REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 218 OF 2008

(From the original Conviction and Sentence in the Criminal Case No. 4231/2006 of the Chief Magistrate's Court at Mombasa: R. Kirui – PM)

BAKARI RASHID……..…..……..……APPELLANT

VERSUS

REPUBLIC……..……..……..RESPONDENT

JUDGMENT

The appellant **BAKARI RASHID** has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at the Mombasa Law Courts. The appellant was arraigned before the trial court on 5th December, 2006 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) PENAL CODE**. The particulars of the offence were given as follows:

> **"On the 22nd day of November, 2006 at about 7.10 p.m. at Mshomoroni area in Mombasa District within Coast Province, jointly with another not before court while armed with dangerous weapons namely a knife robbed DANIEL MURIMI MURIITHI of cash Kshs. 500/=, a mobile phone make Nokia 2100 valued at Kshs. 7,000/=, a wrist watch make Seiko 5 and a silver necklace all valued at Kshs. 17,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said DANIEL MURIITHI."**

The appellant entered a plea of *'Not Guilty'* to the charge and his trial commenced on 19th February, 2008. The prosecution led by **INSPECTOR KITUKU** called a total of four (4) witnesses in support of their case. Briefly the facts of the case were as follows.

PW1 DANIEL MURIMI MURIITHI a student at Kitengela High School told the court that on 22nd November, 2006 he was walking from Mombasa town to his home at Mshomoroni. As he walked through a narrow lane in Mshomoroni he was attacked by two men whom he knew and recognized. One threatened him with a knife and they robbed him of his cash 500/=, silver neck chain and Nokia mobile phone. **PW1** screamed for help and one **WANJOKI PW2** came to his assistance. The robbers ran off. A lady passer-by informed them that the robbers had boarded a matatu to *'mwisho was lami'*. **PW1**

informed community policing officers and they all proceeded to Mwisho wa Lami. They spotted the two suspects alighting from a matatu. When appellant saw **PW1** he immediately dropped the chain and phone he had stolen. **PW1** recovered the items and took them to the police as exhibits. The next day appellant was arrested and was later charged with the offence of Robbery with Violence.

Upon the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He elected to make an unsworn defence in which he denied any and all involvement in the robbery. On 29th July, 2008 the learned trial magistrate delivered his judgment in which he convicted the appellant and sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Being a court of first appeal we are obliged by law to re-examine and re-evaluate the evidence on record and to draw our own conclusions on the same. The appellant opted to rely upon his written submissions which had been duly filed in court. **MR. MUREITHI** learned state counsel made oral submissions on opposition to the appeal. We have carefully perused the written submissions filed by the appellant. In them he raises the following grounds for his appeal

- Defective charge sheet
- Identification
- Failure to supply witness statements before trial
- Failure to provide OB
- Inconsistency in evidence

We will proceed now to consider each ground individually.

DEFECTIVE CHARGE SHEET:

The appellant submits that the charge as framed was fatally defective because he was charged under section 296(2) of the Penal Code which he submits provides only for the **penalty** for the offence of Robbery with Violence and does not create the offence. He also submits that the charge sheet did not provide sufficient detail of the offence. A charge sheet is but a synopsis of the evidence to be adduced at the trial. The charge must inform the suspect with **sufficient clarity** of the offence for which he has been arraigned in court. The charge sheet is not expected to provide a summary of the evidence to be called. We have anxiously perused the charge sheet and find that it did contain **sufficient information** about the charge which the appellant was facing. The appellant could not have been in any doubt about the reason for his arraignment and we have no doubt that is why he pleaded to the charge as it was. The appellant has also raised the issue of the section under which he was charged being section 296(2) of the Penal Code which provides for the penalty for the offence of Robbery with Violence. Section 295 creates the offence itself. Does the fact that the appellant was charged under section 296(2) as opposed to section 295 render the charge fatally defective. We think not. This controversy has been put to rest by the Court of Appeal in the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS – VS – REPUBLIC Criminal Appeal No. 5 of 2008** where it was held as follows:

> **" We reiterate what was stated by this court in various cases before us. The offence of robbery with violence ought to be charged under section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon is in the company of others or if he uses any personal violence to any person.**
>
> **The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code……..It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge."**

We need add no more to this. The charge as framed under section 296(2) was proper and correct and we therefore dismiss this limb of the appeal.

IDENTIFICATION:

The second ground of appeal raised by the appellant is that he was not properly identified as one of the robbers by the prosecution witnesses. **PW1** who was the victim of the robbery told the court that he was attacked at about 7.00 p.m. as he was walking home. At 7.00 p.m. it is dusk thus it is not entirely dark and **PW1** states on his evidence at page 27 line 16:

> **"The incident took place at 7.00 p.m. and it was not yet dark."**

Under cross-examination **PW1** goes on to clarify that:

> **"There was some light from a bulb but it was not even dark yet. The electric bulb was not far."**

As such the light was sufficient to render attackers visible to him. **PW1** went on to testify that he was able to recognize the two attackers whom he knew very well. He states at page 27 line 13:

> "**I identified both the robbers as they come from the area where I live. I identified them from their appearance and names one is Bakari Rashid and the other is Haji. I knew them before and recognized them when I saw them …….."**

PW1 went on to clarify under cross-examination that the two attackers were persons whom he had known for two (2) years preceding the incident. As such they were not strangers to him. In the case of **ANJONONI & OTHERS – VS – REPUBLIC [1980] KLR** the Court of Appeal held that:

> **"recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or other."**

Having known the appellant for two (2) years the complainant would have had no difficulty at all in recognizing and identifying him. **PW1** was able to describe in detail the role that each attacker played proving that he had a clear view and was able to see them well. He vividly describes what happened when **PW2** came to his rescue:

> **"Then Haji who had the knife threw the knife at him [PW2] trying to scare him away. Then Bakari Rashid [the appellant] who had held me by the neck kicked me and I fell down……."**

This provides clear evidence that the witness knew his assailants not only by appearance but he knew their names as well.

The same applies to **PW2 SAMSON WANJOKI MWANGI** who told the court that he rushed to the scene upon hearing the cries for help from **PW1**. The witness said that he found **PW1** under attack by two men. **PW2** told the court that he too being a resident of the same area knew the attackers well and was able to recognize them. Just like **PW1**, **PW2** stated that it was not yet dark and there was sufficient light to aid identification. **PW2** was able to give a vivid account of the role which each assailant played. He states at page 30 line 11:

> **"I recognized the two men holding the other [complainant] as Bakari nicknamed Beka and Haji. Haji had a knife. When I wanted to know what was going on Haji turned to me with the knife. I struggled with him upto an electric post and threw the knife away. When I managed to get the knife Haji ran away and was followed by Bakari……."**

This corresponds with the account given by **PW1** about what occurred when **PW2** came to his rescue. Thus there is evidence on both identification and recognition of the appellant from not one but two eye-witnesses. Both **PW1** and **PW2** testify that when the two assailants ran off a female passerby told them

that the two had boarded a matatu to a place called Mwisho wa Lami. Both **PW1** and **PW2** boarded a matatu and followed them there. Upon arrival and when the appellant saw them he immediately dropped the knife, chain and mobile phone which he had snatched from the complainant. Here again the evidence of the two witnesses is consistent that it was the appellant and not his companion who dropped these items. **PW1** recovered his stolen goods and took them to the police station. The same were produced as exhibits during the trial **Pexb1**, **Pexb2** and **Pexb3**. The fact that barely minutes after **PW1** is attacked and robbed at knife-point, the appellant is seen disposing of a knife, as well as the complainant's stolen mobile phone and chain is clear proof that he was involved in the robbery. On the whole we are satisfied that there has been clear, positive and reliable identification of the appellant as one of the two men who robbed **PW1**. We find no possibility of a mistaken identity. This ground of the appeal therefore fails.

FAILURE TO SUPPLY WITNESS STATEMENTS BEFORE TRIAL:

The third ground of appeal raised by the appellant is that he was not supplied with witness statements before his trial commenced. The Constitution of Kenya provides that all suspects must be accorded a fair trial. It is trite law that one of the fair trial practices is to allow an accused advance view of the evidence to be presented against him (in the form of the witness statements) so as to enable him adequately prepare his defence. Thus it is clear that the appellant had a **right** to be provided with the witness statements before the trial commenced. His claim that this right was denied to him is not only misleading but is actually incorrect. Perusal of the record clearly shows that initially the witness statements were supplied to the appellant's lawyer **'Mr. Abubaker'**. Later on 28th May, 2007 the accused informed the court that he no longer had an advocate on record and requested for a second set of witness statements to be supplied to him. This was done. Again on 25th June, 2007 appellant informed the court that the witness statements supplied to him had gotten lost and he requested for yet a third set of statements. Each time the trial magistrate adjourned the case in order to allow the appellant to receive and peruse the witness statements. Finally, on 8th October, 2007 the accused stated in court:

> **"Accused – The witnesses are present in court. I have also been given their statements."**

He therefore confirmed that he had infact been supplied with the witness statements. The trial did not commence until four (4) months later on 19th February, 2008. This provided more than ample time for the appellant to peruse those statements and to prepare for his trial. We find no merit in this ground of the appeal and the same is hereby dismissed.

FAILURE TO PROVIDE OB:

The fourth ground of appeal was that despite his requests to have the relevant OB availed during the trial this was not done. Again we have anxiously perused the trial record to establish the truth. We note that indeed appellant did make several requests to have the OB for 23rd November, 2006 from Nyali police station availed in court. Despite the court issuing orders for the OB to be produced this was never done. The trial proceeded and appellant did not raise the issue again. The question of whether this failure to produce the OB renders the entire trial invalid will depend on whether this failure occasioned any prejudice to the appellant. During this appeal the appellant did again seek to have the said OB produced as additional evidence. The application was allowed and the copy of OB for 23rd November, 2006 from Nyali police station was produced. We have perused entry No. 42 of the OB which relates to the report made by the complainant. In his submissions the appellant complained that although **PW1**said that he was able to recognize his attackers he did not give the police their names. Once again this submission is not only misleading but is also not borne out by the OB extract which reads as follows:

> **"Report made: To station is one male adult namely Daniel Murimi c/o 98147 Mombasa or 0733382508 a resident of Mshomoroni area and submit that yesterday 22nd November, 2006 at about 7.00 p.m. while nearing his home he was attacked by a group of two person [sic] known to him as Haji and Beka who were armed with a knife and robbed him of his mobile phone Nokia 2100, valued at 15,000/=, one silver chain valued 10,000/=, wrist watch make Seiko automatic value to follow……."** *[Our own emphasis]*

It is clear therefore that **PW1** did give the police the names of his attackers proving once again that he knew them. The OB report therefore corresponds with the evidence of **PW1** and the failure to produce it during trial could not have prejudiced the appellant in any way. Our perusal of the OB report does not show any anomaly with the evidence on record. The OB clearly names the appellant as *'Beka'* [his nick names] thus the appellant's claim that **PW1** did not give police the names of his attackers has no basis. This ground of the appeal is similarly dismissed.

INCONSISTENCY IN EVIDENCE:

The final ground of appeal raised by the appellant is inconsistencies in the prosecution evidence. We have carefully analyzed the evidence on record and find no material inconsistencies. On the contrary the evidence in our view is overwhelming and was sufficient to prove the charge. The appellant and his companion armed with a knife attacked **PW1** and stole from him various items. The incident amounts to a Robbery with Violence as envisaged by section 296(2) of the Penal Code. In his defence the appellant claimed that the charge was fabricated against him due to a quarrel he had with one Edward Were over a lady. This Edward Were is not the complainant in this case and no connection is shown between the complainant and this Were. The said Edward Were who was the chairman of the Community Policing Unit in Mshomoroni testified in this case as **PW3**. The appellant did question **PW3** about a lady called Faji but **PW3** denied any disagreement with the appellant over the said lady. In any event we fail to see how an alleged disagreement with **PW3** over a lady would cause the complainant (who is not shown to have been involved in that alleged dispute) to fabricate a charge against the appellant. This defence clearly has no basis and the trial magistrate was right to dismiss it. From our own analysis we are satisfied that the prosecution did prove their case beyond a reasonable doubt. The conviction of the appellant was proper and we do uphold the same.

The appellant was allowed an opportunity to mitigate after which he was sentenced to death. The sentence was lawful and we confirm it as such. The upshot is that this appeal fails in its entirety and is hereby dismissed.

Dated and delivered in Mombasa this 18th day of February, 2014.

M. ODERO

JUDGE

M. MUYA

JUDGE