REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 32 OF 2011

(From the original Conviction and Sentence in the Criminal Case No. 2928/2009 of the Chief Magistrate's Court at Mombasa: J. Omburah – SRM)

BAKARIRASHID *Alias* Beka…….....……..……APPELLANT

VERSUS

REPUBLIC…….……..……....……..RESPONDENT

JUDGMENT

The appellant **BAKARI RASHID alias BEKA** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Mombasa Law Courts. The appellant was arraigned in the lower court on 8th September, 2009 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(1) OF THE PENAL CODE**. The particulars of the charge were that

"On the 20th day of August, 2009 at Caltex Harambee area Likoni location in Mombasa District within Coast Province jointly with others not before court while armed with dangerous weapons namely metal bars robbed ROSE MUTHENI cash Kshs. 680,000/= and one mobile phone make Vodafone all valued at Kshs. 681,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ROSE MUTHENI."

The appellant entered a plea of '*Not Guilty' t*o the charge and his trial commenced on 19th November, 2009. The prosecution led by **INSPECTOR MAIYO** called a total of five (5) witnesses in support of their case. **PW1 ROSE MUTHENI MULANDI** and **PW2 BEATRICE NYIVA MULANDI** both told the court that on 20th August, 2009 at about 10.00 a.m. they were in the house of **DAVID KAMAU NJUGUNA PW3** who was their uncle. **PW2** were engaged in feeding a child and **PW1** was the househelp. Some men knocked on the door which was ajar. **PW2** went to check who they were. She invited the three men in. The men came in and asked for Kamau's wife. **PW2** responded that the lady of the house had gone out. The men grabbed hold of the two women and tied them up. They were armed with a pistol and a metal rod. The men demanded the keys to the bed-room. **PW2** responded that she did not have the keys. Using the metal rod the men broke the bed-room door. They ransacked the room and broke into the suitcases. They stole a mobile phone and left. After the robbers left **PW2** and **PW3** called for help. A neighbour called '*Christine'* came to their aid and untied them. **PW3** who was away at work was informed of the robbery. He rushed home and found his bedroom door broken. His bedroom had been ransacked. Upon checking **PW3** realized that cash Kshs. 680,000/= which he had kept in the house awaiting banking was missing. He reported the matter to Likoni police station. The police

launched investigations which led to the arrest of the appellant. At a police identification parade **PW2** positively identified the appellant as one of the men who had robbed them. The appellant was then arraigned in court and charged.

At 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 statement in which he denied any and all involvement in the robbery. On 18th January, 2011 the learned trial magistrate delivered his judgment in which he convicted the appellant of the charge of Robbery with Violence and thereafter sentenced him to death. Being aggrieved the appellant filed this appeal. **MS. BII** Advocate argued the appeal on behalf of the appellant whilst the learned state counsel **MS. MWAURA** made arguments opposing the appeal.

As a court of first appeal we have an obligation to re-consider and re-examine the prosecution evidence and to draw out own conclusions on the same. Learned counsel Ms. Bii raised the following as grounds upon which the appeal ought to be allowed

- Defective charge sheet
- Improper identification
- Failure to call informer to testify
- Unconstitutional sentence

The first question that would arise is whether the incident described amounted to a Robbery with Violence as defined by section 296(2) of the Penal Code. The theft was perpetrated by more than one person. The witnesses testify that one of the men was armed with a pistol which is a dangerous weapon and another with a metal rod. Both **PW1** and **PW2** were tied up and manhandled leading to a legitimate fear for their lives. There was actual use of force. In short we find that all the crucial ingredients of the offence of Robbery with Violence are shown to have been present bringing this incident within the ambit of section 296(2) Penal Code.

Regarding the charge sheet counsel for the appellant submits that because as the charge sheet refers to the *'wrong'* complainant it is defective. The complainant who is referred to in the charge sheet is '*Rose Mutheni'* who testified as **PW1**. However, **PW2** did state very categorically in her evidence that the house in which the robbery occurred was not her house. She states at page 12 line 19

"I am called Rose Mutheni Mulandi. I am 18 years old and stay in Likoni. I stay with my aunt called Mary. I was a house girl at my aunt's house. She is called Mary Muthendwa Kamau. I had worked for her for one year. I recall on 20th August, 2009 at about 10.00 a.m. <u>I was at the house of Kamau</u> with my sister called Beatrice Nyiva Mulandi……..."*[my own emphasis]*

Given that the house belonged to the uncle of **PW1** called Kamau it stands to reason and indeed it follows that the property inside that house also belonged to Kamau. Certainly any items inside the bedroom which was broken into and ransacked could only have belonged to Kamau and his wife who were the employers of **PW1.**

The said *'Kamau'* who was the owner of the house testified as **PW3** and informed the court that when his bedroom was ransacked the robbers made away with cash Kshs. 680,000/=. He explains that this money was the proceeds of his transport business which he had kept in his bedroom awaiting banking. However, it was not **PW1** and **PW2** who were present in the house when the incident occurred. Kamau was away at work. In the circumstances **PW1** as the duly employed househelp and as an agent of her employer could properly be said to have been in constructive possession of the house as well as all its contents. Any item stolen from the house while her employer was absent can properly be said to have been stolen from **PW1** as the recognized agent of her employer. Therefore the inclusion of **PW1** as the complainant instead of **PW3** is not in our view a defect in the charge. The money was indeed stolen from **PW1** who was inside the house and who was therefore in actual possession of the cash when the theft occurred. We therefore dismiss this limb of the appeal.

Counsel for the appellant goes on to challenge the identification of the appellant as one of the robbers.

Out of the two eyewitnesses to the robbery it was only **PW2** who positively identified the appellant at the police identification parade mounted at Likoni police station. **PW1** did not identify anyone at the parade. The learned trial magistrate did not place any reliance on the evidence of **PW1** as an identifying witness. We believe in this he was correct since **PW1** had failed to identify the appellant at the parade. The trial magistrate did however rely on the identification by **PW2**. In this regard we feel we can do no better than to cite the findings of the learned trial magistrate in his judgment at page 23 line 13 as follows

"The evidence of PW2 is that she saw the accused who was the one holding a pistol and later identified her at the parade and was sure he was one of the robbers. As I have noted above the robbery took place during the day and lasted about 30 minutes and chances of one identifying a person were quite high. I know the dangers of convicting a person on the evidence of a single witness in identification and I have warned myself already, but circumstances in this case and especially the evidence of PW2 that she saw the accused doing the robbery and that she identified him at the parade carries some weight of truth. One reason why I am convinced that she identified the accused is that it was accused who was ahead of the other accused as they got into the house. She [PW2] was the one who opened the door even thought the door was ajar. She first saw the robbers standing by the front door knocking. She let them in and spoke to them as they asked about Kamau's wife. They took off the child from her before tying her hands with ropes, they broke into the bedroom as she watched them. She later recognized the accused from his swollen mouth and even though he was this time dressed in different clothes. This witness had a long time with the accused more than the complainant and chances that she properly identified the accused are high and cannot be doubted. I have also considered the circumstances of the arrest of the accused and the fact that the identification parade was held in less than 14 days that PW2 memory could not have long lapsed……."

We find that the learned trial magistrate did cover all the salient points and we would have no more to add to his findings. He has carefully analyzed this question of identification and has come to what in our view is the correct conclusion that there existed a clear, positive and reliable identification of the appellant by **PW2** as one of the persons who robbed them on the material day. We say no more on this.

Counsel took issue with the fact that the identification parade was conducted by an officer whom the terms as the investigating officer of the case. We find that this is not the correct position. **PW5 INSPECTOR JAMES TINA** the officer who conducted the parade was at the material time the Deputy OCS of Likoni police station. He narrated the manner in which he conducted the parade which we find to have been in accordance with the law and with the Force Standing Orders. The appellant duly signed the parade forms and had no complaint to make. Even during the trial we note that the appellant raised no issues with the manner in which the parade was conducted. We do not accept the contention that section 46 of the Police Standing Orders which restricts an OCS from conducting an identification parade extends also to the Deputy OCS. If this was the intention, then it would have been clearly provided for. There is clear evidence that this case was investigated by **PW4 SERGEANT SAMUEL AWUOR** who gave a lengthy narration of all that he did from the time when he received the report upto the time when he arrested the appellant. Therefore the allegation that the identification parade was conducted by the investigating officer is not only misleading but is false.

Lastly on the ground of identification it is submitted that failure to call as a witness the informer who led police to the appellant is fatal to the prosecution case. We do not agree. The informer did not witness the robbery. The police have no obligation to reveal the identity of their informers to court. Indeed **PW4** the investigating officer stated this informer led them not only to the appellant but to two other suspects known as *'Ken'* and '*Otile'* who were wanted in connection with other offences. The informer had no useful evidence to give regarding the incident of the robbery and therefore failure to call him does not in any way weaken the prosecution case. We are satisfied that the prosecution case was overwhelming. The offence of Robbery with Violence was proved beyond a reasonable doubt. We find the conviction of the appellant to have been sound and we do uphold the same.

Finally counsel takes issue with the death sentence imposed upon the appellant terming it unconstitutional and therefore unlawful. Section 296(2)of the Penal Code under which the appellant was charged provides

for a mandatory sentence of death upon conviction. Counsel relies upon the case of **GODFREY NGOTHO MUTISO VS. REPUBLIC Criminal Appeal No. 17 of 2008** where in a judgment delivered on 30th July, 2010, the Court of Appeal at Mombasa declared the mandatory death sentence provided for murder by section 204 of the Penal Code to be unconstitutional. However, this matter of the constitutionality and/or legality of the mandatory death penalty remains far from settled. Following the **Godfrey Mutiso** case the Court of Appeal went on to make two further (and contradictory) pronouncements on this very issue. In the two cases of **MWENDWA KILONZO & ANOTHER VS. REPUBLIC Criminal Appeal No. 209 and 200 of 2004** and **JOSEPH NJUGUNA & 2 OTHERS VS. REPUBLIC Criminal Appeal No. 5 of 2008**, two different benches of the Court of Appeal sitting in Nairobi, in judgments coincidentally delivered on the same date 18th October, 2013, declared the mandatory death penalty provided by section 296(2) of the Penal Code to be both lawful and constitutional. These two decisions were made **after** the **Godfrey Mutiso** decision upon which the appellant relies. As stated earlier the situation remains uncertain. With conflicting decisions from the Court of Appeal, it is imperative that the matter be settled by way of a pronouncement from the Supreme Court. Failing that we find that at the present time the mandatory death sentence has been declared lawful and therefore the learned trial magistrate was quite in order to impose the same. We find no defect in the sentence – it is provided for by law and by Article 26(3) the Constitution thus we do uphold the death sentence imposed upon the appellant. Finally, this appeal fails in its entirety. The conviction and sentence of the appellant are hereby confirmed and upheld.

Dated and delivered in Mombasa this 28th day of July, 2014.

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:

Ms. Bii for Appellant

Mr. Ayodo for State

Court Clerk Mutisya