REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

[Coram: F.A. Ochieng & G.W. Ngenye-Macharia JJ.]

CRIMINAL APPEAL NO. 63 OF 2011

BENARD WAMALWA ALIAS BENO ::::::::::::::::::::::::::::::::::APPELLANT

=VERSUS

REPUBLIC:::RESPONDENT

{Being an appeal from the Judgment of Hon. G.A. M'masi, Senior Resident Magistrate

dated 6/4/2011 at Eldoret Chief Magistrate's Court in Criminal Case No. 5924 2010}

JUDGMENT

The Appellant, **BERNARD WAMALWA** Alias "**BENO**", was convicted for the offence of Robbery With Violence Contrary to Section 296 (2) of the Penal Code. He was then sentenced to suffer death as by law prescribed.

In his appeal, he faults the trial court for failing to specify the language in which the proceedings was conducted. He asserts that that is a violation of the mandatory provisions of Section 198(1) of the Criminal Procedure Code.

Secondly, the trial Court is faulted for failing to warn itself about the danger of basing a conviction on the evidence of a single identifying witness.

Thirdly, the evidence of the prosecution was described as having been riddled with inconsistencies. Therefore, the same was was not a proper foundation for any conviction.

The Complainant was alone when he was attacked. However, the police officer who visited the scene said that the police had been informed about the incident. As the person who informed the police was not brought as a witness at the trial, the Appellant submitted that the prosecution had failed to provide an essential witness.

The Appellant also pointed out that whilst the police officer who rushed to the scene testified that he found that the Complainant had been rushed to a private clinic, the Complainant himself only made reference to the Kitale District Hospital. In the circumstances, the Appellant submitted that there was inconsistency in the evidence produced by the prosecution.

The police officer who gave evidence said that he sent another police officer to the Kitale Police Station, with a view to having that officer check on the progress of the victim. As far as the Appellant was concerned, that evidence is a reflection of the confusion in the minds of the prosecution, because the progress in the health of a victim can only be ascertained from the hospital: not from the police station.

The Appellant also noted that the Complainant's relative, to whom the Complainant had given the name of his assailant, did not testify. That relative is the one who told the police officer about the name of the assailant.

Meanwhile, the Complainant did not testify that he had told any relative of his, about the name of the assailant.

The Appellant accused the Complainant of dishonesty for saying that he only knew one of his assailants yet the Complainant also said that he gave to the police the name of the suspects. If he gave the names of the suspects, then he must have known both the assailants. But if he only knew only one assailant, he could not have named both Appellants. That is the Appellant's contention.

Another issue that the Appellant raised was with regard to the need for an Identification Parade. As the Complainant was not present when the Appellant was arrested, it was the Appellant's submission that the police ought to have conducted an identification parade.

In this case, the police officer who arrested the Appellant said that he had known him prior to the arrest. But because the officer did not give particulars of how he got to know the Appellant, the Appellant submitted that it was wrong to assume that the officer actually knew him.

The Appellant also said that the Complainant was confused about the period of time he spent in hospital. He was therefore described as unreliable. His evidence was said to be anything but firm and consistent.

Finally, the circumstances prevailing were said to have been harsh. The time was in the night, and the Complainant failed to specify the position of the alleged lighting vis-a-vis the scene of crime. Furthermore, the Complainant was said to have failed to state the duration of the incident. Therefore, the Appellant argued that the Court could not know how much time the Complainant had to observe the Appellant, during the robbery.

In answer to the appeal, **Mr. Mulati**, learned State Counsel, submitted that the Appellant definitely understood the language in which the proceedings were conducted. That understanding is discernible from the manner in which the Appellant cross-examined the witnesses.

The Respondent also submitted that it is the Complainant who named the Appellant, when he talked to the police.

As regards the lighting at the scene of crime, the Respondent submitted that there was enough lighting at the stage, where the Complainant was waiting for transport.

In a nutshell, the Respondent emphasized that the prosecution proved the case against the Appellant beyond any reasonable doubt.

Being the first appellate court, we have re-evaluated all the evidence on record, and drawn our own conclusions. We have, however, borne in mind the fact that we did not have the benefit of observing the witnesses when they testified. Therefore, to the extent that reliability or otherwise of a witness was determinable on the basis of demeanour, the learned trial magistrate would have been in a better position to make an informed assessment than an appellate court.

The particulars of the offence were spelt-out in the charge-sheet as follows:

" <u>BERNARD WAMALWA ALIAS BENO</u>: On the 23rd day of November, 2010 at Moi's Bridge trading centre, Moi's Bridge Location in Eldoret West District within Rift Valley Province, jointly with others not before court, while armed with a dangerous weapon, namely a metal bar, robbed DANIEL KIGUMI NJENGA Kshs 150/= (one hundred and fifty shillings) and mobile phone make Nokia 1600 valued at Kshs 3,500/= and immediately before the time of robbery used actual violence to the said DANIEL KIGUMI NJENGA."

<u>P.W.1, JOEL SUTER</u>, was a Clinical Officer at the Uasin Gishu District Hospital. He testified that the Complainant provided a history of having been assaulted by two (2) people who were known to him.

P.W.1 said that the Complainant had been admitted at the Kitale District Hospital, where his spleen was surgically removed.

During cross-examination, P.W.1 clarified that the Complainant had indicated that he only knew one of the 2 people who attacked him.

<u>P.W.2, DANIEL KIGUMI NJENGA</u>, is the Complainant. He was attacked when waiting for a motor-bike which was to take him home. P.W.2 was standing on a culvert at the Moi's Bridge stage. He said:

"The accused, who is called 'Beno' and another I did not know came and passed near where I was standing. The stage is lighted by street lights."

P.W.2 had known Beno as he used to see him touting at the Moi's Bridge stage, for a period of one year.

The Appellant boxed P.W2 on the head, causing P.W.2 to fall down. The Appellant then stepped on the Complainant's stomach, whilst the Appellant's accomplice hit P.W.2 on the ribs. He used a stick to hit P.W.2.

The two men then robbed P.W.2 of Kshs 150/= cash and a Nokia phone. The Complainant lost consciousness, and only regained the same on the next day, while at the Kitale District Hospital. Initially, P.W.2 was admitted from 23rd to 25th November, 2010.

But when he returned home, P.W.2 was in so much pain that he was again re-admitted at the Kitale District Hospital. When he was in hospital, PW.2 was operated on his stomach.

The typed record of the proceedings reads as follows:-

" I was in hospital until 15/12/2010. I was discharged on

13/12/2010. Police officers came to tell me a suspect

had been arrested ..."

That piece of evidence led the Appellant to submit that the Complainant was confused, because he was unsure about the date of his discharge.

We have perused the original hand-written record and it is in the following words:

" I was in hospital until 5/12/2010. I was discharged.

On 13/12/2010 police officers came to tell me a

suspect had been arrested ..."

Clearly therefore, the confusion was caused by the person who was tasked with the typing of the record. The complainant was discharged on 5th December, 2010. Thereafter, he was visited by the police officers on 13th December, 2010, when they told him that a suspect had been arrested.

That evidence is clear. It has no confusion within it. The Complainant also made it clear that the police recorded his statement whilst he was at home. A perusal of the hand-written record reveals the following particulars of the Complainant's statement;

" In my statement, I wrote the name of the suspect who had

violently robbed me. I mentioned Beno in my statement".

In other words, the complainant named one suspect, not <u>suspects</u>. Again, it is the person who typed the record who made an error.

To our minds, the Complainant had, at all times, said that he only identified one of the 2 men who robbed him. That person was Beno, the Appellant.

<u>CPL ANTHONY KIRAGU</u> (P.W.3) was based at the Moi's Bridge Police Station at the material time. Whilst he was on routine patrol at Moi's Bridge, they were alerted that somebody had been attacked within that area.

P.W.3 was with P.C. Murito. The 2 of them rushed to the scene but found that the victim had been rushed to a private clinic for medication.

P.W.3 testified that the victim had lost consciousness. And after 5 days, P.W.3 sent P.C. Murito to the Kitale Police Station to check on the progress of the victim.

In our considered view, there is no reason to warrant a criticism of that piece of evidence. We say so because whilst the incident took place at Moi's Bridge, the victim had been admitted at the Kitale District Hospital. Logically, the police officer from Moi's Bridge first went to the Kitale Police Station, under whose jurisdiction Kitale District Hospital was located. The officer learnt that the victim had been discharged.

Thereafter, P.W.3 traced the victim's residence, and he visited him there. But by then, the victim had been re-admitted at the Kitale District Hospital.

Until that stage, P.W.3 had not talked to the Complainant. P.W.3 only managed to talk to the Complainant later, when the Complainant had returned home, following surgery. At the time, the

Complainant was bed ridden.

P.W.3 recorded the statement of the Complainant, who told him that he had been attacked by Beno.

But because P.W.3 had known Beno, he had already arrested him on the strength of information from a relative of the Complainant. The said relative was not named by P.W.3.

Thereafter, P.W.3 escorted the Complainant to the police station, where the Complainant identified the Appellant as the "Beno" who had robbed him.

As the Complainant had known the Appellant for over a year before the incident, an Identification Parade would not have served any useful purpose.

Did the police officer take a risk in arresting the suspect before recording the Statement of the Complainant?

The answer is in the affirmative. He took a risk, but the said risk appears to have been a calculated one because the officer had already been told that the Complainant had named Beno. And the police officer said, when being cross-examined by the Appellant that the Appellant was known to the officer, as a resident of Moi's Bridge.

Later, when put to his defence, the Appellant confirmed that he was indeed a resident of Moi's Bridge. Therefore, that line of defence appears to have added further corroboration to the evidence tendered by the prosecution.

As regards the language in which the proceedings were conducted, we have noted that the Appellant carried out extensive cross-examination of the witnesses. We have described the said cross-examination as extensive because the same was not only relevant but also in-depth.

In the circumstances, although it is always advisable for the court to record the language in which the proceedings are conducted, we find that the failure to do so was not fatal. The Appellant followed the proceedings and he was therefore not prejudiced.

Section 198 (1) of the Criminal Procedure Code provides as follows:-

> ***" 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 he understands."***

We understand that provision to make it mandatory to provide interpretation to an accused person whenever any evidence was given in a language which he did not understand.

In this case, the Appellant has not asserted that any of the witnesses gave evidence in a language which he did not understand. And as already alluded to, the Appellant appears to have understood the language in which the witnesses testified, hence his ability to carry out effective cross-examination.

The learned trial magistrate was alive to the fact that the Appellant was identified by a single witness, at night. But the court noted as follows;

> ***" … he had known him for over one year, and at the***

stage where the Complainant was, was well lighted

by security light, and he vividly saw the accused

before the accused attacked him".

In other words, the learned trial magistrate actively engaged her mind to the need to give careful scrutiny to the evidence of a single identifying witness, before determining whether or not the identification was positive.

The trial court then went on to say;

" The Court observes that the identification was

proper and did not leave any doubt."

We could not agree more. There was sufficient lighting at the scene; and the Appellant had passed near the Complainant.

As the Appellant assaulted the Complainant physically before they robbed him, and because the Appellant was in the company of another person, the ingredients of the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code were all proved.

Accordingly, there is no merit in the appeal. The same is rejected. We uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 27TH DAY OF MAY, 2014.

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FRED A. OCHIENG **G.W. NGENYE-MACHARIA**

JUDGE **JUDGE**