IN THE COURT OF APPEAL
AT NAKURU
CORAM: WAKI, ONYANGO OTIENO & NYAMU, JJ.A.

CRIMINAL APPEAL NO. 135 OF 2006

BETWEEN

ABDI CHEGE ALI
JESSE NGARASHU GICHUKI ……APPELLANTS
AND
REPUBLIC…….....…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome Musinga, JJ) dated 3rd March, 2006
in
H.C.CR.A. NO. 157 -158 OF 2002)

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JUDGMENT OF THE COURT

The two appellants before us, ***ABDI CHEGE ALI*** and ***JESSE NGARASHU GICHUKI*** were charged before the Senior Principal Magistrate's court at Naivasha with two counts, the first of which was that of Robbery with violence contrary to ***Section 296(2)*** of the Penal Code and the second was that of being in possession of imitative firearm without a firearm certificate contrary to ***Section 34(1)*** of the Firearms Act Chapter 114 Laws of Kenya. That court, after full hearing in which six prosecution witnesses were heard and the appellants also gave their unsworn statements in defence, found the appellants guilty of the offence of robbery with violence, convicted them and sentenced each of them to death. They were acquitted of the offence of being in possession of imitative firearm without a firearm certificate on the proper legal ground that the facts giving rise to that count formed part of the offence of robbery with violence. The appellants were dissatisfied with that conviction and sentence. They lodged appeals in the High Court at Nakuru – ***Criminal Appeal Numbers 157 and 158 of 2002.*** These appeals were consolidated and heard together. The learned Judges *(Koome and Musinga, JJ)* in a judgment dated and delivered on 3rd March, 2006, dismissed those appeals stating in so doing that both appellants were properly identified as the perpetrators of the offence as charged, hence this appeal.

The particulars of the offence of robbery with violence read as follows:-

"On the 12th day of June, 2001 at Gilgil Ammunition Site of 2nd Brigade in Nakuru District of the Rift Valley Province, jointly with another not before court and while armed with a toy pistol robbed Patrick Mwaura Karanja cash money Kshs.8,000/= at or immediately before or immediately after the time of such robbery used personal violence to the said Patrick Mwaura Karanja."

The facts of the entire case as accepted by the courts below were straightforward, and rather simple. On 12th June, 2001 at about 9.30 a.m. ***Patrick Mwaura Karanja, (PW1),*** the complainant, was walking from

his home to Gilgil. He saw three people ahead of him about ten (10) metres away walking towards him. When those people were two metres away from *Patrick,* one of them whom he identified in court as ***Jesse Ngarashu Gichuki,*** the second appellant, asked him for cigarettes. Suddenly the second person he identified as ***Abdi Chege Ali,*** the first appellant got, hold of his neck. He screamed and the first appellant told him to keep quiet. The first appellant produced a pistol. The second appellant got hold of his right hand while the third person knocked him down. As he was down, the first appellant was still on his neck strangling him as the second appellant took money from his pockets. They took Kshs.8,000/= in total. Thereafter they left him but the first appellant told him to go away and not to look behind. The three thugs then went away, but after they had gone a short distance - about 100 metres, the complainant shouted for help. Members of the public which included ***Moken Ole Kishambili (PW2)*** and ***Stephen Ole Koibony, (PW3)*** responded to complainant's shouts for help and started chasing the three thieves who, after sensing danger also started to run away. The complainant followed them. After a long chase, which according to complainant covered about three kilometers, the first appellant ran to the main Nairobi-Nakuru road at a *"nyama choma"* area. At that relevant time, ***Sgt. Elijah Karia, (PW4)*** and ***PC Driver Peter Otieno, (PW5),*** both attached to Anti Stock Theft Unit at Gilgil were heading to Nakuru in their official Peugeot vehicle. As they reached the *nyama choma* area, they saw many people chasing a man. They stopped their vehicle. The man who was being chased approached them after throwing something which turned out to be an imitative pistol on the road. He got into their vehicle and a member of public picked up the imitative pistol he had thrown on to the road and took it to the police. He was taken to Gilgil Police Station. In the meanwhile, ***Stephen Ole Koibony (PW3)*** and other members of the public continued chasing the second appellant whom they arrested near Elementaita Lodge when he grew tired and could not proceed further with his effort to escape. He was put in a private motor vehicle and later taken to Gilgil Police Station where both were charged with the offences as stated. When put to their defence the first appellant, stated in an unsworn statement as follows:-

"On 12.6.2001 I got permission for an off. I proceeded to Nyama Choma area. On the way I saw two people running. Suddenly members of public came chasing me. I saw a police van. I ran to the said vehicle for safety. Members of public brought pistol saying that it was mine. I was taken to police station. I denied having committed these offences which I deny. That's all."

And the second appellant stated, also in unsworn statement:-

"On 12.6.2001 I proceeded to Gilgil town while on the way I met a group of people who were armed. They interrogated me asking me whether I had met some people running. I said I had not. I had no ID card. They said that I was one of the thugs. I was taken to police station where I found the 1st accused, whom I did not know before. I was later charged with this offence. That's all."

The above, were the facts that were considered by both the trial court and the first appellate court and the reliance on which resulted in the conviction of the appellant by the trial court and confirmation of the conviction by the first appellate court. The two appellants now come before us on a second appeal premised on four grounds of appeal in respect of the first appellant and on five grounds of appeal filed on behalf of second appellant in two supplementary memoranda of appeal which contain similar complaints. *Mr. Maragia Ogavo,* the learned counsel for both appellants adopted the same grounds and abandoned the original grounds and supplementary grounds filed by each appellant in person. The common grounds are that the appellants were not properly identified as the witnesses lost sight of them from time to time as they chased them; that as the alleged toy pistol had not been dusted and finger prints on it raised, the learned judges erred in finding that the appellants were in possession of it, that the provisions of ***Section 77 (2) (b)*** of the retired constitution and those of ***Section 198 (4)*** of Criminal Procedure Code, were violated and thus the trial was a nullity in law; and that the evidence of PW1, PW2 and PW3 were not corroborated. As regards the first appellant, an additional ground was raised that the learned Judges failed to re-evaluate and analyse various issues of fact and law as set out in the first appellant's petition of appeal before the High Court.

In a lengthy and well presented submission to us, *Mr. Maragia*, the learned counsel for the appellant stated that there was no evidence that throughout the three kilometres when the appellants were being chased, the complainant never lost sight of them. He referred us to parts of the record and contended that

it showed that the two were not throughout within sight of the complainant and thus there was serious doubt that the appellants were properly identified. He submitted further that the evidence as regards possession of the toy pistol was weak as it was not ascertained that he was the person who dropped the toy pistol that was eventually taken by the police. On the ground alleging that the trial court did not conduct the trial in a language understood by the appellants, *Mr. Maragia's* take was that there was nothing on record to indicate the language in which the entire trial was conducted and that at the end of the case, in his mitigation, the first appellant stated that he was not able to present his case properly. In his view, *Mr. Maragia* felt this remark demonstrated that the appellants were unable to actively take part in the proceedings because of their lack of understanding of the language in which the proceedings were conducted. Again, *Mr. Maragia* stated that witnesses such as the chief and those who chased the appellants were essential witnesses and omission to call them was fatal and lastly *Mr. Maragia* maintained that the High Court failed to consider the matters that were raised in the appellants' petition before it such as the issue of language and failure to lift finger prints from the alleged toy gun.

In opposing the appeal, *Mr. Nyakundi*, the learned State Counsel was of the view that the decisions of the trial court and of the High Court were sound and the conviction of the appellants was inevitable in that the complainant saw all his attackers very well as it was day time and he talked to them. After attack on him by the appellants, and as they were 100 metres away, the complainant sought help and the members of the public chased the appellants. That chase took place in a plain area and the complainant saw the appellants throughout the chase. The "pistol" was seen by the complainant at the time of his attack and was found with the first appellant towards the end of the chase. On language, *Mr. Nyakundi* submitted that as a clerk was in court, and as the record shows that the appellants conducted their defence well and also gave their defence statements, they must have understood the language of the court which must have been interpreted to them.

This is a second appeal. By dint of the provisions of ***Section 361(1) (a)*** of the Criminal Procedure Code, only matters of law would be considered at this stage unless it be demonstrated that the first appellate court and the trial court failed to consider what they should have considered or that they considered what they should not have considered or that looking at the entire case, the decision is untenable.

The alleged offence took place at 9.30 a.m. That was during the day time. The appellants, together with another who escaped, were the only three people on that foot path. The three were walking towards the complainant. The second appellant asked the complainant for cigarettes. All this time only the three attackers and the complaint were at the scene. Under those circumstances, the complainant had time and ample opportunity to see and identify those people, one of whom asked him for cigarettes. This was before the attack. Thereafter the three, started attacking him when the first appellant suddenly getting hold of his neck. When the appellant screamed, he was told to keep quiet and a pistol, later found to be an imitation of a pistol, was produced. The second appellant got hold of his right hand as the other person, who disappeared knocked him down. And as he fell down the first appellant was still strangling him, as the second appellant took money from his pocket. After all this, they left the complainant and walked away. Again, none joined them through the distance of 100 metres as they walked away as the complainant was looking at them. Thus more time was availed to the complainant of seeing and identifying the appellants such that by the time people came to his aid and started chasing the appellants, he had seen them for a considerable time and his identifying them again after chase was reliable. It is true that he did not himself personally take part in the arrest of the two appellants. It is also true that he said that he did not know where first appellant was arrested and that he found the first accused had already been arrested. One must however appreciate that the complainant was alone when he was attacked by three people and when these people were being chased, he could not as an individual chase all of them at the same time particularly as they split and were running in different directions. He could not under those circumstances be expected to be at the scene of arrest of each appellant. One thing seems to be certain though, and that is, that before their arrest, he had seen them for some time and was among the people chasing them while screaming and the second thing is also clear, that immediately after their arrest he was certain that the appellants were the people who had robbed him.

Added to the complainant's evidence was the evidence of *Moken Ole Kishambili*and *Stephen Ole Koibony*. These were members of the public. *Moken* responded to the screams of the people who were

chasing thieves. He saw three of them running and being chased before they separated. Indeed, they separated as he joined the chase. As they separated, he continued chasing the first appellant. Part of his evidence was as follows:-

"When I saw the thugs they were at a distance of about ten metres. I decided to apprehend them. They separated. I chased them. They separated. I chased (sic) one of them he is the 1st accused. I had my panga and club. When he saw that I was nearing him he produced a pistol. I stopped suddenly and went to the market and said that there were thugs with pistols."

Thus *Moken* also saw the first appellant with a pistol as the first appellant was running away being chased in response to the alarm raised by the complainant. The same first appellant seen by the complainant and who threatened complainant with a gun, was immediately thereafter seen with a pistol by *Moken* as he was being chased. Further, *Sgt. Elija Karia* also saw and arrested the first appellant whom *Karia* said had thrown something which was in his hand as he was running away being chased by members of the public. That thing turned out to be an imitation pistol. Clearly the first appellant, though seen at the scene of the crime by only one witness, was immediately thereafter seen with the same pistol by *Moken* and *Sgt Karia.* These two witnesses' evidence confirms that the complainant identified the right person though not arrested in his presence. *Stephen Ole Koibuny* confirmed that he saw first appellant with a pistol.

As regards the second respondent, Stephen said the members of the public together with him, chased the second appellant upto near Elementaita Lodge. This was, according to Stephen, because the complainant had identified him as one of the thieves. This was in continuation of the same chase prompted by the complainant. The decision in the case of ***JARED OCHIENG MANGIRA vs REPUBLIC*** (2011) eKLR to which we were referred by *Mr. Maragia* was based on sound law and we accept and adopt it, but it is clearly distinguishable from this case in that, in that case the first appellate court found that the complainant did not claim in his evidence that he identified the appellant at the scene a finding which this Court finds is inconsistent with the evidence of the complainant here who said the appellant was one of the people who robbed him. Secondly, in that case, the court found that the evidence that was adduced by the complainant on identification was dock identification which was not enough. In this case, the complainant ran after the appellants and never left the chase to go to his house and to hospital and later to Police to find the appellant had been arrested and taken there, as was the case in the ***NANGIRA*** case (supra). In this case, the first appellate court made findings as follows:-

"We have considered the evidence upon which the appellants were convicted, the evidence recorded shows that the chase against the 1st appellant from the time the complainant raised alarm was continuous, it was joined by PW2, PW3 and the 1st appellant, was apprehended by PW4 and PW5 who saw him drop the toy pistol. The scenario presents to us a continuous sequence of events and there is no moment that the chase was broken to give room for a mistaken identity…….…. The chase took place on a pastureland and, PW2 or PW3 stated they continued with the chase of the 2nd appellant up to the time of apprehension and the complainant immediately identified the 2nd appellant when he was apprehended and put in a vehicle of the local Councilor as the person who had robbed him of his money a few minutes earlier."

We do not need to belabour more distinguishing factors of the two cases. In our view, the appellants were properly identified as the perpetrators of the offence with which they were charged.

Mr. Maragia raised another complaint, that the imitative pistol which the first appellant used in threatening complainant, and which he threw away just before he surrendered himself to the police, was not dusted for finger prints and this made the allegation that he was found in possession of it untenable. In our view, this was a matter of fact which by virtue of the provisions of ***Section 361*** of the Criminal Procedure Code, does not fall for our decision. However, even if we were to decide on it, it is neither here nor there. The evidence was clear that the first appellant towards the end of his chase, threw the imitative pistol down and it was picked by members of the public and handed over to police. In that scenario, the raising of finger prints on the pistol could not have been of any value to the case as by the time it reached police station, it had been handled by so many people that whether the first appellant handled it would not

have come out clearly as other handlers finger prints would also be all over it. That complaint lacks merit.

The other main complaint was that it was not indicated in what language the trial was held. We agree that looking at the record, the learned magistrate did not indicate the language in which the trial proceeded. This was a sad omission particularly in view of our many judgments on that issue. However, as concerns this particular case, we note that the complaint is not that the appellant did not understand the language in which the trial was conducted. The complaint is that ***Section 198 (4)*** of the Criminal Procedure Code and ***Section 77(2)*** of the retired constitution were breached. It is not stated in what way these provisions were breached. During his submissions, Mr. Maragia relied on the undisputed fact that the trial court did not record the language in which the witnesses and the appellants gave evidence and on the part of the record where the first appellant is recorded as having said in mitigation that he was not able to present his case properly. In our view, the law is clear that the constitution, both the retired and the current one requires that an accused person be informed of the charge he is facing in a language he understands. That provision must be complied with at every hearing of a criminal case. However it is not specifically stated that that language must be recorded down in the proceedings and whereas recording that language down in the proceedings is the best direct evidence that indeed the accused was informed of offence in the language he understood, and should always be the way to go by the courts, there are cases where it can be deciphered from the record that indeed the court, though it did not record the language in which the trial was conducted, nonetheless complied with that constitutional requirement. This is one of those cases. The record shows there was a court clerk by name Njuguna. If one were to go by names, he was from the same ethnic background as the appellants. His work as a clerk included in the main, interpretation. Secondly, each appellant, according to the record, did cross examine all witnesses effectively which suggests that they understood the language in which the witnesses gave evidence. Thirdly, the appellants gave unsworn statements which were fairly lengthy and coordinated; again further evidence that they were not at sea as far as the language in which the hearing proceeded was concerned. In our understanding, when the first appellant said he did not present his case properly, he was not saying that he was hampered by inability to understand the language in which the case was conducted nor by his own inability to speak that language. All we understood him to be saying is that though he had opportunity to present his case, he failed to do so properly due to reasons he did not mention. We think that, if it appears from the record that the accused at the trial fully understood the language in which the trial was conducted and there is no doubt on that, then though the trial court may not have specifically written down that language, the requirements of the constitution and of ***Section 198(4)*** of the Criminal Procedure Code cannot be said to have been breached. In this case, as we have stated, we are of the view, that from the reading of the record, there were no breaches of the provisions of ***Section 198(4)*** of the Criminal Procedure Code and of ***Section 77(2) (b)*** of the retired constitution.

Lastly, it is not in dispute that the Councilor in whose vehicle the second appellant was put was not called. That however, was not of any fatal consequence as two members of the public were called and gave evidence on the events leading to the arrest of the appellants. In any event the provisions of ***Section 143*** of the Evidence Act are clear that superfluity of witnesses is not necessary. In this case, we think the number of witnesses called were enough to prove prosecution's case.

We have said enough to show that in our view, this appeal cannot succeed. It is dismissed.

DATED and DELIVERED at NAKURU this 23rd day of FEBRUARY, 2012.

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……..
JUDGE OF APPEAL

J.G. NYAMU
……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.