IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 316 OF 2005

JAMES KIMUYA MWANGI ……………………..….... 1ST APPELLANT

JOSEPHAT MUGO KIMANI ………..………..…….. 2ND APPELLANT

AND

REPUBLIC ………………………………………..…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ.) dated 22nd July, 2004

in

H.C.CR.A. NOS. 259 & 301 OF 2002)

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JUDGMENT OF THE COURT

The two appellants herein, *James Kimuya Mwangi (1st appellant)* and *Josephat Mugo Kimani (2nd appellant)* were jointly charged with three counts of attempted robbery with violence contrary to *section 297(2)* of the Penal Code. Following their trial before the Senior Resident Magistrate (E.O. Awino, Esq.), the appellants were convicted on all the three counts. The two were subsequently sentenced to death as mandatorily provided by the law.

The essential background facts were as follows:-

On *12th December, 2001* at about 9:00 p.m., *Samuel Gathecha Karanja (PW1 the first complainant)* was on his way to work as a night guard at Teikunu when he met two people who stopped him. One of those people had what looked like an AK47 rifle while the other person had a Somali Sword. The two armed people ordered Karanja to sit down. Then *Alphonce Inzian (PW2 the 2nd complainant)* came riding a bicycle on which he had given a lift to his son, ***Samuel Chege*** *(PW3 – the third complainant)*.

These two *(PW2 and PW3)* were also ordered to sit down. These complainants were ordered to give out what they had but had nothing to give out. It is at that moment that the police officers arrived and arrested the two armed men. The two are the appellants in the dock.

In his defence the 1st appellant stated that on the material day he had gone to Nderu area to claim his money when he met police officers who mistook him for a criminal.

The 2nd appellant's defence was that on the material day he had gone to buy a cow at Teikunu when he was arrested as a suspect.

The learned trial magistrate considered the foregoing facts and came to the conclusion that the appellants were guilty. In concluding his short judgment the learned trial magistrate stated:-

"My finding is that the accused persons were arrested in the act of trying to rob the three complainants. They were arrested red-handed with the imitation AK 47 rifle and the sword. The imitation rifle and the sword were produced in court as exhibits. The contradiction of who was armed with what is immaterial. I dismiss their defence and enter conviction as charged."

As expected, the appellants were aggrieved by their convictions and the death sentence and lodged appeals to the superior court.

The learned Judges of the superior court *(Lesiit and Ochieng, JJ.)* considered the appellants' appeal and that court came to the same conclusion, as the trial magistrate, that the appellants were, indeed, guilty as charged. The appellants' appeal was therefore rejected. In the course of their judgment, the learned Judges of the superior court stated:-

"The robbers were two and they ransacked the pockets of PW1 looking for money. They were armed with a Somali sword. They also demanded money from PW2 and PW3 as a pre-condition for their release.

The only reasons why the robbers mission did not succeed is because (i) PW1 did not have anything in his pockets and (ii) the police who were on patrol arrived at the scene. But there can be no doubt whatsoever that the two robbers attempted to rob their victims."

Being dissatisfied by the decision of the superior court the appellants now come to us by way of second and final appeal. That being so only matters of law fall for consideration as provided by ***section 361(1)*** of the Criminal Procedure Code *(Cap. 75 Laws of Kenya)*.

When this appeal came up for hearing on *12th February, 2008*, Mr. B.N. Kiptoo appeared for both appellants while Mr. B.L. Kivihya, (Senior State Counsel) appeared for the State. Mr. Kiptoo chose to argue his appeal under the following four grounds:-

i) language

ii) identification

iii) charge being defective

iv) failure of the trial court to comply with section 169 of the Criminal Procedure Code.

At the outset we would say that the issue of language cannot be considered as a ground of appeal as the record of trial court clearly shows that the appellants were arraigned before Mrs. Mburu, a District Magistrate on *18th December, 2001* when the substance of the charge was read and explained to them but the taking of the plea was adjourned to the following day *(19th December, 2001)* when each appellant pleaded ***"Not Guilty"*** to each count. The record further indicates that the trial commenced on *16th January, 2002* before the Senior Resident Magistrate Mr. E.O. Awino. The prosecutor was Inspector Mburu and the court clerk who was interpreting English and Swahili was one, Mbiu. The prosecution called four witnesses and the record shows that the first three witnesses testified in Kiswahili while the last witness ***Inspector Magero*** *(PW4)* testified in English. From the record the appellants understood the proceedings since they were able to cross-examine the witnesses. Clearly, there could be no question of the appellants not being able to follow the proceedings. We are satisfied that the appellants were able to follow the proceedings and they actively participated in the trial court's proceedings.

We accordingly find no merit in that ground as it relates to the language used in the trial court.

As regards identification, the superior court considered this matter and came to the conclusion that identification was a non–issue.

Mr. Kiptoo submitted that the Judges of the superior court failed to consider the issue of identification. We have given a brief summary of the background facts in this matter which indicate that the appellants were arrested by the police officers on patrol. Dealing with this issue of identification the learned Judges in their judgment said:-

"Having perused the record of the proceedings, we find that the appellants were caught red-handed. Policemen who were on patrol happened upon the scene, and found the appellants at the spot where they had "arrested" PW1, PW2 and PW3. Although the appellants pleaded their innocence by testifying that they were not involved in the offence, the learned trial Magistrate who observed them testifying decided that their evidence could not be believed. The trial court believed that PW1, PW2 and PW3 were honest. We find absolutely no reason to deviate from those findings of the learned trial Magistrate. In effect, identification of the appellants was actually a non-issue."

We have carefully considered the issue of identification and like the two courts below, we are of the view that the appellants were arrested in the act and hence the issue of identification, as correctly pointed out by the superior court, was a non-issue. We therefore find no merit in that ground relating to the identification of the appellants.

The third ground of appeal related to the charge before the trial court. It was submitted that the charge was defective in that no simis were produced but only an AK47 and a Somali sword. The charge stated that the appellants were armed with dangerous or offensive weapons, namely, simis and home made gun. The complainants had testified that the appellants were armed with what looked like an AK47 and a somali sword. These items are clearly dangerous and offensive weapons. It may be necessary to consider the essential ingredients which constitute the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code and also attempted robbery with violence contrary to *section 297 (2)* of the Penal Code. This Court considered that question in *<u>JOHANA NDUNGU V. REPUBLIC</u> – Criminal Appeal No. 116 of 1995* (unreported) where it stated:

"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section:

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons, or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the

time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

And in ***JUMA V. REPUBLIC*** *[2003] 2 EA 471* this Court said:

"Under section 296(2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds, beats or strikes or uses any other personal violence to any person. In this appeal the charge as laid was defective as it did not clearly specify the essential ingredients of the offence under section 296(2) of the penal code.

We wish to point out that in charging a person under section 296(2) of the Penal Code the prosecution must be extremely careful as the consequences of conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual that is at stake."

Although the two cases cited above related to a charge under *section 296 (2)* of the Penal Code, they are equally relevant to the charge under *section 297 (2)* of the Penal code.

In our view, the charges as laid in respect of the appellants cannot be described as defective since the witnesses testified that the appellants were two; they were armed with dangerous weapons and they threatened to use actual violence on their victims. That ground of appeal must therefore fail.

Lastly, we are to deal with the issue of the judgment of the trial magistrate. It is true that this was a very brief judgment. *Section 169 (1)* of the Criminal Procedure Code provides that a judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision. In the judgment of the trial magistrate, we find that the offences were stated together with their particulars. Then followed the narration of evidence by the complainants. The issue for determination was whether the appellants were involved in the commission of the offences with which they were charged. The trial magistrate made a finding that the appellants were arrested red-handed. That finding was upheld by the superior court. These are findings of facts by the two courts below. In *CHEMAGONG V. R [1984] KLR 611* it was held that a Court of Appeal will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

Applying the foregoing to the facts of this appeal, we are satisfied that we have no reason to interfere with the concurrent findings of facts by the two courts below.

Before concluding this judgment something must be said about the sentence as this was one of the issues raised by Mr. Kiptoo in his submissions. As stated at the commencement of this judgment, the appellants were charged and convicted on three counts of attempted robbery with violence contrary to ***section 297(2)*** of the Penal Code. The trial magistrate sentenced each appellant to death. That sentence was upheld by the superior court. Although it was not clear as to what happened to two other counts it must mean that each appellant was sentenced to suffer death in respect of only the first count. In ***FANUEL MAKENZIE AKOYO V. REPUBLIC*** – *Criminal Appeal No. 45 of 2006 (unreported)* this Court said:-

"Regarding sentence the appellant was sentenced to death in respect of three counts of robbery with violence. That was in our view, erroneous as the appellant cannot logically suffer death twice or thrice. We accordingly correct the error by setting aside the sentences in counts 2 and 3. The result is that the appellant shall suffer the sentence of death in count 1 only."

We have said enough to show that the appellants' appeals have no merit and we order that the same be and are hereby dismissed. It is so ordered.

Dated and delivered at Nairobi this 29th day of February, 2008.

E. O. O'KUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

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JDUGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR