IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 310 OF 2005

BONIFACE MUNGAI MACHANGA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

Nairobi (Lessit & Ochieng, JJ.) dated 2nd June, 2005

in

H.C.CR.A. NO. 783 OF 2002)

****

JUDGMENT OF THE COURT

The appellant, Boniface Mungai Machanga, was convicted by Kiambu Senior Resident Magistrate for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It had been alleged in the charge sheet that on the 10th day of November, 2001 at Kangangi Market in Kiambu District, jointly with others not before court while armed with weapons namely knives, he robbed Abraham Karanja Gikonyo cash Shs.3000 and a wrist watch, Seiko, all valued at Kshs.5,500 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on Abraham Karanja Gikonyo. Upon his conviction, the mandatory death sentence was meted out against him. He subsequently challenged his conviction before the superior court but the appeal was dismissed. He now comes before us on his second and last appeal. As such, the appeal must be confined to points of law as expressly provided under section 361 (1) of the Criminal Procedure Code. This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact arrived at by the two courts below unless they were based on no evidence. The test to be applied is whether there was any evidence on which the trial court found as it did – see Reuben Karani s/o Karanja v Republic [1950] 17 EACA 146. In M'Riungu v Republic, [1983] KLR 455; the Court held:

"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings – The Times of March 30, 1983)."

In his memorandum of appeal which he drew up in person, the appellant listed some six grounds which learned counsel who appeared for him, Mr. Okelo Opolo, said nothing about. Instead Mr. Opolo filed a supplementary memorandum of appeal, as he was entitled to do under **rule 64 (2)** of the rules of this Court, and he argued the three grounds laid out therein. The grounds are these: -

"1. THAT the prosecution failed to discharge its legal burden of proof beyond reasonable doubt.

2. THAT the learned first appellate judges erred in law by failing to independently analyze and/or evaluate the evidence before drawing a conclusion as is by law required.

3. THAT the fundamental rights of the appellant as enshrined under section 77 (2) (b) and (f) (sic) have been infringed."

To these grounds of appeal we shall return presently. What were the facts of the case accepted by the two courts below?

At about 9 p.m. on 10th November, 2001, **Abraham Karanja Gikonyo** (PW1) (Abraham) had just left a hotel in Kiambu town when he heard someone running towards him from behind. As Abraham became scared and started running towards the Ndumberi/Limuru bus stage nearby which was well lit by electricity security lights from a petrol station about 50 metres away, the man pursuing him shouted "*shika huyo ako na pesa*". Then suddenly some men appeared from the sides and robbed him. The man who had been pursuing him arrived and grabbed him tightly as another one gagged his mouth. From his pockets they took Shs.3000 and removed his Seiko watch from his wrist. He screamed for help as the knife-wielding men tore up his clothes but he managed to hold firmly onto the man who had first pursued him. In his evidence, the attackers were three but two of them escaped when two good samaritans came to his assistance. The man he firmly held onto, and whom he came to recognise shortly after, was the appellant.

One of the first people who responded immediately to Abraham's screams was **Evans Ogeto Migoro** (PW3), (Evans), a security guard on duty at the Kobil Petrol Station whose security lights were lighting up the bus stage. He rushed out to answer the distress call only to find Abraham clinging onto a man who had pinned him down. He saw three men fleeing from the scene and heard Abraham complain about being robbed. A Police Reserve Inspector, **David Maina Murage** (PW2) (IP. Murage) was also in the vicinity of the bus stage when he heard the screams and dashed out to assist. He too saw three people running away from the scene as the screaming man (Abraham) was pinned down by another man (the appellant). With the assistance of Evans, IP Maina seized the appellant and separated them. He recognized the appellant as a local tout he knew before. After carrying out a quick search on the appellant and finding no weapon on him, IP. Maina, Evans, and other members of the public who had arrived at the scene, handed him over to Kiambu Police Station and the matter was investigated by **Pc. Edward Rotich** (PW4) before the charge of robbery with violence was preferred against the appellant.

In his defence, the appellant admitted that he was a matatu tout and was at the bus stage, the alleged scene of the robbery, that evening. All that happened, however, was that he saw some people standing at the stage and he went towards them to ask if they were travellers. They told him not to bother them, but moments later some other people came running and one of them, IP. Murage, grabbed him and took him to Kiambu Police Station claiming that the appellant had spoilt the bus stage while other members of the public were alleging that he had assaulted Abraham. He denied all the allegations but was still taken to court.

On that evidence, the trial court was in no doubt about the credibility of the three main prosecution witnesses (PW1, PW2 and PW3) and he believed them. He also examined and rejected the appellant's story. The learned magistrate stated in part: -

"The witness (PW1) was firm in his evidence even under cross examination. He complained aloud that he had been robbed of Kshs.3000/= and in this he is supported by PW2 and PW3. He was consistent in his evidence and (sic) conduct is worthy of credit and I believe him. I have not seen

any reason in the entire evidence for him to lie. There is no doubt that violence was used on him. He was knocked down and knives were drawn on him. He was then held tightly to subdue him so that he could be frisked. His clothes were torn during the incident which go a long way to show that violence was used. He was also slightly injured as his watch was snatched. It is quite apparent also that his attackers were more than one. He says he was grabbed by some men who were joined by the accused who had been chasing after him. In this he is supported by PW2 and PW3 who on approaching the scene saw some men fleeing from the scene. These are the men the complainant says ran through his pockets as he was tightly held by the accused. Lastly it is self evident that the accused was one of the robbers. He was the one who initiated the chase shouting "shika huyo ako na pesa." He is the one who held the complainant firmly as the others not before court stole from him. He is the same man that complainant held onto tightly and refused to release as the others fled. Indeed he was found red handed on top of the complainant by PW2 and PW3. PW2 and PW3 have testified that they removed him from the complaint. This is hard and fast evidence against the accused."

The superior court was alive to its duty, as the first appellate court, to subject the evidence to fresh evaluation and make its own conclusions in the matter. We are satisfied that this was done when the court stated in pertinent part:

"We have carefully re-evaluated the evidence adduced before the trial court as is our duty to do, as the first appellate court. The appellant contended that he was not one of those who robbed the complainant because by the time he reached the complainant, he had already been robbed. He also contended that the complainant's evidence that three people including the appellant robbed him was contradicted by PW2 and PW3 who saw three men running away and the appellant on top of the complainant. .....

The evidence adduced by the prosecution is very clear. Abraham said that a man, whom he later realized was the appellant, and whom he knew as a tout, ran behind him as he stepped out of a hotel. The appellant was shouting to accomplices, who later emerged from the sides of the stage to hold and rob the complainant because he had money. In addition to those words, the appellant was the first to hold the complainant before his accomplices emerged. After he was robbed, the complainant held onto the appellant until some other people went to his rescue. The appellant's role in this offence was very clear. The words he spoke and the action he took both prove that he was acting in concert with those who robbed Abraham. As opposed to the appellant's contention, it was he, the appellant, who first held the complainant before his accomplices robbed him. Both IP. Murage (PW2) and Mr. Ogeto (PW3) witnessed the robbery and saw the appellant on top of the complainant, as three other accomplices ran off. We are satisfied that the words and actions of the appellant at the scene of the robbery all prove beyond any doubt that he acted with one common intention, which was to rob the complainant, on the evening in question."

We must now revert to the legal issues raised before us. Mr. Opolo urged as the main issue, ground 3 (supra) which relates to the validity of the entire trial owing to alleged transgression of **section 77 (2) (b)** and **(f)** of the Constitution of Kenya. It was an issue raised for the very first time but, of course, there is no impediment to the appellant raising issues of jurisdiction at any stage of the case.

The gist of Mr. Opolo's submission on the issue is that the trial court did not, throughout the trial, record the language in which the trial of the appellant was conducted. Taken on its face value, the submission is, of course, formidable and we would readily agree with Mr. Opolo that such a trial would be a nullity. The issue of "**language**" in criminal trials has been severally examined by this Court and strong expressions made about compliance with the requirements of the law. As recently as May, 2007, the Court in **Degow Dagane Nunow v R. Cr. A. 223/05 (ur)** revisited the issue and delivered itself thus: -

"On this aspect of the matter, the burden is on the trial court itself to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. As we have repeatedly pointed out, these are not mere procedural

technicalities. There is, first *section 198* of the Criminal Procedure Code and that section provides:-

"198 (1). Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

2. If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English."

The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of a trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak. *Section 77* of the Constitution is in relevant parts, in these terms:-

"77 (2) Every person who is charged with a criminal offence –

(a) .....

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence with which he is charged;

(c) .....

(d) .....

(e) .....

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge."

It is the responsibility of trial courts to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place."

In the ***Nunow*** case, there was no attempt by the trial magistrate to indicate at any stage what language was used in the trial. It was only at the end of the judgment that he recorded that: *"Judgment was delivered in open court in the presence of the accused, IP Mukoko for State, court clerk Mohamed Somali/Kiswahili."* The appellant in that case had raised the issue before the superior court when he asserted that the trial was conducted in a language he never understood. The plea itself, according to the record in that case, was recorded in English although the appellant was only conversant in the Somali language. And so it was throughout the record up to the day of judgment, hence the strong admonition by this Court.

With respect, we think the case before us is nowhere near the circumstances of the ***Nunow*** case. Nor do we think the authority relied on by Mr. Opolo takes the argument any further. He relied on the decision of this Court in **David Waiganjo Wainaina v Republic Cr. A. 113/05 (ur)** where the court, after dealing with the main issues raised in the appeal, stated: -

"**There is yet another issue to be considered in this appeal. The record of the trial court shows that the witnesses were sworn but there is no indication as to the language used. Sample the following:-**

"PW1 (SWORN) AND STATES

My name is Peter Kihara .....

PW2 (sworn) and states:

My name is Joseph Kamau

Muiru ....."

That pattern was repeated throughout the record of the trial court. It was not clear in what language the witnesses were testifying. It may appear a minor issue but this being a court of record we can only rely on what is recorded."

It was on the basis of that authority that Mr. Opolo submitted that the indication on the language used must appear in every adjourned hearing in the course of the trial. However, nothing in that authority shows that the appellant (accused person) was not informed about the nature of the offence with which he was charged in a language he understands or that there was no interpreter provided for him if he did not understand the language of the court. Those are the mandatory requirements of the constitutional provisions cited above. The case is therefore distinguishable.

In the case before us, the appellant first appeared before the trial magistrate on 15th November, 2001. The session was for taking his plea to the charge laid against him and it was therefore the earliest opportunity for the trial court to comply with **section 77** of the Constitution. The coram shows that apart from the presiding magistrate, there was a prosecutor and a court clerk. It also shows that the language understood by the appellant was Kiswahili and therefore the charges drawn up in English were interpreted to him into that language. We may reproduce the record in full: -

"15.11.2001

Coram: J. Ondieki (Mrs) SPM

C.C. – Rahab.

Prosecutor - Chief Inspector Idewa

Interpretation - English/Kiswahili

Accused - present.

The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands , who being asked whether he admits or denies the truth of the charge replies: Not guilty.

Court - Plea of not guilty entered.

Order - Hearing is on 21.11.2001 court 3. Offence not bailable.

Accused remanded in custody."

There were several adjournments and resumed hearings subsequently until 15th July, 2002 when the judgment was delivered. The appellant was unrepresented but participated fully in cross-examining the witnesses and in stating his own case. He also conducted his own appeal in the superior court until the judgment was rendered on 2nd June, 2005. As stated earlier, at no time did the appellant complain about any difficulty in the language he chose at inception for conduct of the proceedings. We have also examined the record and we do not find any record changing the language of choice. Indeed a court interpreter was always at hand in the course of the proceedings. We think in all the circumstances of this case, there was compliance with **section 77 (2) (b)** and **(f)** of the Constitution and we decline to find, as

sought by the appellant, that the trial was a nullity. That ground of appeal fails.

The two other grounds of appeal were argued as one by Mr. Opolo. He summarized the issue of law as being, that the evidence adduced was so insufficient or unreasonable that no tribunal could believe it. He cited as examples the contradictory evidence by PW1 that the distance from the petrol station to the scene of robbery was 50 metres while PW3 said it was 10 metres. It was also Mr. Opolo's view that there were two separate robberies which fact neither of the two courts appreciated; that the fact that PW2 and PW3 found PW1 and the appellant entangled in an embrace was not proof of robbery; that the finding that the discrepancy in the number of robbers involved was of no consequence; and that PW2 and PW3 were eye witnesses to the robbery when they were not. The findings made on these facts by the two courts, according to Mr. Opolo, were mere theories imported by the two courts and had no support in the recorded evidence. That, in his submission, was the procedure deprecated by the then Court of Appeal for East Africa in **Okethi Okale & others v Republic [1965] EA 555** where it was held: -

"(i) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches."

We have carefully gone through the records of the two courts below and considered the authorities relied on. As stated earlier, the superior court subjected the evidence on record to fresh evaluation and indeed dealt, correctly in our view, with some of the selfsame issues raised before us here. We also re-stated the guiding principles on concurrent findings of fact. We are satisfied that the factual findings made by the two courts below were not mere suppositions or fanciful theories as contended by the appellant. The complaints made before us are a far cry from the goof made by the trial judge

in the **Okethi Okale** case (supra) who said: -

"This is a case in which reasoning has to play a greater part than actual evidence,"

and then went ahead to theorise about how the fatal blow in that case was inflicted on the deceased when there was no evidence to support such theory.

We are satisfied, as found by the two courts below, that there was only one robbery and that the appellant took part in it. We have no reason to interfere with that finding and we reject that ground of appeal also.

It only remains for us to record that the appeal was opposed by learned Senior Principal State Counsel Mrs. Murungi and we are grateful for her assistance.

The upshot is that the appeal has no merits. We order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 15th day of February, 2008.

R.S.C. OMOLO

.....

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