IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 235 OF 2006

SIMON KARANJA WAINAINA ALIAS WAKIONGO………..……….APPELLANT

AND

REPUBLIC………………………………………….……………..RESPONDENT
(Appeal from a judgment of the High court of Kenya at Nairobi (Ojwang & Dulu JJ) dated 1st November, 2007

in

H.C.CR.A. NO. 1 of 2006
****

JUDGMENT OF THE COURT

The appellant, Simon Karanja Wainaina alias Wakiongo, was convicted after a trial of two main counts of robbery with violence contrary to **section 296(2)** of the Penal Code and was sentenced to the mandatory death penalty for the offence, as also two main counts of possession of a firearm and ammunition respectively contrary to **section 4(1)** as read with **section 4(3)** of the firearms Act, Cap 114 of the Laws of Kenya, for which he was sentenced to 10 years imprisonment to run concurrently, but which sentences were ordered to be in abeyance because of the death penalty, aforesaid. The trial court did not make any finding on the alternative counts to the robbery counts of stolen property contrary to **section 322 (2)** (sic) of the Penal Code.

The appellant's first appeal to the superior court having been dismissed the appellant comes to us on second appeal, and the main grounds of complaint are contained in a supplementary memorandum of appeal which his counsel, Mrs Betty Rashid, filed and these are:

" (1) the learned Judges of the High Court erred in law and fact in upholding the appellant's conviction and sentence whereas the same was founded on a defective charge sheet.

(2) the learned Judges of the superior court erred in law and fact in upholding the appellant's conviction and sentence on faulty identification.

(3) the learned Judges of the High Court erred in law and fact in upholding appellant's conviction and sentence when the proceedings had contravened the provisions of section 213 and 310 of the Criminal Procedure Code and section 77 (1) of the Constitution of Kenya.

(4) the learned Judges of the High court erred in law and fact when the issue of possession of

exhibits produced were not proven to have been found in the appellant's possession.

(5) that the learned Judges of the superior court erred in law by upholding the conviction and sentence when the prosecution's case is full of contradictions and inconsistencies.

(6) the learned Judges of the high court erred in law and fact by upholding conviction without re-evaluating and analyzing the entire evidence on record as the law requires."

This being a second appeal by dint of the provisions of **section 361 (1)** of the Criminal Procedure Code, issues of fact do not fall for our consideration. Such an appeal may only be on issues of law. To the extent that some grounds question findings of fact we will not consider them. Before we consider the grounds proffered for this appeal, it essential to set out the background facts, in resume form only.

On 14th February 2004, at about midnight as Bipin Amin, while in the company of one Rajin Shah, drove the latter's car registration no KAE 880S, a BMW, into the latter's residence, a lone armed man confronted them as they parked the car. He pointed a gun at Amin and demanded from him mobile phones and money. Amin surrendered his mobile phones, a Nokia 7250 and Kshs. 11,000/- in cash. Amin was the driver and he did not have time to obey a command the gun man had given for them to lie down, but Shah did. After the gunman had finished with Amin he turned to Shah and demanded from him all the valuable items he had. Shah surrendered his mobile phone, a Nokia 8310, about Kshs. 9000 in cash, golden bracelets and 2 neck chains, after which he ordered him to open the house.

As soon as they entered the house the gunman opened drawers looking for money. While all this was happening there were electric lights on both outside and inside the house. According to both Amin and Shah, they were bright and lit the area well. Using the light they were able to observe the lone gunman. Shah testified that the man had not covered his head but Bilah Dima Duba (Duba), who was the watchman employed to guard the home testified that the gunman had covered his head with a hat, but his face was clearly visible. Diba also testified that the gunman was wearing a white long sleeved shirt, black trouser and safari boots shoes.

Amin, Shah and Duba, all testified that they observed the lone gunman and were able to identify him. The gunman, according to the three witnesses was the appellant.

Be*fore the appellant left, he demanded form amin and was givn a wedding ring and wrist watch. Eh also got a wrist watch form Sha.* He then left and walked towards Batu Batu gardens. Guards from Falcon Security followed him in their security vehicle, but before they could catch up with him, P.C. John Mathenge and his colleague P.C. Rotich who were on patrol duties met them. They saw a lone man escape from a thicket nearby; the man jumped over a wall into a house within 1st Parklands avenue. There were security lights on nearby, and with the aid of those lights they were able to see the clothes he had on.

P.C. Mathenge described the clothes the man was wearing namely, a white, T-shirt and a black trouser. The description is of course different from the description given by Duba, who said that the lone gunman had a white long sleeved shirt on. Be that as it may the man escaped from that compound by jumping over a wall into Batu Batu gardens. The policeman pursued him while firing into the air and eventually he surrendered to them. Two nokia mobile phones and a gun were recovered from near where he was arrested. This however, conflicts with what P.C. Franklin Ndulu, another police officer who was present at the time of arrest stated. His evidence was that the mobile phones were in the appellant's pocket, while the gun was in a trench near where the appellant was arrested. That notwithstanding, both Amin and Shah, identified the phones as the two which were stolen from them. The money and other valuables were not recovered. Both witnesses and Duba identified the appellant as the lone gunman who had attacked them a short while earlier. The three witnesses participated in an identification parade which the police organized later. They were the identifying witnesses. We however wish to state that their evidence in that regard was worthless. The suspect was exposed to them soon after he was arrested. Consequently although they picked the appellant in that parade as the person who robbed Amin and shah, that evidence is of no probative value.

At the close of the prosecution case, the trial Magistrate, W.M. Muiruri, Chief Magistrate, in a considered ruling ruled that the appellant had a case to answer. We, however, wish to state that at that stage it is inadvisable to give a long ruling analyzing the evidence and making findings of fact on it. As at this stage the court is not in possession of all the evidence. It is sufficient to state that the evidence discloses a prima facie case and reserve any reasons for that conclusion to be included in the judgment if the need would arise.

In his defence the appellant gave a sworn statement. In that statement he stated that he was heading home from Maasai Villa Bar, when he met two Asian gentlemen in the company of two police officers. They were in a car. They stopped him and asked him from where he was coming. They searched him but found nothing. The two Asian gentlemen pointed him out as possibly the person who robbed them as he was wearing white clothes similar to those the person who robbed them was wearing. He was then taken to Parklands Police station. He admitted an identification parade was held and Amin, Shah, and Diba identified him. He denied he was the owner of the pistol which was allegedly recovered next to him. He also denied he was found in possession of the two nokia mobile phones.

In his judgment the trial magistrate believed the prosecution witness, noted that there were several inconsistencies in the testimony of various witnesses, which he pointed out but concluded that the inconsistencies were not fundamental. He was satisfied that the acceptable evidence, taken cumulatively, coupled with the fact that the appellant was arrested close to the *locus in quo* proved beyond any reasonable doubt that the appellant was the lone gunman who Robbed Amin and Shah; and that he was the person found in possession of a gun and ammunition as charged. He rejected the appellant’s defence as being false. He then found him guilty and sentenced him as earlier on stated.

The superior court, on first appeal, outlined the evidence analysed and re-evaluated it, and it too was satisfied that there were inconsistencies in the evidence but it did not think those inconsistencies were of a fundamental nature. It made a concurrent findings of fact as the trial court, that the amount of light at the house *locus in quo,* was bright enough to facilitate a correct identification; the appellant remained with the identifying witness for long, and that the appellant was arrested close to the *locus in quo*. In the end that court was satisfied that the appellant committed the offences he was charged with. The court did not however consider the particulars of the charge to appreciate, as Mrs Rashid submitted, that there was some variance between the particulars of the robbery count and the evidence thereto. In the end the court dismissed the appellant’s appeal.

We earlier set out the grounds the appellant has proffered in support of this appeal, and Mrs. Rashid addressed us at length on the same. We have considered them, and propose to deal with them seriatim.

The particulars of the robbery counts allege that the appellant “jointly with others not before the court” robbed Amin and Shah. Both Amin and Shah, as also the watchman testified that there was only one robber who was armed with a pistol. Mrs. Rashid thinks that the variance is fundamental and is fatal to the charges.

Mr. Munda, Senior State Counsel, for the Republic conceded there was variance but he submitted that the variance is inconsequential, in his view, because the prosecution adduced evidence to establish the charge. The turn “joint” can be ignored without affecting the strength of the prosecution case.

It is not every defect in a charge sheet in our view that will render the charges invalid. The law recognizes this and hence the provisions of **section 382** of the Criminal Procedure Code, which as material provides thus:-

“382 subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”

Particulars in a charge are matters which the prosecution give notice of as the aspects of a particular case they would call evidence on. **Section 296(2)** of the Penal Code under which the appellant was charged sets out three different ways of proving the commission of an offence of robbery with violence.

In some cases all the three aspects may be included in the particulars of the same court, but not necessarily that evidence would be adduced to prove each of them. The offence would be proved if only one aspect of the aforesaid three aspects is proved. In the case before us the word "joint" would have been material if the particulars alleged that the appellant was in the company of one or more persons without more. Where, as here, reliance was not being placed on the appellant being accompanied, and at the same time being armed, proof of one would be Sufficient. In view of that we do not think that the defect pointed out by Mrs. Rashid, is fatal to the charges the appellant stands convicted of. There is no merit in that complaint.

Regarding identification, both courts below made a concurrent finding that there was ample light at the *locus in quo.* The appellant was close to the witnesses, for long. The witnesses testified that the robbery lasted for more than 10 minutes. He conducted Amin and Shah through the various rooms of the later's house with electric lights on. They had ample time and opportunity to observe the appellant. There was a conflict in the evidence with regard to the issue whether the gunman who robbed Amin and Shah was wearing a hat. On the assumption that indeed the man had a hat on, it is our view that it did not cover the appellant's whole face. That was the evidence of the watchman. Besides the fact that the appellant remained with the witnesses for long, and was arrested near the scene removes any doubt as to the correctness of the appellant's identification. It is also noteworthy that two mobile phones which Amin and Shah identified as theirs were recovered close to the place where the appellant was arrested. It was night time and it cannot be said that another person left them there. It was an isolated place and the robbery had occurred only a few minutes earlier. This ground too does not avail the appellant.

The third ground relates to the provisions of **section 213**, and **310** of the Criminal Procedure Code, and also **section 77(1)** of the Old Constitution. **Section 213**, above deals with the order of speeches at the close of a trial. That section reads as follows:-

" 213. The prosecutor or his advocate and that accused and his advocate shall be entitled to address the court in the same manner and order us in a trial under this code before the High court."

Section 310, provides for the right of reply by the prosecutor. However the order of speeches is set out in **sections 306** to **310** both inclusive of the Criminal Procedure Code. Mrs Rashid is not complaining that the appellant was denied a right of submitting to the two courts below. Her complaint appears to us to be that he was denied a right to orally address the court. At his trial the appellant was represented by one Ouma, advocate. He requested to and was allowed to put in written submissions at the close of the prosecution case. He was not present during defence hearing and the appellant asked the court to allow him to proceed with the case despite the fact that his advocate was absent. The court obliged. At the close of his case he did not address the Court. In the High court, however, the appellant made written as well as oral submissions.

Mrs Rashid, in her submissions must be relying on the language of **section 213** and **310** CPC, in which the word " address" is used, to imply oral submissions. True, the law as it is at present implies that the court in a criminal matter should allow oral submissions. That is the ideal. A failure to allow such submissions is an irregularity but which in the circumstances of that case is not fatal. We say no more on this matter.

Regarding the 4th and 5th grounds they relate to issues of fact. By dint of the provisions of **section 361 (1)** of the Criminal Procedure Code, this being a second appeal those grounds do not fall for consideration by this Court. Besides there are concurrent findings of fact by the two courts below on the two issues, and we cannot but affirm those findings.

In the last ground the appellant complains that the superior court did not analyse and re evaluate the evidence before it dismissed his first appeal. In view of what we stated earlier that the superior court

appreciated some of the discrepancies in the prosecution case and dealt with them, it cannot be true that it failed to re-evaluate the evidence. As stated earlier the main issue in the appellant's case was identification and the superior court considered in detail the evidence in that regard and came to the conclusion that, notwithstanding some discrepancies in the evidence, the conditions for a correct identification were favorable.

Before we wind up this judgment there is an issue Mrs Rashid raised concerning the gun which the appellant was allegedly arrested with. The issue though one of fact was raised in regard to the alleged failure by the superior court to re-evaluate the evidence. The serial number of the gun in the particulars of the charge was given as No. 996408. However, in the ballistic's report it is shown as No 6408. We have looked at the exhibit memo form which forwarded the exhibit gun to the ballistic expert and the number given there is 996408. The ballistic expert is the one who produced the exhibit memo along with his report, and the omission of 99 at the beginning of the serial number he gave may be explained as either a typographical error or as describing the caliber of the gun.

We have said enough to show that the appellant's appeal has no merit.

In the result it is dismissed.

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

S. E. O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is
a true copy of the original

DEPUTY REGISTRAR