REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 3223 of 2005

JOSEPH KARANJA MBUGUA……..……..APPELLANT

AND

REPUBLIC ……...…….……RESPONDENT

(Appeal from judgment of the High Court of Kenya

Nairobi (Lessit and Ochieng JJ) dated 9th December, 2004

In

H.C.CR. A. NO. 954 OF 2001)

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JUDGMENT OF THE COURT

JOSEPH KARANJA MBUGUA ("the appellant") comes before us on the second and last appeal against his conviction by Kiambu Senior Resident Magistrate on one count of robbery with violence contrary to section 296(2) of the Penal Code and one count of being in possession of a firearm contrary to section 4(2) (c) of the Firearms Act. Upon his conviction he was sentenced to death on count 1, and to imprisonment for 6 years on count 2. His first appeal to the superior court was dismissed on 9th December 2004 and the sentences were confirmed. We may state in passing that the two courts below erred in imposing a sentence of imprisonment on the second count after sentencing the appellant to death on the first count. As we have stated *ad nauseum*, it makes no sense to hang a person and then imprison him subsequently. Once there is a sentence of death on the capital charge the other counts are left in abeyance. The line of authorities in this respect include, amongst others, Muiruri v R [1980] KLR 70, Abdi Hussein Kaimoi v R Cr Appeal No. 47 of 2001 (ur), Abdul Debano Boye & Anor v R Cr Appeal No 19/01 (ur), and Samuel Waithaka Gachuru v R Cr. App. No 261/03(ur).

It had been alleged in the charge of robbery with violence that the appellant, on 25th of March 2000 along Kiawaroga / Limuru road in Kiambu District, jointly with others not before court, while armed with a dangerous weapon, to wit a revolver, robbed Leonard Maina Migwi of a motor vehicle registration No KAL 876D, Toyota Hilux Pick-up valued at Kshs 1.2 million and at or immediately before or immediately after the time of the robbery used personal violence on the said Leonard Maina Migwi. The second count alleged that on the same day and place, he was found in possession of a US Colt revolver serial number 121742 without a firearm certificate. As this is a second appeal, only matters of law may be raised – see **section 361** Criminal Procedure Code.

The appellant in person drew up his own "*Petition of Appeal*" which ought to have been a "*memorandum of Appeal"*, but a supplementary memorandum of appeal was filed by the firm of the counsel appointed by the Court for him, Mrs Betty Rashid. However, in the submissions made before us, Mrs Rashid argued only the four grounds listed in the supplementary memorandum as follows:-

"*1.That the learned first appellate court judges erred in law by failing to find that the suit (sic) motor vehicle once restored to the complainant, before production in court ceased to be of any relevance as an exhibit* ***(section 322 (3) (b)*** *of the Penal Code).*

2. That the learned first appellate court judges erred in law by failing to find that the appellant was not provided with an interpreter contrary to Section 198 (1) CPC (sic) and section 77 (2) of the Constitution of Kenya.

3. That the learned Judges of the High Court erred in law in relying on extraneous matters in their judgment not canvassed in evidence as regards identification.

4. That the learned first appellate court Judges erred in law in failing to analyze, evaluate the evidence on record exhaustively and in particular where the burden of proof was shifted to the appellate (sic) by the trial magistrate in holding that failure by the appellate to call Rono, the councilor (sic) who had promised him a job was prejudicial to his defence."

To those grounds we shall revert shortly. First, the brief facts as found by the two courts below:

Leonard Maina Migwi (PW1) ("the complainant") was the Manager at Kiawaroga Farm in Tigoni, Limuru. At about 2.30 pm on 25th March 2000, he was on Kiawaroga / Limuru road driving a Toyota pick up Reg. No. KAL 876D which belonged to his employer. As he took a corner at low speed, two people suddenly appeared in front of him and forced him to stop. One of them held a revolver. The man identified as the appellant then took control of the steering wheel and the other man sat on the passenger seat sandwitching the complainant in the middle. The pickup was then driven towards Limuru for some distance then suddenly it made a U-turn and headed towards Githunguri. At a point near Githiga, the appellant's accomplice engaged the complainant in a conversation in Kikuyu language then suddenly the complainant grabbed the revolver held by the accomplice and a struggle ensued inside the vehicle which was still in motion. Some members of the public who were at a nearby bus stage who knew the appellant and the pickup vehicle, started screaming that he had been robbed. As the struggle in the vehicle continued, the appellant lost control of it, hit a tree and overturned, resting on its roof. The appellant and his accomplice crawled out through the windows leaving behind the complainant who could not move as his left leg was broken. The revolver was left inside the cabin.

As the vehicle was overturning, Pc Ndungu Gaturu(PW4), an off-duty Police Officer, was driving from the opposite direction in the company of his brothers. He saw the accident when he was about 50 metres away and stopped. Then he saw some two people crawl out of the vehicle and run away. He dashed to the vehicle and found the complainant injured and trapped inside shouting that the two people were robbers. Pc Gaturu saw a revolver in the vehicle and took possession of it before running after the appellant and his accomplice. He was joined in the chase by his brothers and other members of the public. Pc Gaturu did not lose sight of the appellant who was running along an uphill foot-path and was "very tired". He caught up with the appellant and arrested him. He left his brothers guarding the appellant as he ran after the accomplice but turned back when the brothers shouted for help saying the appellant was struggling in an effort to escape. The appellant was overpowered and taken back to the scene. The accomplice disappeared. The appellant was taken to a nearby Administration Police Camp and Pc Gaturu alerted Kiambu Police Station. Police officers led by IP. Boniface Mwaura (Pw5) arrived a the scene soon after. Pc Gaturu then handed over the appellant to the police together with the revolver, six spent cartridges, and the motor vehicle which was towed to Kiambu Police Station.

The complainant was taken to Nazareth Hospital for first-aid before he was transferred to MP Shah Hospital where he was admitted and treated until 2nd April 2000. On 5th April 2000 he attended an identification parade at Kiambu Police Station organized by IP Samuel Wamwai (Pw3) and he picked out

the appellant out of a line of eight other persons. He had, in his statement informed the police that he could identify the assailants if he saw them again. He was examined by Dr Zephaniah Kamau (PW6) in July 2000 and it was confirmed that he had lost three teeth and had a communted fracture of the left femur. The injuries were classified as grievious.

IP Mwaura (PW5) was the Investigating Officer. He forwarded the revolver and ammunition for examination by Mbogo Donald Mugo (PW2), a ballistic expert, and it was conformed that it was a .45 inch caliber Smith & Wesson revolver manufactured in the USA. It was in good mechanical condition and was capable of being fired. Mr Mugo also confirmed that the six spent cartridges were fired from the revolver.

In his defence, the appellant said he was a casual labourer ar Baba Ndogo, in Ruaraka. On the material day, 25th March 2000, he decided to go to his former school in Githunguri to collect his school certificate to enable him to secure a job he had been promised by a Narok councillor, one Mr Rono. He had left Ruaraka that morning and arrived at Githunguri at about 12.30 pm. He was then given a lift in a pickup which dropped him at Githiiga. As he took a shortcut heading to the school, he heard footsteps behind him and then saw a crowd of people. They asked him where he was going to and one of them said he was a stranger. Then a policeman hit him on the head and the crowd joined in beating him unconscious. He came to at Kiambu Police Station. He was later identified in an identification parade which was not properly arranged and was charged with offences he knew nothing about. The appellant called the Headmaster of Githiiga High School, Mr. Kariri Muiruri (DW1) as a witness to confirm that he visited the school on 25th March 2000 to collect his school certificate and that he had an outstanding balance of school fees since 1990. Mr Muiruri however denied those assertions. He did not know the appellant and the school records produced at the insistence of the appellant did not show that he visited the school as alleged on 25th March 2000 or that he had any school fees balance. On the contrary, the name almost similar to the appellant's which was in the register, was for a student who was still in Form III in the school.

We must now revert to the issues of law raised by Mrs. Rashid. The first ground of appeal is premised on the assertion that the motor vehicle allegedly stolen from the complainant was restored to the complainant before it was produced in court as an exhibit. As such, it ceased to be evidence in the case and therefore any person alleged to have stolen it would be absolved of the alleged crime. To buttress this proposition, Mrs Rashid cited **section 322 (3) (b)** of the Penal Code, which provides in relevant part as follows:

"**322 (1) ……..**

(2) ……..

(3) For the purposes of this section-

(a) ……..

(b) No goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing."

With respect, that submission is misconceived in law and in fact for the following reasons:-

Section 322 is the first provision in Part XXXI of the Penal code which provides for offences relating to: "Handling Property Stolen or unlawfully obtained and like offences." The side note to the section is about "**Handling stolen goods"** and **subsection (3)** makes provisions for purposes of that section only. **Sub section 3(b)** is a sensible and logical provision flowing from the nature of the offence of handling stolen goods. Clearly therefore, the provision has limited application and will not extend to the offence of substantive "**Theft"** which is covered under Chapter XXVI of the Penal Code or "**Robbery and Extortion"** covered under chapter XXVIII of the Code.

Furthermore, it is not correct to state, as Mrs. Rashid did, that the stolen motor vehicle was released before it was produced as an exhibit in court. The record shows that on the 20th June 2000, the hearing of the case commenced and the evidence of the complainant was recorded. In relation to the motor vehicle, the complainant identified it and it was marked for identification in the proceedings as (MFI 1). He also produced the motor vehicle registration book (the log book) which was marked as (MFI 3). The motor vehicle was at the time outside the courtroom and the trial magistrate recorded that it was visible from where he sat. The superior court criticized that mode of identification since the trial magistrate did not leave the court to go near the exhibit, but in the end the court found no substance in the issue which could affect the judgment since there was other relevant and credible evidence relating to the identification of the motor vehicle. It will be recalled that the motor vehicle hit a tree and rolled. Possession of it was taken by Pc Gaturu (PW4) at the scene of the accident and he released it to the investigating officer IP Mwaura (PW5) who had it towed to Kiambu Police Station. It is from there that it was towed to court as an exhibit on 20th June 2000. The case was on that day adjourned after two other prosecution witnesses testified and it came up for hearing again on 14th August 2000. That is when Pc Gaturu (PW4) testified and produced, among other exhibits, the motor vehicle. It was marked as Exibit 1. The Exibits memo was prepared to that effect and is part of the court record. So that, once the motor vehicle was marked as an exhibit, it became the property of the court. That is why the prosecution applied to the court at the end of the day when the case was adjourned for further hearing on 22nd September, 2000, to have the motor vehicle (Exhibit 1) and the revolver (exhibit 4) released to the complainant and the police respectively. There was no objection raised by the appellant and therefore an order was recorded allowing the application. In our view, there was nothing unprocedural about the release of the stolen motor vehicle to the complainant in those circumstances. We find no merits in the first ground of appeal and we reject it.

The second ground of appeal relates to the language of the court at the trial. It is now a popular ground of appeal, normally raised for the first time before this Court. And for good reason: it not only has statutory and constitutional underpinning in **sections 198(1)** of the Criminal Procedure Code and **section 77(2)** of the Constitution, respectively, but it has also received interpretation in peremptory language by this Court in the recent past. Mrs Rashid referred us to the decisions of this Court in **Jackson Lelei v R Cr. Appeal No. 313 of 2005,** decided on 22nd September 2006, and **Anthony Kibatha v Republic Cr. Appeal No. 109/05** decided on 16th March 2007. In both cases, this Court emphasized the need for trial courts to follow the provisions of the law relating to the language in Criminal trials and interpretation where the accused person cannot understand that language. The objective of following those provisions is to guarantee a fair trial which is the constitutional right of every individual charged with an offence. Ultimately however, whether the provisions cited above were complied with or not remains a question of fact and we must therefore examine the record.

The submission by Mrs Rashid was that on 14th August 2000, PW4, Pc Gaturu, whom she referred to as "the star witness", testified in the English language which the appellant did not understand. The basis of that submission was that the trial court did not record in the "*Coram"* for that day what language was used or indicate whether there was interpretation. With respect, we do not accept that proposition. The record shows that the trial court recorded the language chosen by the appellant in the trial and an interpreter conversant in both languages was present throughout the trial. The languages used were "**English / Kikuyu**" and the Court Clerk / Interpreter was one "**JF Njau**." That recording was made at the commencement to the trial on 20th June 2000 and also on other resumed hearing dates and there was no indication that the position had changed when the coram for the hearing on 14th August 2000 was recorded. It is no wonder therefore that the appellant cross-examined Pc Gaturu at length on his evidence. In those circumstances, this case is distinguishable from the **Lelei** and **Kibatha cases** (supra). We are not satisfied that the appellant did not receive a fair trial on account of the language used at the trial on 14th August 2000 and once again we reject that ground of appeal.

Identification is the third ground of appeal and the submission by Mrs Rashid was that the superior court relied on extraneous matters in confirming the identification of the appellant as one of the robbers. The extraneous matter relied on, according to her, was that the superior court created a theory that the complainant, who had been seriously injured in the incident, did not see the appellant at the scene and therefore his identification at the parade organized for that purpose later was not vitiated. It was also

extraneous, she submitted, for the superior court to make a finding that Pc Gaturu (PW4) did not "**lose sight**" of the appellant as he chased him. The record shows PW4 as stating that he did no "**lose track"** of the appellant, and according to Mrs Rashid, there was a difference.

We think for our part, that the latter submission draws a distinction without a difference. The evidence of PW4 must be construed holistically and must also be related to other evidence on record. He was clear in his evidence that he saw the stolen vehicle overturning and two persons emerging therefrom. He took less than one minute to go to the vehicle, hear the complainant screaming about the robbers, take possession of the revolver and run after the two persons. His brothers were in the chase too. Although the record shows that the appellant was arrested "after about 5 meters", this was unlikely, because Pw4 stated as follows in cross examination by the appellant:

"**I arrived at the scene immediately. The complainant is the one who told me that you were thieves. I chased the robbers and the complainant was assisted by people who were passing-by. You were running away and you were close to me. That was the first time for me to use the road. The road led to Githiga. You never told me anything when I arrested you. You were very tired. I chased you through a footpath up a hill. One could not see the vehicle, from where I arrested you."**

As correctly found by the two courts below, whether the words used be "lost sight" or "lost track", from the moment PW4 saw the appellant leave the motor vehicle upto the moment he apprehended him, he never lost him. We think the finding was properly made and there is no substance in the complaint made before us in that respect.

As for the submission that the appellant was seen by the complainant at the scene thus making any subsequent identification parade valueless, we think there is some basis in the complaint.

The issue of identification was dealt with by the superior court as follows:-

"**On the issue of identification of the appellant and the nexus between the perpetrators of this offence and the appellant, we find that the prosecution in its evidence ably provides a nexus between the two. The robbery took place at 2.30 pm. It was in broad day light. The appellant drove the complainant's vehicle for a distance. Neither the appellant nor his colleague concealed their identity or disguised themselves. The two even spoke with him asking him for money in order to fuel the vehicle. There was even a moment of struggle before the accident occurred. All these circumstances in our view, created a very good time and opportunity for the complainant to see the appellant clearly enough to identify him. In addition, the struggle that ensued gave the complainant a good opportunity to see his attackers clearly. His ability to identity the appellant a week later confirmed his ability to identify him as the one who took over the driving of his vehicle after he and his accomplice stopped him at gun point. The identification in this case was watertight and creates no doubt in our minds that the appellant was one of two men who committed the offence."**

That assessment was in our view, a sound one on the evidence. But the appellant goes further and states that the identification parade that was conducted one week later was of no value since the complainant had seen appellant at the scene. The superior court did not think so and so upheld the evidence of identification parade as lending strength to the complainant's evidence. The passage in the superior court's judgment which the appellant takes issue with is this:-

Whereas the appellant claims that he was taken back to the scene to be seen by the complainant, PW4 said that he let the appellant in the care of his brothers. By the time he took the appellant back to the scene, a crowd gathered who unleashed 'mob justice' on him. The complainant had suffered lost teeth from the blow he received by the appellant's accomplice, and a fractured left femur from the accident. Taking into consideration the evidence on the severity of his injuries and the fact that a crowd gathered around the appellant to beat him, we are not satisfied that the circumstances were conducive for the complainant to see the appellant as the appellant alleged. Eventually a seek or so later, the appellant was identified in an identification parade by the complainant."

We have carefully examined the record and it is evident that the appellant was indeed taken back to the scene after apprehension by Pc Gaturu. A mob then gathered and started beating up the appellant as Pc Gaturu made contact with the police. Whether the complainant had at the time been removed from the motor vehicle and taken to hospital or whether he was still present at the scene, and in either case whether he saw the appellant is not evidence from the record. It is apparent that the superior court thought the complainant was still at the scene, but, on account of his injuries, he was not able to see the appellant. We do not blame Mrs Rashid for surmising that this was a theory without support from the evidence on record. The benefit of doubt in that regard should have been extended to the appellant with the result that the evidence relating to identification of the appellant at a subsequent identification parade arranged for that purpose was vitiated.

Would the exclusion of the evidence relating to the identification parade affect the remaining evidence on identification? We do not think so. The evidence of Pc Gaturu, was in our view cogent and forthright, and was properly believed by the two courts below. Taken together with other evidence on record it is sufficient to sustain the conviction of the appellant even if the identification parade evidence was excluded. We do not in the circumstances propose to interfere with the findings made on identification of the appellant. That ground of appeal is also rejected.

Lastly, Mrs. Rashid attacked the superior court for failure to re-evaluate the evidence on record and to reach its own conclusions. That, of course, is a duty imposed on the first appellate court and this Court has always re-examined appeal records on second appeals to ensure compliance. – see **Okeno v Republic [1972] EA 32.** Whether a proper reevaluation was made or not however must depend on the circumstances of each case and is essentially a question of substance. As was stated by the supreme court of Uganda in **Uganda Breweries Ltd v Uganda Railways Corporation [2002] EA 634:-**

"**There is no set format to which a revaluation of evidence by a first appellate court should conform. The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first appellate court. In this regard, I shall refer to what this Court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU) Tsekooko JSC said at 11:**

"***I would accept Mr Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial)."***

In Odongo and Another v Bonge, Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki JSC (as he then was) said: "While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance." I agree with the views expressed by the learned justices of this Court in the two cases immediately referred to above."

We have carefully examined the record before us and we think the superior court substantially re-evaluated the evidence in reaching the conclusions it did on the issues raised before it on the first appeal. The main issue raised by the appellant is the failure by the superior court to admonish the trial court for wondering why the appellant did not call a named witness in support of his defence evidence. It was indeed an unfortunate remark by the trial court since there is no burden, at any stage of the trial, on an accused person to prove his innocence unless the matter falls under **section 111** of the Evidence Act or other statutory enactment shifting the burden of proof. The appellant's evidence had nevertheless been dealt a fatal blow by his own witness, DW1, who denied him and there was overwhelming prosecution evidence to sustain the charges facing him. In all the circumstances we find that the remark by the trial court did not occasion any failure of justice. That ground of appeal fails.

All that remains is for us to state that the appeal was vigorously opposed by the state through learned Senior State Counsel, Mr. Kaigai. We thank both counsel for their assistance in the appeal. The upshot is

that there is no merit in the appeal and we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 27th day of July 2007.

S.E.O BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

……...

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR