this Court held in **Neema Ndurya V R (2008) eKLR,**

"*it is now settled that for a court to convict on circumstantial evidence there must be evidence which points irresistibly to the accused person to the exclusion of any other person. At the same time there must be no co-existing factor or circumstances which may weaken or destroy the inference of guilt of the accused person (**R V Kipkering Arap Koske (1949) 16 EACA 135**).*

In our view the evidence before the trial court met that test. The evidence pointed irresistibly to the appellant. We are therefore satisfied that the prosecution proved its case beyond all reasonable doubt.

21. The duty of the first appellate court as set out in the case of **John Kagunda Gitau and Anor vs. Republic, Criminal Appeal No. 28 of 1997,** is to re-evaluate and analyze the evidence and make its findings bearing in mind that the appellate court did not have a chance to hear the witnesses.

22. We have reviewed the judgment of the High Court and are satisfied that as the first appellate court it discharged its mandate by evaluating the evidence by subjecting it to fresh and exhaustive scrutiny after which it affirmed the conviction and sentence.

23. Turning to the constitutionality of the death sentence, the sentence imposed by the trial court and confirmed by the High Court is constitutional and lawful and we have no basis for interfering with it. Under Section 71(1) of the repealed Constitution, a person could be deprived of his life in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. That is precisely the case here.

24. The final complaint to which we now turn is that the judgment of the lower court does not accord with the requirements of Section 169 of the Criminal Procedure Code in that the trial magistrate did not pronounce the conviction of the appellant.

25. After reviewing and evaluating the evidence, the learned trial magistrate stated

> "***I find the prosecution has proved its case against accused 1 who in defence…[said]… he knew nothing of the robbery …. have no doubts in my mind regarding accused one [being] PW1's robber***."

26. Whereas it may have been preferable for the learned trial magistrate to categorically state and specify the offence and the section of the law under which the appellant was convicted at the conclusion of the judgment, we note the offence and the provision of the law under which the appellant was charged and convicted are clearly set out at the onset of the judgment of the trial court. No prejudice was therefore suffered by the appellant by reason of the fact that the provisions under which he was convicted are not repeated at the conclusion of the judgment. In any event, we do not consider the omission to be one that has occasioned a failure of justice as the omission is curable under Section 382 of the Criminal Procedure Code.

27. For the above reasons, we dismiss the appeal.

Dated and delivered at Nairobi this 18th day of October 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU

…….

JUDGE OF APPEAL

I certify that this is a

*true copy of the original***.**

DEPUTY REGISTRAR