REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 206 of 2006

BETWEEN

SIMON NJOROGE KABUI ..... 1ST APPELLANT

JOHN NJUGUNA KIMANI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Maraga & Kimaru, JJ) dated 15th May, 2006

In

H.C.Cr. A. Nos. 316 & 317 of 2002)

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JUDGMENT OF THE COURT

Two persons had appealed to this Court. They were Simon Njoroge Kabui as the 1st appellant and John Njuguna Kimani as the 2nd appellant. During the pendency of their appeals, John Njuguga Kimani escaped from prison custody and by the time the Court was hearing the appeals, he had not been re-arrested and this judgment is concerned only with the appellant Simon Njoroge Kabui (the appellant).

He was among three persons who were charged before the Senior Principal Magistrate at Naivasha on two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and two other counts of being in possession of a fire-arm (count 3) and ammunition (count 4) contrary to ***section 4 (2) (a)*** of the Firearms Act, ***Chapter 114*** Laws of Kenya. The appellant who was accused number one before the Magistrate and the one who escaped from prison were convicted on all the four charges and were sentenced to suffer death on the counts of robbery and to various terms of imprisonment on those involving firearm and ammunition. The particulars of the two counts of robbery were that on 3rd March, 2001 along Mai-Mahiu – Naivasha Highway in Nakuru District, Rift Valley Province, jointly with others not before the court and while armed with a dangerous weapon, namely a pistol, they robbed Gabriel Ragina Okindo (count one) and Boniface Kaleli Ngao (count two) of various items including a motor vehicle Reg. No. KAL 389K, make Nissan lorry with its contents and K.shs.2,200/- and that during the robbery they killed Gabriel Okindo and used actual violence to Boniface Kaleli Ngao. Upon his conviction, the appellant appealed to the superior court but by its judgment dated and delivered on 10th May, 2006, that court dismissed the appeal and confirmed the sentences on the charges of robbery with violence. The court was not satisfied that the charges involving a firearm and ammunition were proved according to law but failed to formally acquit the appellant thereon. We shall deal with that matter in due course. The appellant now comes to this Court by way of a second and final appeal, and that being so the Court can only deal with matters of law – ***section 361 (1)*** of the Criminal Procedure Code. Mr. Wambeyi Makomere, learned counsel for the appellant, argued the appellant's appeal before the Court and he relied on the memorandum of appeal and the supplementary memorandum of appeal which were drafted by the appellant. According to Mr. Makomere, those documents raised two issues of law, namely the language used during the trial and whether the appellant understood the proceedings and secondly an alleged failure by the first appellate court to re-evaluate and reappraise the evidence itself before coming to the conclusion that the trial court's judgment ought to be affirmed.

On the issue of the language used during the trial, it is clear, as is usual in most of the cases tried by this particular Magistrate at the relevant time, that the Magistrate was clearly unaware that he was required to show in his record the language which an accused person has himself chosen to speak and into which proceedings were to be interpreted to him. Right from page one to the very last page of the proceedings, the Magistrate did not record the language in which the appellant, his co-accused persons or the witnesses who testified addressed the court. This Court has repeatedly held that an accused person is entitled to choose a particular language in which he wishes to conduct his case and to have the proceedings interpreted to him in that language. If an accused person is represented by a lawyer and the lawyer does not understand the language being used by the witnesses or even by the accused person, the lawyer is entitled, free of charge, to have the proceedings interpreted to him into English. That is what ***section 198*** of the Criminal Procedure Code provides. Mr. Makomere's submission on this point appears to be that because the language the appellant used has not been recorded by the Magistrate, the appellant did not understand the proceedings. That contention, however, is not borne out by the record. Right from the beginning, the appellant was charged with two other persons. The other two were Francis Kamau Kahindi and John Njuguna Kimani. Those names, on their face indicated that the appellant and the two came from the same community and spoke the same language. Francis Kamau Kahindi who was the 2nd accused person was represented by a lawyer, one Mr. Mburu. At no stage did Mr. Mburu inform the Magistrate that his client, Francis Kamau Kahindi did not understand the proceedings and when witnesses started testifying and it was necessary to cross-examine them the appellant extensively did so. The first witness was Francis Mwaka Mutevu; he was a formal witness who was employed by the company which owned the lorry, the subject of the robbery in count one. He was based in Nairobi and was not at the scene of the robbery. The appellant asked him no questions; Mr. Mburu did not ask him any question either and John Njuguna Kimani did not also ask any question. The second witness was Boniface Kaleli Ngao, the complainant in count two. He was the turn-boy in the lorry and was with the driver Gabriel Okindo who was shot dead during the robbery. His evidence was crucial to the prosecution's case and he was cross-examined at length by or on behalf of all the persons charged. At some stage during the proceedings the appellant told the Magistrate he was unwell and asked for an adjournment which was duly granted. When placed on his defence, the appellant made a detailed statement dealing squarely with the issues raised by the prosecution witnesses, i.e. why he and others were in the area where the offence had taken place, how they were chased by Masaai men wielding rungus and pangas and which made him think tribal clashes had broken out in the area, how they were arrested and collected by police from Naivasha.

On our own assessment of the recorded evidence, we have no doubt that though the Magistrate did not record the language in which the appellant spoke before him, the appellant fully understood the proceedings and fully participated in them. We would once again draw the attention of the Magistrate to the fact that this kind of careless omission of elementary requirements results in unnecessary complaints being raised against his judgments. We direct that a copy of this judgment shall be made available to him. In the circumstances of this appeal, however, we reject the complaint that because the language is not shown in the record, the appellant did not understand the proceedings.

That now brings us to the second ground argued by Mr. Makomere that the learned Judges on first appeal did not perform the duty placed on them as set out in the case of **OKENO VS. REPUBLIC, [1972] EA 32,** namely that:-

"--- it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. ---."

Mr. Makomere contended that if the superior court had discharged its duty, it would have found that the identification parade at which Boniface (PW2) identified the appellant was irregularly held, that Boniface did not state the duration of time he had the appellant under observation, and that Boniface did not give a description of the appellant before he (Boniface) identified him.

The evidence of Boniface which was accepted by the two courts below was that he and the deceased driver left Nairobi on 3rd March, 2001 and by mid-day, they had reached a place on Mai-Mahiu – Naivasha Road. The driver thought there might be something wrong with the lorry-tyres and asked Boniface to go down and check. Two men were standing by the road side and having found nothing wrong with the tyres, Boniface prepared to re-board the lorry. The two men came close to the driver and asked him for a lift to Naivasha. The driver agreed and the two men entered and sat with them in the cabin. At a place called Munyu one of the men ordered the driver to park the lorry by the road side. The driver refused and the two men produced pistols. The driver thought the pistols were fake and told Boniface so. A struggle ensued during which the driver was shot dead and one of the two men took charge of the lorry. According to Boniface it was the appellant who asked the driver for a lift and that it was him who struggled with the driver over the lorry. Boniface himself struggled with the third accused person.

This attack was in broad day-light and for a time the passengers created no trouble at all when they were offered a lift. When cross-examined by the appellant, Boniface stated:-

"The goods belonged to Pembe Company. You stopped us at Mai-Mahiu. I had ample time and opportunity to see you clearly. You were wearing a white T-shirt with some stripes. You produced a pistol both of you. My driver told me the pistols were fake. We struggled with you. I struggled with the 3rd accused. You were struggling with my driver. I was later abandoned tied to a tree. When you were arrested I was not present. I did not know you before."

The trial Magistrate accepted this evidence, holding that:-

"I have no doubt in my mind that the turn-boy (PW2) had ample opportunity to identify the 1st and 3rd accused. These two men, 1st & 3rd accused were seen by the Chief of the area and his policemen emerge from the bushes running not far from where the body of the driver and the lorry had been abandoned. They gave chase and the two were arrested after a distance of about seven kilometers. The 1st & 3rd accused do not deny that they were chased by Masaai herdsmen and later arrested after they were exhausted -------."

This chase of some seven kilometres took place during day time and just a short time following the robbery and killing of

the driver. For its part the superior court found:-

"The evidence adduced by the prosecution witnesses, therefore, gives an unbroken narration of the chain of events as they took place from the time the deceased gave the lift to the appellants, to the time the appellants hijacked the lorry and killed the deceased to the time the appellants drove the said lorry to the said harvesting site owned by PW4, to the time they were chased by PW3, PW10 and PW11 and to the time they were arrested and taken to Naivasha Police Station.

The evidence adduced by the prosecution was overwhelming and was not dented by the alibi defence which was offered by the appellants and which could not exonerate them from the charges that they faced. In fact the alibi defence offered by the appellants places them at the scene where the robbery took place and where the body of the deceased was recovered after the robbery incident and the fatal shooting of the deceased. In the circumstances of this case, we find no merit whatsoever with the submissions made by the appellants that they were not properly identified by the prosecution witnesses. We therefore disallow their appeals."

In the face of these emphatic findings by the superior court we are at a loss to understand how it can be argued that that court failed to perform the duty of a first appellate court. The complaint of the appellant on this aspect of the matter appears to us to amount to no more than that it is him who ought to have been believed and not the prosecution witnesses.

The law requires of this Court that on a second appeal it must give deference to the concurrent findings of facts by the two courts below unless it is shown that the findings were either based on no evidence or that the evidence on which they were based was of such a nature that no reasonable tribunal could be expected to act on that evidence. None of those situations arises in this case. Indeed like the two courts below, we are satisfied the evidence adduced by the prosecution in support of the two charges of robbery with violence was simply overwhelming and the appellants conviction on those charges was inevitable. We dismiss his appeal against conviction on the charges of robbery with violence. The superior court allowed his appeal on the two charges involving a firearm and ammunition but failed to formally quash the convictions thereon and set aside the sentences of imprisonment.

We accordingly quash the convictions on counts three and four involving the firearm and the ammunition and set aside the sentences of imprisonment imposed on those counts. On the robbery charges, the Magistrate had sentenced the appellant to death on each count and the superior court simply confirmed those sentences. A man cannot be hanged twice over and we now order that the sentence imposed on count two is set aside and save to that limited extent the appeal as regards sentence is also dismissed. Those shall be the orders of the Court in the appeal.

Dated and delivered at Nakuru this 11th day of June, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE 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.