REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 241 OF 2010

SALIM MWACHUNGU MALU …..... 1ST APPELLANT

ELVIS M. KIPELENGO ….....….....2ND APPELLANT

VERSUS

REPUBLIC ……..…….....…RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 356 of 2009 of the Principal Magistrate's Court at Taveta – Hon. Ndegwa - SRM)

JUDGMENT

The two Appellants above mentioned were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and were Convicted after a full hearing and determination and Sentenced to suffer death.

The particulars of the charge they faced were that:-

> ***"On the 20th day of June, 2009 at around 9:00 p.m at Mukuyuni area Taita Taveta County they robbed SILVANO JULIUS of a Motor cycle registration number KMCE 217 A make Tvs valued at Ksh. 85,000/=, mobile phone make "Lonke" valued at Ksh. 7,000/= and cash 1,500/= all valued at Ksh. 93,000/= and immediately after the time of such robbery wounded the said SILVANO JULIUS".***

In the alternative the two were charged with handling stolen goods contrary to section 322 (2) of the Penal Code.

The prosecution called a total of six (6) Witnesses to buttress their case and the defence called three (3).

Being the first appellate Court its incumbent upon us to re-evaluate and analyze the evidence adduced before the trial Court and draw our own conclusions bearing in mind that we did not have the benefit of seeing and hearing the Witnesses.

The main grounds of appeal we find are;

1. That the charge as framed was defective in that section 296(2) of the Penal Code provides the mandatory death penalty whereas section 295 sets out the criminal offence committed.

2. The Complainant did not give the description of his attackers to police and further that no identification parade was carried out.
3. That the element of violence was not proved.
4. Ownership of the motorbike and the house where it was recovered was not proved.
5. The doctrine of recent possession was wrongly applied by the trial magistrate.
6. The trial magistrate did not consider the ALIBI defence fronted by the Appellants.

The brief facts of this case are as follows;

The Complainant one Silvano Julius, a boda boda operator under the employ of one Mzee Mkamba was on the 20th day of June, 2009 hired out to proceed to a place called Timbila on the way he met two persons who proceeded to beat him and made away with his motor bike make Tvs, cash Ksh. 1,700/= and a phone worth Ksh. 7,000/=. During the attack he lost consciousness and when he regained it he went and reported the matter at Taveta police station and he was referred to Taveta District Hospital for treatment. On 24th June, 2009 he was informed that the Accused persons had been arrested and the motor bike had been recovered.

In his Judgment the learned trial magistrate framed three (3) issues thus,

1. ***Whether the Accused persons were properly identified by the Complainant on 20th June, 2009.***
2. ***Whether the offence of robbery with violence has been proved.***
3. ***Whether the case against the Accused has been proved beyond reasonable doubt.***

On the issue of identification, this is what the learned trial magistrate observed at page 3 line 4 of the Judgment,

"The incident occurred at 9:00 pm and the Complainants saw the Accused persons using lights from the motorcycle. Thereafter the Accused persons were found in possession of the stolen motor cycle. That corroborates the fact that the circumstances under which the complainant saw them on 20th June, 2009 were good for positive identification. Besides, the Complainant knew the Accused persons before and it was therefore a case of not just identification but recognition which is more reliable. It is therefore my finding that the Accused persons were positively identified by the Complainant on 20th June, 2009".

As to whether the offence of robbery with violence was proved the trial magistrate did note that the Complainant was attacked by two Accused persons.

That he was tied with a rope and was pulled off from his motorbike and was hit severally with a piece of metal. The injuries were assessed as maim by a Doctor.

Further it was observed that the Accused persons did to dispute the fact that they were found inside the house wherein the stolen motorbike was recovered. The trial magistrate did proceed to consider the Alibi evidence adduced by the two Accused persons and did conclude that it was far fetched.

Upon a careful analysis of the evidence adduced before the trial magistrate and in particular

1. ***Defective charge.***

It is the appellants contention that they were charged under section 296(2) of the Penal Code but they ought to have been charged under section 295 as read with section 296(2) of the Penal Code because it is section 295 that defines the offence of robbery.

The Court of Appeal in the case of Simon ***Materu Munialu –Vs- Republic 2007 eKLR (Criminal Appeal No. 302 of 2005*** when confronted with a similar case held,

"The ingredients that the appellants and for that matter any suspect before the Court on a

charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such Accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In Short section 296(2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an Accused person facing such offence with robbery under section 295 as read with section 296 (2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion. In our considered view section 137 of the Criminal Procedure Code could be complied with if an Accused is charged, as the appellant was under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296 (2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal".

We therefore find the contention by the the Appellants that the charge was defective to be without merit. The appellants also contend that the charge sheet does not include a rope and a metal bar which the complainant in his evidence told the Court that these were the weapons used by his attackers and no mention is made of dangerous or offensive weapons in the same charge. In his Judgment the trial magistrate at page 3 line 10 did observe and correctly that,

"Section 296(2) of the Penal Code has three limbs. These are;

1. When the offender is armed with any dangerous or offensive weapon or instrument.
2. When the offender is in company of one or more other person or persons.
3. When immediately before or immediately after the time of robbery, he wounds, beats strikes or uses any other personal violence to any person. A perusal of the charge sheet herein does show that two Accused persons were charged. This answers to the second limb of the offence.

The charge also does indicate that, the Complainant was wounded during the incident. This answers to the third limb of the offence.

It is for the prosecution to prove any of the three limbs of the offence or robbery with violence.

Identification.

The appellants contention is that the learned trial magistrate placed a lot of reliance on the evidence of PW 1 who was the Complainant in this case and that this was a single Witness and it was not safe to act on such identification.

Its not factually correct to state that the Complainant was a single Witness. There is evidence of recovery of the motorbike which was among the items which were stolen. Apart from the evidence of the Complainant, the learned trial magistrate also relied on the doctrine of recent possession.

Evidence was adduced on the recovery by PW 3 and PW 4. As earlier observed the trial magistrate did note on identification that the incident occurred at 9:00 pm. That complainant saw the Accused by the use of lights from his motorcycle. That he knew the Accused persons before and that the two were found in possession of the stolen motor cycle. In their submissions the appellants advance the view that if the complainant knew them before this incident he did not give their descriptions to police before the arrest and the identification if any was dock identification.

At page 3 line 3 of the record of proceedings the complainant told the Court,

"On the way at 9:00 pm I met the two Accused persons. The 1st Accused hit me with a

metal on the head. The 2nd Accused tied a rope on me and pulled me off the motor bike.

The motor bike fell. The 1st Accused removed Ksh. 1,700/= from my pocket together with a phone worth Ksh. 7,000/=. The 1st Accused continued beating me all over the head with the metal he had".

From the above it can be observed that the complainant was quite clear on what role each of the Accused persons played during the robbery incident. He cannot have done so if he did not see his attackers clearly that night.

The source of light is given as the headlight of the motorbike he was ridding.

During cross examination by the 1st Accused he stated,

"I saw you first from a distance of 15 metres. Under cross examination by 2nd Accused at page 4 line 19 he states, "I told police that I could identify the attackers. That report is in the occurrence book. I was in a bad state when I went to the station and I could not give all details. I stayed in Hospital for about a week".

We note that no identification parade was conducted in respect of the identification by the Complainant but we also observe that it is the Accused persons who refused to take part in the identification parade for reasons best known to themselves. We are satisfied that the complainant did clearly identify/recognize the accused persons at the time of the robbery from light emanating from the headlight of his motorbike.

Doctrine of recent possession.

The Court of Appeal in the case of ***Arum –Vs- Republic KLR 206*** page 233 held,

"(1) Before a Court can rely on the doctrine of recent possession as a basis of Conviction in a Criminal case, there must be positive proof;-

(a) That the property was found with the suspect.

(b) That the property was positively the property of the Complainant.

(c) That the property was recently stolen from the complainant.

(2) The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

(3) In order to prove possession there must be acceptable evidence as search of the suspect and recovery off the allegedly stolen property and any discredited evidence cannot suffice, no matter from how many Witnesses.

(4) In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analysing it and accepting that it considers it to be correct and an honest version".

In the present case the robbery took place on the 20th day of June, 2009 and the recovery of the motor bike was on 24th June, 2009. This was in a house belonging to PW 4 one John Muinde Matiku.

PW 4 had testified to have gone to his farm on 24th June, 2009 which is situated at a place called California while in the company of PW 3 and another person. He had a house in the farm which was usually occupied by his farm hand but at the time it was not being occupied. Upon arrival at the farm he noticed that the window to his house was open upon close look he saw a side mirror of a motor bike.

Suddenly the window was closed and three(3) men came outside. He confronted them by demanding to know who they were. He threatened to call police and the men started running. He chased the first Accused and managed to arrest him.

The 2nd Accused was chased by members of public arrested and was taken to police station.

In their defence the Accused persons testified that they are well diggers and had gone to California to dig a well belonging to one John Fadhili but they did not find him but on the way they met an old man who invited them in his house and later excused himself stating that he was escorting a lady they had found in the house.

After a while PW 3 and PW 4 arrived ridding a motor bike. They entered hit the house to wait for he old man but instead other boda boda riders arrived and they were beaten. The 1st Accused was arrested there but 2nd Accused escaped and reported the matter to police.

The learned trial magistrate did observe that the Accused persons did not dispute the fact that they were found inside the house where the stolen motor bike was recovered. He did note that their behaviour of trying to escape after seeing PW 3 and PW 4 was not consistent with innocence.

The motor cycle in question had fake registration which was an attempt to conceal.

We are satisfied that the Accused persons were found inside PW 4's house in questionable circumstances. The house belonged to PW 4 who categorically stated that he did not know the Accused persons and that the house was supposed to be occupied by his farm hand but it was not occupied at the time. We are in agreement with the learned trial magistrate's observation that the behaviour of the Accused persons when found PW 3 by PW 4 in the house was suspicious and not consistent with innocence as the men decided to flee. There is evidence which was not controverted, to the effect that the motor bike was the property of PW 2 who had employed the Complainant.

Between the robbery incident and the recovery of the motor bike there were four (4) days. In the circumstances of this case we deem this duration as recent. We are of the view that the doctrine of recent possession was correctly applied in this case.

The upshot is that we find no good reasons to disturb the Conviction. The Sentence is a lawful one. We find the appeal to be without merit and it is disallowed.

Judgment delivered dated and signed this 15th day of April, 2015.

…. **….**

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:-

Court clerk ….....

Learned State Counsel ….....

Appellant ….....