IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 26 of 2008

BETWEEN

CHRIS KASAMBA KARANI ……………………. APPELLANT

AND

REPUBLIC …………………………………….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Kimaru, JJ.) dated 24th January, 2008

in

H.C.CR.A. NO. 199 OF 2004)

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JUDGMENT OF THE COURT

The facts giving rise to this appeal before us are straight forward and brief. ***Charles Chege Njoroge*** (PW2) was running a bar called Eliza at Ponda Mali Estate in Nakuru. ***Betty Nawire*** (PW1) was working in that bar. On 3rd February 2004 at 8.00 p.m. only Betty and one customer were in the bar. Apparently Chege was somewhere else within the precincts of the bar. A person, later identified by Betty as the appellant entered the bar and asked Betty to sell to him Merry Cane sachet. As Betty went to pick the sachet, another person appeared. Both the appellant and that other person pulled out pistols - one each. The appellant ordered Betty to lie down and pushed her under a table. Two other robbers appeared, one holding a panga and a powerful torch. The appellant and one robber entered the counter and took Ksh.2,000/= from the counter. They also took Ksh.3,000/= from the customer. As all this was going on, the bar was lit with bright electricity light. In the intervening period, Chege walked into the counter to buy cigarettes. He also confirmed there was bright electricity light in the bar. Chege saw two people in the counter. Those two people charged at Chege with one having a panga. Chege got hold of one of them who had a panga, and as a result he (Chege) was not cut with the panga. He held that one tight as the other one ran away. The one he held had not only a panga but a metal bar also. He was wearing a cap which covered his eyes. Chege shouted as he struggled with him. Members of the public responded to Chege's shouts for help. As they were struggling, Chege said, identification documents of the person he was holding fell from his (robbers') pocket. With the help of the members of the public, that person was arrested and taken to the police station. Chege identified that person as the appellant. The panga and metal bar which the appellant had were all taken to Bondeni Police Station. He was handed over to PC Joel Wambua (PW3) who rearrested him and after investigations, he was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars were that:-

"On the 3rd day of February 2004 at Ponda Mali Estate in Nakuru township within Nakuru District of Rift Valley Province, jointly with others not before court while armed

with dangerous or offensive weapon (sic) namely pistols, pangas, metal rod robbed Betty Nawire of her cash money Ksh.2,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Betty Nawire."

He pleaded not guilty to that charge and at his trial, his defence, given in an unsworn statement, was that on that day, 3rd February 2004, he went to his place of work and worked until 7.00 p.m. He then left for home and on his way home he went to Ponda Mali where he found people shouting, screaming and talking in Kikuyu language. He enquired from one of them as to what was happening but he was made to sit down and was asked to identify himself as a worker at Mt. Sinai Hotel – apparently he had alleged that he was working at that Hotel. Police were called and he was taken to the police station and was charged. He denied the offence. In his defence he stated that Chege had given false evidence against him.

The learned Senior Resident Magistrate (J. Nduna), after considering the above evidence, found the appellant guilty as charged, convicted him and sentenced him to suffer death as prescribed by law. He was not satisfied with that conviction and sentence. He appealed to the superior court vide Criminal Appeal No. 199 of 2004. In a lengthy judgment delivered on 24th January 2008, the superior court (Koome and Kimaru, JJ.) dismissed the appeal and confirmed both the conviction and sentence, hence this appeal which was originally based on a memorandum of appeal and supplementary memorandum of appeal, both filed by the appellant in person, but both of which have been abandoned and replaced by a supplementary memorandum of appeal filed by the appellant's advocates on 25th March 2010. Four grounds of appeal are raised in that supplementary memorandum of appeal and they are as follows:-

"1. That the learned Appellate Judges erred in law by sustaining the finding of the subordinate court despite the testimony of PW1 and PW2 being deficient of credibility.

2. That the learned Appellate Judges erred in law in upholding the finding of the trial court which court failed to note and acknowledge and address itself on the absence of essential witnesses and exhibits before reaching a finding of guilty.

3. That the learned Appellate Judges erred in law by sustaining the finding of the subordinate court despite of the exhibits being produced contrary to the law.

4. That the learned Appellate Judges erred in law in upholding the finding of the subordinate court inspite of the evidence of prosecution witness conflicting with the trial court finding that the accused involved himself with robbery incident."

In urging the above grounds before us, Mr. Ogaro, the learned counsel for the appellant submitted that the evidence of Betty could not be relied upon, as she was ordered by the attackers to lie down and was pushed under a table in the bar and so she could not see what was going on in the bar including witnessing money being stolen from the counter and identifying the thieves. Further, he submitted that there was contradiction between Betty's evidence and that of Chege for whereas Betty said the appellant had a pistol, Chege said the appellant had a panga. Added to that is lack of proper identification, Mr. Ogaro contended that Exhibit 1 which was a panga was not properly produced as PC Joel produced it before it was identified by Chege who should have identified it before it was produced as an exhibit. He also submitted that the trial court erred in failing to call the manager of Mt. Sinai Hotel despite having issued summons for him to give evidence. Mr. Ogaro however conceded on that point, that the appellant, on his own, closed his case thereby making it difficult to call the Manager of Mt. Sinai Hotel to give evidence on his behalf. Mr. Nyakundi, the learned State Counsel on the other hand supported the conviction and sentence, contending that the conviction was based on proper evidence and should not be disturbed.

This is a second appeal. By dint of the provisions of ***section 361*** of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or

that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. Whether Betty and Chege were credible witnesses are matters of fact and we would be very reluctant to interfere with the concurrent findings of the two courts on such matters. In dismissing the appeal and confirming the conviction of the appellant, the superior court, after analyzing the evidence on record and evaluating it stated as follows in pertinent parts:-

"It was therefore clear to this Court that the appellant was apprehended in the course of the robbery. He was arrested while possessed of a panga which had earlier been used to threaten (sic) PW1 to surrender the money that was in her possession. Although the appellant stated that he was a victim of mistaken identity, it was clear to this Court that the prosecution addressed evidence which clearly explained the chain of events that took place at Eliza bar from the time robbers entered into the said bar, threaten PW1 and later robbed her of Ksh.2,000/=. The chain of events were not broken when robbers attempted to make good the escape from the bar. One of the robbers was thwarted in his bid to escape from the scene of the robbery. That robber was the appellant.

Our re-evaluation of the evidence adduced leads us to no other conclusion than that the appellant was one of the robbers who robbed the complainant. His protestation of innocence does not hold water. ……………..
We see nothing in the said events that would persuade us to arrive at a contrary decision. It was clear to this court that the appellant was apprehended by members of the public immediately after he had committed the offence. He was therefore literally caught re-handed."

The appellant's defence which the two courts below rejected, was as we have stated, that he was merely passing near the scene where the incident had just taken place and he was thus a victim of circumstances. Thus he was stating in short that his identification as one of the robbers was mistaken. That raised the question of identification of the attackers of Betty and that is a matter of law. The guidelines as regards the principles that the court should look into when dealing with evidence of identification which the accused says is mistaken, including that of identification by recognition, are well set out in the well known case of ***<u>R vs. Turnbul and others</u> (1976) 3 ALL ER 549*.** This Court relied on it in its judgment in the case of ***<u>Wamunga vs. Republic</u> (1989) KLR 424*** in which it held inter alia as follows:

> ***"1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.***
>
> ***2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."***

This was a case of identification of a stranger. When the attackers entered the bar, Betty said she was only with one customer. The bar where the two were, was well lit by electricity light. There was no press of people in the bar to hinder Betty's view. She was pushed under a table and there was no evidence as to any object that would have blocked her from seeing the attackers even as she was under the table. And finally, one of the attackers was caught there and then by Chege. As they struggled and moved outside the bar, an identity card from the pockets of that attacker fell down and it was found outside near the bar. The cap he was wearing fell off during the struggle. To cap it all, Chege never let go of that person till members of the public came and helped him take the person to the police station. That person was the appellant. In our view, the part of the superior court's judgment we have reproduced herein above sums it all. He was caught red handed and his defence which was rejected, after due consideration by the two court's below was indeed ousted by clear and credible evidence adduced by the prosecution. We, too, see no merit in it.

We agree that the panga, exhibit 1 was irregularly produced. In law and following the correct procedure, Chege should have identified that exhibit and it should have been marked for identification,

before PC Wambua could produce it as exhibit. However, in our view, nothing turns on that irregularity because the production of that exhibit did not affect any ingredient of the offence. The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit. In any case, there were more than one attackers and that being the case, the offence was proved even without the existence of a dangerous weapon. On the allegation that a defence witness was not called, Mr. Ogaro conceded that it was the appellant who had closed his case thereby shutting out his witness. We say no more on that.

Before we conclude this judgment, we note that the trial court, after finding the appellant guilty and convicting him, proceeded to pronounce sentence upon him in the same judgment, without receiving any mitigating circumstances from the appellant and the appellant's antecedents before sentencing him. This was not proper. This Court has said in several decisions that even where the sentence is a mandatory, the trial court needs to record mitigating circumstances before pronouncing the sentence. This is important because, on appeal, the appellate court may be minded to find the appellant guilty of a lesser charge which does not attract mandatory sentence. In such a situation mitigating circumstances on record would be of importance when assessing appropriate sentence.

Further, there may be other situations such as when the President is considering commuting the sentence, then the record may be of importance

In conclusion, as is clear from the above, there are no grounds upon which we would disturb the decision of the two courts below. The appeal lacks merit. It is dismissed.

Dated and delivered at NAKURU this 28th day of May, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

…………………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR