



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 322 of 2006

SAID HASSAN NUNOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 16th November, 2006

H.C.Cr.A. No. 124 of 2004)

JUDGMENT OF THE COURT

This appeal arises from the conviction and sentence imposed upon the appellant by Senior Resident Magistrate Garissa on 21st September, 2004 in the *Senior Resident Magistrate's Court Criminal Case No. 536 of 2003*. Said *Hassan Nuno*, the appellant, was charged in that court with the offence of robbery with violence contrary to *section 296(2)* of the Penal Code. The particulars of the charge were that on 19th day of December, 2003 at Bulla Iftin area in Garissa District of Eastern Province while armed with dangerous weapon, namely, panga, he robbed *Mwana Hamisi Salim Barissa* of Kshs.1,010/= and at or immediately before or immediately after the time of such robbery used personal violence to the said *Mwana Hamisi Salim Barissa*.

On 19th December, 2003 at around 9.00 a.m. *Mwana Hamisi Salim Barissa* (PW1) was walking towards Bulla Iftin market to buy vegetables when she met the appellant. He was standing beside the road and as she passed him the appellant hit her with the flat side of the panga which he was holding in his hand on the back and both ears. He also kicked her and she fell to the ground. When she fell down the appellant grabbed a pouch in which she had kept Kshs.1,010/= and ran away. PW1 reported the incident to her father *Salim Barissa* (PW2) who came to the scene soon after the incident and they both went to report it to Garissa Bulla Iftin Police Patrol Base where a P3 form was issued to PW1. She then went to Garissa General Hospital where she was attended to by *Adan Ali Dike* (PW5) who treated her and completed the P3 form which was produced in evidence as exhibit 3.

At around 12.00 noon on the same day the appellant was spotted by *Adam Salim Barissa* (PW3) who informed *Pc. Jonathan Kosgey* (PW4) and *Pc. Rono* (PW6) about his whereabouts. The two officers went to where the appellant was

and arrested him after a short chase. When he was taken to Garissa Police Station and searched, some Kshs.447/= was recovered from him. He was then charged with the offence as herein before stated.

When placed on his defence the appellant testified on oath and stated that he did not rob the complainant and was arrested for nothing. He stated further that he had disagreed with the complainant earlier and asked the court to release him. The learned Senior Resident Magistrate (*J.G. Kingori*) heard the case, wrote and delivered his judgment on 21st September, 2004 in which he found that PW1 was robbed of Kshs.1,010/= on the date of the incident by the appellant who was well known to her and that at the time of such robbery he, the appellant, was armed with a panga which he used to inflict injuries on her. Upon the appellant's conviction, the learned Magistrate imposed the death sentence on him as by law prescribed. His appeal to the superior court was dismissed (*Lenaola & Sitati, JJ.*); hence this appeal before us which is grounded on the home-drawn memorandum of appeal by the appellant with six grounds of appeal. It was abandoned at the hearing of the appeal and a supplementary memorandum of appeal with four grounds of appeal filed by the firm of *M/s Njuguna Kimani & Company Advocates* representing the appellant adopted for argument on appeal. The four grounds are as follows:

- 1. The learned Honourable Judges of the Superior Court erred in law in not appreciating that the trial court did not indicate what language was used in the proceedings by PW1, PW2, PW3, PW4, PW5, PW6 and even the appellant in his defence. Prejudice and a miscarriage of justice was occasioned to the appellant.***
- 2. The learned Honourable Judges of the Superior Court erred in law in failing to appreciate that there was no independent witness who witnessed the alleged attack on the complainant though committed in broad day light and misdirected themselves in holding that PW4, PW5 and PW6 were independent witnesses. Prejudice was occasioned to the appellant.***
- 3. The learned Honourable Judges of the Superior Court erred in law in failing to adequately evaluate the state of circumstances obtaining during the attack and subsequently robbery of the money coupled with how the panga was allegedly used by the appellant and the injuries inflicted as if they so did, they could have formed the irresistible inference that a lesser offence was indeed disclosed and therefore mete out the appropriate sentence. Prejudice was occasioned to the appellant.***
- 4. The learned Honourable Judges of the Superior Court erred in law in failing to appreciate that the Trial Court never gave the appellant a chance to cross-examine the complainant in total disregard to section 208(3) of the C.P.C. Prejudice and miscarriage of justice was occasioned to the appellant.***

When the appeal came up for hearing before us **Mr. Kimani**, learned counsel for the appellant submitted that the language used during the proceedings of the case was not stated, hence the appellant's constitutional rights were breached. According to him, there were three different court clerks during the hearing of the case and without indicating the language of the court it was not clear which language each of them interpreted to the appellant. He submitted further that if the trial court had evaluated the evidence, it could have detected the failure to record the court language used during the proceedings. He submitted that there were no eye witnesses to the incident. Though it was alleged members of the public who came to the scene to assist PW1 saw the appellant; he contended that if this was so, such members of the public should have been summoned to testify in court. According to his submissions although the

alleged robbery was committed during daytime, there were no exchanges between PW1 and the appellant and no explanation was given on how the panga the appellant had was used. The trial court, he concluded, did not consider all these issues and if it had, it could probably have come to the conclusion that a lesser offence had been committed and not robbery with violence contrary to **section 296(2)** of the Penal Code.

Mr. Kaigai, learned Principal State Counsel opposed the appeal and submitted that this was a case of recognition. On the issue of court language he submitted that the appellant participated in the proceedings, cross-examined all the witnesses; and understood the charge facing him. He did not raise the issue before the trial court or in the first appellate court. Mr. Kaigai further stated that although there were three different court clerks, their duty was to do interpretation during the proceedings. He submitted that the trial and first appellate courts made concurrent findings of fact which this Court cannot interfere with. Finally he urged us to confirm the appellant's conviction and that since he carried a dangerous weapon he was correctly charged and convicted of the offence under **section 296(2)** of the Penal Code.

This is a second and final appeal and by dint of **section 361(1)** of the Criminal Procedure Code our jurisdiction is confined to points of law only. The appellant's counsel based his submissions mainly on the issues of the appellant's identification and the language used during the trial. The treatment of accused persons who cannot understand the language used in a court of law has been provided for in **section 77(2)(b)** and **(f)** of the Constitution and **section 198** of the Criminal Procedure Code. On this issue, it is clear, that the trial magistrate seems to have been unaware that the law requires him to specify in his record the language which the appellant had himself chosen to speak and into which proceedings were to be interpreted to him. Right from the first to the last page of the proceedings the language used by the appellant and witnesses was not recorded. This Court has continually held that an accused person is entitled to choose a particular language he will use in the proceedings and there is a duty to provide an interpreter to him in that language - ***Degow Dagane Nunow v R., Criminal Appeal No. 223 of 2005 (UR)***.

Each case must, however, depend on its own particular facts: see ***Benard Lelimo Ekimal v R. Criminal Appeal No. 151 of 2004 (UR)***. In this appeal, when the appellant appeared before the trial court for plea on 22nd December, 2003, this is what the record shows:-

“The substance of the charge and every element thereof has been stated by the court to the accused person, in a language that he understands, who being asked whether he admits or denies the truth of the charge replies:

ACCUSED

It is not true.”

(emphasis provided)

This was followed by the full hearing of the case between 8th January, 2004 to 10th August, 2004 during which time the appellant fully participated and cross-examined the witnesses. When he was placed on his defence after the ruling on a

case to answer, the appellant stated on oath:

“My name is (sic) Said Hassan Nuno. I know the charge I am facing. I did not rob the complainant. I was arrested for nothing. I had disagreed earlier with the complainant. I ask the court to release me. That is all.” (emphasis also provided).

Apart from the above, at each stage of the proceedings 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 or even to the court where it does not understand the language of the accused; or a witness to the case. Mr. Kimani attempted to take issue of different court clerks attending the court on different dates but did not make out what his complaint on this was all about. 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. This ground of appeal fails.

It is true that the evidence adduced before the trial court may not have revealed the presence of any other person at the scene where the complainant was attacked by the appellant. However, there is no provision in law for the need for a particular number of witnesses to the commission of a crime before founding a conviction on it; see **section 143** of the Evidence Act. In ***Ogeto v Republic [2004] KLR. 14*** this Court held that:-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such witness especially when it is shown that conditions favouring a correct identification are difficult.”

In this appeal the incident occurred in broad daylight and the parties knew one another. There was no case of mistaken identity. Although the appellant alleged he had disagreed with the complainant earlier he made no elaboration of the disagreement though he was under no duty to do so. He was given adequate opportunity to cross-examine PW1 but he put no question to her. Her testimony therefore stands unchallenged. Grounds 2 and 3 of the memorandum of appeal fail too.

On a charge of robbery with violence under **section 296(2)** of the Penal Code the presence of only one ingredient of the offence suffices. In the case giving rise to this appeal, the appellant was armed with a panga which he did not dispute and the Clinical Officer who examined PW1 found tenderness below the ear, and on the right upper arm, the areas PW1 complained to have been injured during the robbery. The charge under that section was properly established.

The trial court believed the complainant’s evidence as honest and truthful and rejected that of the appellant and the first appellate court was in agreement with the former and found that there was no reason for the complainant to frame the appellant with such a serious offence.

We agree with learned Principal State Counsel that there were concurrent findings of the two courts below and that this Court has no reason to interfere. This appeal has no merit and it is hereby dismissed.

Dated and delivered at Nyeri this 19th day of November, 2010

E. O. O’KUBASU

.....
JUDGE OF APPEAL

P. N. WAKI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR