IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. NAI 215 OF 2008

BETWEEN

JOSEPH KAMAU…… APPELLANT

AND

REPUBLIC……..... RESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (J.B. Ojwang & H. Omondi JJ) dated 25th September,2008

in

HCCRA NO. 486 of 2006)

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JUDGMENT OF THE COURT

The appellant herein ***Joseph Kamau,*** was initially charged in the Chief Magistrates court at Kibera vide Criminal Case No.124 of 2006 with the charge of stealing from the person contrary to section 279(a) of the Penal Code, which offence was subsequently substituted with that of Robbery with violence contrary to section 296(2) of the Penal Code, in that on the 1st day of January,2006 at Railway line Ngando in Karen, within Nairobi province, jointly with others not before the court robbed ***Dorcas Kinya Kinoti*** of a mobile phone make Nokia 2100 valued at Kshs.5,600 and cash Kshs.200, all valued at Kshs.5,800 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ***Dorcas Kinya Kinoti.***

The appellant pleaded not guilty to both the initial charge of stealing from person as well as the subsequently substituted charge of robbery with violence.

The prosecution called three witnesses namely, ***(PW1) Dorcas Kinya Kinoti, (PW2) David Simiti Kelwa and (PW3) No.75007 P.C. Moses Ndiu,*** whereas the appellant was the sole witness for his defence. In summary, the evidence is that on the material day at about 6.30 p.m. PW2 was on his way from Kawangware with his wife and children. On nearing the sport of the incident, he met with three male youths headed in the opposite direction. Shortly after by passing the three male youths, PW2 heard shouts of "***help, help"*** from a female voice. PW2 rushed to the scene and found PW1 on the ground struggling with the appellant. PW1 held the appellant tightly as she screamed for help. The other two youths

ransacked her pockets and removed the mobile phone and Kshs. 200/= but when they saw PW2 approach, the two youths took off. PW2 assisted PW1 to overpower the appellant and detained him.

PW3 who was on patrol in the locality, received the report and came to the scene and rescued the appellant from the mob, who allegedly wanted to lynch him. The appellant was taken to the police station and subsequently arraigned in court.

The appellant's unsworn evidence is to the effect that on the material day, he was innocently walking on the road from Lenana School where he had been playing football. He met with two people, a man and a woman. The woman pointed at the appellant and said "***It is this one."*** The man then descended on the appellant and started beating him up. He lost consciousness and found himself at Ngong police station and thereafter he was charged with an offence he knew nothing about.

In a brief Judgment delivered on the 31st day of August, 2006, the learned trial magistrate, ***Mr. Maundu***, delivered himself thus:-

> ***"The issue to be determined is whether the prosecution has proved its case against the accused person beyond reasonable doubt. The complainant narrated how she was robbed by the accused person and three other persons. She said that the accused person grabbed her by the neck in an attempt to strangle her into submission.***
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> ***Unfortunately she was too strong for him and she grabbed him. Both of them fell down. She continued to hold the accused person as his accomplices ransacked her and took away her mobile and Kshs.200. She raised an alarm. PW2 David Simiti come. The two accomplices escaped. PW2 assisted her to arrest the accused person whom he found still holding (him). Therefore the accused person was arrested at the time of the commission of the alleged offence. He was got (sic) red handed and there cannot be a mistake about his identity. His defence that he was walking home when he was suddenly confronted by the complainant and her witness does not hold water. This is a fabricated story. From the evidence adduced, I have no doubt that the accused person was acting in cahoots with the two (2) people who disappeared with the complainant's mobile phone and money. The three of them had common intention and that is to rob the complaint"***

On the basis of that reasoning, the learned trial magistrate found the appellant guilty, convicted and sentenced him to the only sentence known to law for this offence- death.

The appellant was aggrieved by that decision and appealed to the High Court vide Criminal Appeal No.486 against both the conviction and the sentence. In a judgment delivered on the 25th day of September, 2008 ***J.B. Ojwang, J (as he then was) and H.A. Omondi, J*** had this to say:-

> ***"In his appeal, the appellant contended that he had not been properly identified as a suspect; that the charge was defective; that his evidence had been rejected without cause….***
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> ***After considering all the evidence and adverting to the submissions made , we have come to the conclusion that, the time being early evening time, and the appellant not having broken the chain of events and of perception from the time of attack to the time of arrest, there was no possibility of a mistaken identification.***
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> ***The reliable evidence of both PW1 and PW2 proves the case and the appellant did not put up any credible defence.***
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> ***Consequently, we dismiss the appeal, uphold the conviction and affirm sentence as imposed by the trial court"***

The appellant was once more aggrieved by that decision and appealed to this Court firstly vide a home made memorandum of appeal filed on the 6th day of October,2008, subsequently supplemented by the

supplementary grounds of appeal filed on 14th day of June, 2013 namely:

"(1) That the Superior Court Judges erred in Law by failing to ADEQUATELY analyze the whole evidence and arrive at their own conclusion.

(2)The learned Judges of the Superior Court erred in Law in upholding the conviction and the sentence when the burden of proof was shifted.

(3)That the learned Judges of the Superior Court erred in Law in upholding conviction and sentence without positive identification and on mistaken identity of the Appellant."

On the day fixed for the hearing of this appeal, ***Mrs. Betty Rashid and B.L. Kivihya*** appeared for the appellant and the State respectively. In her oral highlights to court, learned counsel for the appellant urged us to allow the appeal on the grounds that the charge as substituted was defective in so far as it failed to name the dangerous weapon allegedly used and failure to include the words "***armed with dangerous weapon."*** If any offence was disclosed as against the appellant then this should have been the offence of stealing from the person as initially charged; that the learned first appellate Judges of the High Court did not properly direct their minds to the contents of the record; because if they had done so, they would have discovered that the charge was defective as drawn.

Learned counsel for the appellant went on to submit that the evidence of PW1 and PW2 was not corroborative of each other as there is a discrepancy on the date when the incident allegedly took place, in that, PW1 and PW2 talked of 1st January 2006, whereas PW3 talked of 7th January,2007. Further, that the language of the court was not stated in the trial Court's proceedings, the rank of the prosecutor was not disclosed; the learned trial magistrate shifted the burden of proof to the appellant by stating that the appellant did not put up a credible defence and that the issue of a possible mistaken identity was not addressed by the first two courts. Lastly, theft was not proved as no receipt or any other document was tendered to court evidencing ownership of the alleged stolen item.

Mr. Kivihya on the other hand opposed the appeal and urged us to dismiss the same and confirm the two concurrent findings of the first two courts. It is ***Mr. Kivihya's*** arguments that the first two courts correctly analysed the evidence and arrived at independent but concurring findings on the evidence; that the charge as framed is in compliance with the provisions of section 137 of the Criminal Procedure Code; that observations made by the learned trial Magistrate that the appellant did not give a credible defence was not prejudicial to the appellant as it did not amount to the trial court shifting the burden of proof to the appellant.

Though the State concedes that indeed the trial Court's proceedings do not show the language of the court when plea was first taken, no miscarriage of justice was occasioned to the appellant as subsequent entries indicate that a clerk was always in attendance and the language of the court was indicated as being English/Swahili; that no prejudice or miscarriage of justice was occasioned to the appellant as the appellant did not complain of not following the proceedings and participated in the trial fully.

The State also concedes that different prosecutors handled the file but that not withstanding the prosecution was conducted by ***Inspector Nyongesa,*** an officer of the prescribed rank. ***Mr. Kivihya*** refuted the allegation that the learned trial magistrate shifted the burden of proof to the appellant and lastly, that the issue of mistaken identity did not arise as the appellant was caught red handed, at about 6.30 p.m when visibility was therefore clear.

This being a second appeal, our mandate is limited to the interrogation of issues of law only as provided for in section 361 of the criminal procedure code. See also the case of ***Gachuru versus Republic [2005] 1KLR 688*** where this Court held, inter alia, that:-

> "***as a second appeal, only points of law may be raised since the Court will not disturb concurrent findings of facts made by the two courts below unless those findings are shown to be based on no evidence."***

This Court has stated many times before, it will not normally interfere with concurrent findings of facts by two courts below unless such findings are based on no evidence, are based on a misaprehension of the evidence or the courts below are shown to have demonstrably acted on wrong principles in making the finding. See ***Chemagong versus Republic [1984] KLR 611.*** From the rival arguments set out above, the under listed issues of law have been raised for our determination namely:-

i. Whether the prosecution has proved beyond reasonable doubt, firstly, that the offence charged took place on the material date as alleged and secondly, whether the appellant had been proved to have been involved in the commission of the alleged offence.
ii. Whether the trial was flawed by reason of failure to state the language of the court in which the proceedings were conducted and by failure to disclose the rank of the prosecutor

With regard to the first issue, it is undisputed that the appellant was first charged with the offence of stealing from the person contrary to section 279(a) of the Penal Code, which was subsequently substituted with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The substituted charge as framed does not mention the nature of the weapon allegedly used in the commission of the offence, neither do the particulars of the charge include the words "***armed with dangerous weapons namely …..".*** There is however no dispute that both the particulars of the charge as well as the evidence adduced through PW1 and PW2 indicated that the assailant was in the company of two other persons.

In the case of ***Ganzi and 2 others versus Republic [2005] 1KLR 52,*** this Court set out the elements of the offence of robbery with violence as:-

a. ***The offender is armed with any dangerous or offensive weapon or instrument; or***
b. ***The offender is in the company with one or more other persons; or***
c. ***At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any other person."***

In the case of ***Ajode versus Republic [2004] 2KLR81*** this Court went on to hold, inter alia, that injury of the victim itself is not the only ingredient of the offence under section 296(2) of the Penal Code.

As for the establishment of the ingredient of "***theft",*** we wish to draw inspiration from the observation made in the decision of the predecessor of this Court, the Court of Appeal for Eastern Africa, in the case of ***Opoya versus Uganda [1967] EA 752*** as approved by this Court in the case of ***Moneningu Mbao Mangi versus Republic (2006) eKLR*** thus:-

> ***"It will be noticed that the particulars of the indictment contain the word "robbed". That word is a term of art and connotes not simply a theft, but a theft preceded, accompanied or followed by the use or threats of use of actual violence to any person or property…."***

Applying the above principles to the evidence tendered, we totally agree with the concurrent findings of the first two courts that the appellant and his accomplices were acting in concert; that the appellant violently grabbed the complainant's neck and she fell down. The other two youths quickly ransacked the complainant and stole from her a mobile phone and cash Kshs.200. We find that in normal circumstances the vital ingredients of robbery with violence would have been proved to the required standard. However in the peculiar circumstances of this case, we find that the substituted charge of robbery with violence contrary to section 296(2) of the Penal Code does not contain in its particulars the nature of the weapon used in the commission of the offence and neither do the said particulars include the words "***armed with dangerous weapons namely…"***

In the premises we are of the considered view that the particulars of the substituted charge do not fully support the offence of robbery with violence contrary to section 296(2) of the Penal Code. This omission on the part of the prosecution is fatal only with regard to the nature of the offence committed but not fatal to the fact that commission of any other criminal offence had been disclosed. The particulars of the substituted charge as framed did not support the substituted offence of robbery with violence contrary to section 296(2) of the Penal Code. It falls short of that. Our hands are tied. We cannot fill in the missing

facts and then put them to the appellant to plead a fresh and then hold a trial a fresh.

However, being satisfied that another Criminal offence in fact which had been initially laid of stealing from the person was the one disclosed, we have no alternative but to set aside the confirmed conviction for the offence of robbery with violence contrary to section 296 (2) of the Penal Code together with the resulting death penalty, and substitute therefore a conviction for the disclosed offence of stealing from the person contrary to section 279(a) of the Penal Code.

The maximum sentence for the disclosed offence is fourteen years' (14) imprisonment. The appellant herein never benefited from the offence, he has been incarcerated since the 1st day of Janaury,2006 a period of 7 years or thereabout. We are of the considered opinion that the period served is sufficient to meet the ends of justice for the role played by the appellant in the commission of the offence against the complainants. We also note that there are no aggravating circumstances in this case which can compel us to find otherwise.

This finding could have disposed of this appeal. However, since there are other issues which were argued, it is only prudent that these too be disposed of on their merits.

With regard to failure to indicate the language used during the plea and the rank of the prosecutor who conducted the proceedings in the surbodinate court, it is our finding that these issues are being raised for the first time on appeal as we have not traced similar complaints on the record made by the learned trial magistrate. Neither have we traced similar complaints in the grounds of appeal directed to the first appellate Court. The foregoing situation notwithstanding, we are obligated to rule on this issue on its merit as earlier indicated. See the case of ***ELREMA versus Republic*. [2003] 1EA50.**

We are in agreement with the submissions of the State that indeed the language of the court was not indicated on the date the plea for the offence of stealing from the person was first taken. But subsequently the language was indicated as being English/Swahili. We also note that at all times when the case came up in court either for mention or hearing, there was a clerk in attendance. Section 77(2) (b) of the repealed constitution reads:-

> ***"77(2). Every person who is charged with a criminal offence-***
>
> ***(b) Shall be informed as soon as reasonably practicable in a language that he understands and in details of the nature of the offence with which he is charged"***

A similar prescription is found in section 198 of the Criminal Procedure Code chapter 75 laws of Kenya. It provides:-

> ***"198(1). Whenever any evidence is given in a language not understood by the accused, and he is present in person, it should be interpreted to him in open court in a language which he understands …."***

In the case of ***Kiyato versus Republic (1982-88) 1KAR 974*** this Court held, inter alia, that:-

1. ***It is a fundamental right in Kenya whatever the position is elsewhere, that an accused is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands."***

The Court revisited that issue in the case of ***Abdalla Versus Republic [1989] KLR 456*** and reiterated that:-

" It is a fundamental right of an accused person charged with a criminal offence to have the assistance of an interpreter, a breach of the appellant's constitutional and fundamental right is fatal to the proceedings" See also the case of ***Simiyu and another versus Republic [2006] KLR 100***, wherein it was also held, inter alia, that:-

> ***"The provisions of section 77(2) (b) and (f) of the Constitution and section 198 of the Criminal Procedure Code make it clear that in a criminal trial, the language of the trial must be understood by the accused person"***

This Court has however subsequently qualified its earlier stand in the case of ***Mugo and 2 others versus Republic [2008] KLR19*** wherein it was held, inter, that:-

> ***"It was not every case where language was not shown which would make an appellant to successfully raise the issue of language before the Court. Each case had to be considered in the light of its peculiar facts and circumstances".***

Applying the afore set out guiding principles to the rival arguments herein, we find that no miscarriage of justice or prejudice was occasioned to the appellant as at no time did the appellant complain during his trial in the surbodinate court that he was not following the proceedings on account of his failure to comprehend the language of the court. Secondly, indication of English /swahili and presence of a court clerk throughout the proceedings is a clear pointer to the face that the appellant understood the nature of the proceedings. We have also had occasion to revisit the grounds of appeal which the appellant presented to the High Court in his first appeal, nowhere in them did the appellant raise the issue of a language barrier and inability to understand the proceedings on account of a language barrier.

As for the rank of the prosecutor who conducted the proceedings, there is indication of the presence of an Inspector of police named ***Nyongesa*** who in fact prosecuted the case. There is no indication that there was any other ***Nyongesa*** who was involved in the prosecution of the case in the surbodinate court. We are therefore satisfied with the submissions of the State that there was only one ***Nyongesa*** involved in these proceedings and that ***Nyongesa*** was of the rank of an Inspector and therefore properly mandated to carry out the prosecution of the appellant in the surbodinate court. On that account we find that the proceedings were proper.

In the result and for the reasons given in the assessment we partially allow this appeal. We set aside the conviction by the subordinate court and confirmation of that conviction by the High Court together with its attended death penalty for the offence of robbery with violence contrary to section 296(2) of the Penal Code and substitute it with a conviction for the offence of stealing from the person contrary to section 297 (a) of the Penal Code. For the reasons given we find that the period served is sufficient penalty. We direct that the appellant be released from custody forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 11th 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