REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 1 of 2012

HUSSEIN AFFIERE ROBO……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

From original Conviction and Sentence of the Principal Magistrate's Court at Mandera in Criminal Case No. 305 of 2011 (R. Odenyo)

JUDGEMENT

Background

1. Hussein Affiere Robo (the appellant) was arraigned before the Principal Magistrate at Mandera on 19th September 2011, tried, convicted and sentenced to death on count one, eight years imprisonment on each limb in count two and eight years imprisonment on each limb in count three. The charges facing the appellant were framed in the following terms:

(a) Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code particulars being that on the 13th day of September 2011 at Bulla Mpya Location in Mandera County, being armed with a dangerous weapon namely a Somali sword and a toy pistol, robbed Said Ali Arress of cash Kshs 2,000 and at, immediately before or immediately after the time of such robbery used actual violence on the said Said Ali Arress.

(b) Burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code particulars being that on the 13th day of September 2011 at Bulla Mpya in Mandera County broke and entered the dwelling house of Bashir Farah Mohamud with intent to steal and did steal from therein one belt and cash Kshs 1,000 all valued at Kshs 1,300 the property of the said Bashir Farah Mohamud.

(c) Burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal Code particulars being that on the 11th September 2011 at Bulla Mpya Location in Mandera County, broke and entered the dwelling house of Marian Mohamed Adan with intent to steal and did steal from therein assorted clothes, eight bottles of body lotion creams, one mobile phone Nokia 1100, all valued at Kshs 20,370 the property of the said Marian Mohamed Adan.

2. This appeal had commenced on 27th March 2012 before a bench of two judges composed of **Lady Justices Philomena Mwilu** and **Stella N. Mutuku**. The appellant had submitted before that bench in support of his appeal and the state had responded but had sought more time to table some authorities they wanted to rely on. **Lady Justice Philomena Mwilu** was not available on subsequent dates to enable the

conclusion of the case. A different bench was constituted comprising of **Lady Justices Florence N. Muchemi and Stella N. Mutuku.** Hearing of the case before the latter bench commenced on 27th November 2012 during which time the appellant chose to have the case start afresh. He however adopted the earlier submission he had made before the earlier bench. He further filed, with leave of the court, written submissions. Mr. Mulama, the learned state counsel, also adopted the earlier submissions made by Mr. Gitonga and responded on the issues raised by the appellant in his written submissions.

Grounds of Appeal

3. The petition of appeal lists several grounds. They are poorly drawn grammatically but after reading them carefully we have understood the appellant to be challenging the charge sheet which he says is fatally defective; he blames the trial magistrate for relying on the doctrine of recent possession without supporting proof; for failing to consider his defence of alibi; he is challenging the evidence that it did not prove positive identification; he claims that he was not given a chance to defence himself; he blames the trial magistrate for disregarding his mitigation and submissions; he claims that he did not understand the language used by the court and that the case was fabricated due to personal differences between him and the complainant; he terms the sentence as being too harsh; he claims that the evidence was full of discrepancies and the mode of his arrest was improper.

Duty of the court

4. We have considered that this court is sitting on first appeal and that we are under a duty to reconsider the evidence presented before the trial court, evaluate the same and draw our own conclusions in deciding whether to or not to uphold the judgement of the trial court. This duty has repeatedly been emphasized by the courts (**see Criminal Appeal No. 7 of 2006 Alloys Omondi Nanga v. Republic** where the Court of Appeal quoted with approval the case of **Okeno v. Republic [1972) E.A 32** on this point**).**

The evidence

5. The case for the prosecution in the lower court was supported by the evidence of eight witnesses. **Ali Arress (PW1),** a resident of Bulla Mpya Mandera Town,was asleep at about 3.00am on 13th September 2011 when some commotion inside his house woke him up. He saw a man flashing a torch. The man escaped through the door. When he checked his house he noticed that his phone make G16 and Kshs 2,000 that had been in his wallet were missing. He went after the intruder. He found someone standing outside his house and on asking who the person was, the person took off running. The person had his face covered with a piece of cloth and **PW1** was not able to see his face. Using a torch for lighting he chased after the person. As he was about to capture him, the person tripped and fell and the piece of cloth covering his face fell off. **PW1** saw his face and noticed the person was a stranger to him. The person removed a sword and aimed it at **PW1** stabbing him on the thigh. **PW1** raised alarm and neighbours came to his rescue. They chased the person. **PW1** was picked by the police later the same night. **PW1** saw the suspect who had stabbed him in the same police vehicle. **PW1** identified the suspect as the accused in the lower court (appellant) in this case.

6. On the same night at about 3.30am **Bashir Farah Mohamud (PW2)** was asleep in his house in the same neighbourhood as **PW1** when screams of 'thief', 'thief' woke him up. He went outside and saw people passing by running and he thought they were chasing the thief. He decided to check his house and discovered that his canvas belt with Kshs 1'000 in two 500 denomination notes was missing. He went outside his house and walked towards the place where the crowd had gathered. They had surrounded a man who was brandishing a knife. The man was in a house whose door was open. Police arrived at the scene and took the person to Mandera Police Station, **PW2** identified the accused in the lower court (appellant) as the person he found brandishing a knife.

7. **Abdikadir Abdi Madey (PW3)** the assistant chief of Bulla Mpya testified to receiving a telephone call on 13th September 2011 at about 4.00am informing him of a suspect who had been cornered at a home he referred to as belonging to one **Mukhar Maalim**. He went to the place and found a suspect he identified as the accused in the lower court (appellant) tied with ropes at the hands. The person was lying

down unconscious, his body drenched in blood. The police arrived and took the suspect away. **PW3** testified further that they searched the house where the suspect had been dragged from and a knife was recovered. On asking around they were shown a house which they were told to be the residence of the suspect. From that house, about three blocks away a wallet with Kshs 200 and an identity card in the name of **Hussein Allim Robo** was found. From the same house was found a toy pistol, a maroon canvas belt with pockets from where Kshs 1'000 in two 500 denomination notes, mobile phones and six bottles of lotion cream were found.

8. Further evidence on the events of that night was presented by **Roble Mohamed Adan (PW6)** also a resident of Bulla Mpya in Mandera and working with Islamic Relief as a driver. He narrated to court that he was asleep on 13th September 2011 at around 4.00am when he was awakened by commotion of people shouting outside his house. On opening his door, he saw a crowd of people shouting and throwing stones. The crowd was after someone on the roof of the building where **PW6** was a tenant. The crowd entered through the door of **PW6's** house and started stoning the man with stones. The man jumped and ran into some rooms nearby. **PW6** called the area assistant chief who later arrived at the scene. **PW6** does not name the assistant chief whom he telephoned but since the evidence identifies only one person as being the assistance chief, we conclude that this is **PW3 Abdikadir Abdi Madey** (this witness had testified that he was telephoned around 4.00am on the same date and informed about a suspect who had been cornered by a crowd of people at the home of one **Muktar Maalim)**. **PW6** told the court that he went back to his house to pacify his children who had woken up due to the commotion. When he went out again he found a man lying on the ground having been beaten by the crowd. He identified that man as the accused in the lower court (appellant).

9. **PC David Otieno (PW5)** from Mandera Police Station in company of the OCS arrived at the scene around 5.00am on 13th September 2011. They found a man, who **PW5** identified as the accused in the lower court (appellant), having been badly beaten lying on the ground surrounded by a big crowd. They were shown a partly completed house as the residence of the suspect. They recovered various lotion creams and a Nokia, Vodacom and G type mobile phones and two batteries in a polythene bag, a toy pistol, a wallet with Kshs 215, identity card in the name of the suspect, a canvas belt with a pocket and a sim card. Police also went to the house where the suspect was said to have been hiding and recovered a blood stained knife.

10. **PW6** further testified that they spread word for anyone who may have lost items as a result of theft to go to the police station to identify the items the police had recovered from the alleged house of the suspect. Among the witnesses who went to the police station to identify stolen items are **Maryan Mohamed (PW4)** and **Ali Ahmed Ali Osman (PW8)** who are husband and wife. **PW4** identified a Nokia phone one of the recovered phones and lotions as some of the items stolen from their house on the night of 11th September 2011 at about 3.00am. **PW4's** evidence that they lost items to burglars on the night of 11th September 2011 as they slept was confirmed by her husband **PW8.** They had no idea who had broken into their house as they slept and stole their items.

11. The appellant gave a sworn defence. He told the court he knew the charges he was facing. He said he heard some shouts at night between 9.30pm and 10.00pm as he was going home from the house of his brother. He saw some people running from the direction of the shouts. They started beating him with pangas. They hit him four times and he started running to save himself. At the time he was carrying a mobile phone, a sim card and Kshs 215. He ran until he reached his house but the people were still chasing him and they entered his house. He jumped over the wall into the compound of his brother. He hid inside a cupboard in one room. The mob found him and cut him with pangas occasioning him serious injuries. He told the court that he lost consciousness. They pulled him outside and called police. He found himself in hospital the following day. He denied knowledge of the items produced in court as exhibits and denied committing this offence. He claimed that the case is fabricated because one of the complainants (he did not identify which one) was a rival mason.

Submissions

12. In support of his grounds of appeal, the appellant submitted orally and also filed written submissions.

He submits as follows:

i. **On defective charge** the appellant submitted that the charge as drawn is defective because it does not indicate the tribe of the appellant and it does not support the statement of **PW1** because no force was used during the alleged theft from **PW1's** house; that the charge states that the thief used knife and toy pistol when the evidence of **PW1** does not state so and that the only time **PW1** mentioned a knife is when he said he chased the thief who stabbed him.

ii. **On identification** he submitted that he was not identified as the thief; that **PW1** said the thief was a stranger to him and had his face covered; that the conditions were not favourable for positive identification; that the trial magistrate failed to consider that torch light was being used but the amount of time taken with the suspect was not indicated.

iii. **On the doctrine of recent possession** he submitted that he was arrested with nothing and that the items were not recovered from his house; that the owner of the alleged recovered knife was not established since there were many armed people at the scene; that the people who answered the call of distress from **PW1** did not find anyone else at the scene but were shown the direction the suspect had taken with no description of the suspect; that the witness who showed the house alleged to belong to the appellant was not called to testify; that trial magistrate failed to consider the name on the recovered identity card belonged to **Hussein Allim Robo and not Hussein Affiere Robo** the appellant.

iv. **On harsh sentence** the appellant submitted that death sentence is against the law.

v. **On mode of arrest** he testified that none of the persons who claimed they arrested him testified to confirm that arrest and how it was done and the reasons for that arrest.

vi. **On discrepancy in evidence** he submitted that the investigations were poor because if he had robbed **PW1** of phone and money he would have been found with those items after arrest yet nothing was recovered from him after he was arrested. Also had proper investigations been carried out it would have been established that the name on the recovered identity card was different from that of the appellant.

13. This appeal has been opposed by the state. However the state conceded that counts two and three are improperly drawn and do not constitute an offence and therefore they must fail. Learned state counsel submitted as follows:

i. **On the charge** the learned counsel submitted that the allegations have no basis since the nationality of the appellant is shown as Kenyan; that the ingredients of the offence of robbery with violence under section 296 (2) have been proved by the prosecution and that the injuries sustained by **PW1** were confirmed by medical evidence of the clinical officer **Mr. Suter Walter Kimutai PW7.** The case of **Moi Ochogo Onchiri v. Republic [2010] eKLR** was cited to support that point.

ii. **On identification**, counsel submitted that the appellant was properly identified by **PW1** using the light of a torch and light from outside which was sufficient to enable identification; that it is not for the appellant to determine the circumstances under which he was identified and it is for the court to address itself as to whether the conditions of identification were favourable basing on the **R. v. Turnbull [1976] ALL ER 54** case; that the appellant was arrested on the same night immediately thereafter and **PW1** was able to recognize him when both were put in the same vehicle; that there was no need of identification parade since the appellant had been identified.

iii. **On the doctrine of recent possession** it was submitted that the stolen items were recovered from the appellant's house; that the appellant did not explain how he came by the items recovered from his house (see **Francis Ndungu Warari & 2 Others v. Republic [1005] eKLR)**; that even though there was no evidence on the pistol this omission does not affect the quality of the rest of the

evidence. The state asked the court to dismiss the appeal.

Determination

14. From the outset, we wish to state that we have considered all the evidence and found that the appellant did not offer a defence of alibi. His defence is that he was walking from his brother's house towards his house when he saw a group of people running from the direction some shouts were coming from and that this group turned on him and chased him. His claim that the trial magistrate did not consider his defence of alibi has no basis. Secondly we find that the trial court considered the appellant's defence and his mitigation but dismissed them. We find his claim that he was not accorded a chance to defend himself without basis and dismiss the same. On the issue that the appellant did not understand the language of the court, we state that this cannot be true. The proceedings were conducted in Kisomali language which the appellant speaks and understands. Where Kiswahili was used by the witnesses it was translated into Kisomali. This claim by the appellant has no basis as well.

15. We have also considered the appellant's claim that the case was fabricated against him because of personal differences with the complainant because of rivalry baseless. The appellant has failed to identify which complainant had personal differences with him and we have noted that the case has more than one complainant. We also find the charge not defective especially in respect to stating the tribe/nationality of the appellant. It clearly indicates the nationality of the appellant and the correct provisions of the law are cited.

16. We are alive to the fact that the learned state counsel had conceded during the hearing of this appeal that he does not support counts two and three as they do not constitute the offence charged. These counts therefore do not stand and we will not waste time discussing them in our judgement. As a result, we hereby quash the conviction, set aside the sentences in respect of counts two (2) and three (3) respectively. We will pronounce our final orders on those counts at the conclusion of this judgement. We now wish to consider count one (1) on its merit.

17. After our careful reading of the grounds of appeal and submissions from both sides it is our understanding that the following issues are raised:

i. Was a charge under section 296 (2) of the Penal Code proved?

ii. Was the appellant positively identified?

iii. Was the doctrine of recent possession properly invoked?

iv. Does the evidence display discrepancies?

v. Is death sentence harsh?

18. To answer the first issue, we wish to examine what constitutes robbery with violence under section 296 (2) of the Penal Code. This section must be considered in conjunction with section 295 of the Penal Code. The latter section sets out the essential ingredients of robbery: **use of or threat to use actual violence against any person or property at or immediately before or immediately after robbery.** The existence of these ingredients is pre-supposed in the three sets of circumstances prescribed under section 296 (2)of the Penal Code **(See Johana Ndungu v. Republic in Criminal Appeal No. 116 of 1995)**. The prosecution is under a duty to proof that any one of the following circumstances existed:

(a) If the offender is armed with any dangerous or offensive weapon or instrument, or

(b) If he/she is in the company with one or more other person/persons, or

(c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

19. The evidence is clear that PW1 was woken up by commotion in his house at 3.00am. He stated **"I was woken up by some commotion. I saw someone flashing a torch in my house. I turned on my side. I saw a person escaping through the door. I got up and on checking my room I realized my mobile phone make G16 and also Kshs 2'000 from my wallet were missing".** To our minds this testimony is describing a sneak thief/burglar who expected to take whatever he found in this house when the owner was sleeping. The act of escaping when he realized the owner was awake is enough proof. The evidence further shows **PW1** pursuing the intruder and it is after he made to hold the person he found outside his house that the person fell and removed a knife which he used to stab **PW1**. We will discuss this evidence further when considering the issue of identification. Suffice it to state at this stage that our considered view is that the intruder was alone and there is no evidence to show that he had any offensive weapon or instrument with him at that stage.

20. **PW1** was stabbed outside his house and we have no doubt that he sustained injuries which have been confirmed by the evidence of **PW7**. Assuming the person who stabbed **PW1** outside his house was the same person who was escaping from **PW1's** house, is the stabbing part of the same 'transaction' of robbing so as to fit in the third ingredient under section 296 (2)? Our considered answer to that question is in the negative. Had the stabbing occurred inside the house, perhaps to further the act of robbing or to silence **PW1** or prevent him from identifying or pursuing the intruder, our answer would have been in the positive. Had **PW1** not pursued the intruder, again assuming the person who stabbed him is the intruder, the stabbing in our view would not have occurred. Our conclusion on that point is that the ingredients of section 296 (2) were not established by the prosecution. They do not exist in this case and our view is that it is a good case for burglary.

21. Turning to the issue of identification of the appellant, we have considered the available evidence. **PW1** was woken up by commotion in his house and by use of a torch he pursued the intruder. He found someone standing outside and states that **"….I was unable to see his face as he had covered it with a cloth"**. **PW1** stated that the cloth fell off when the person tripped and fell down. **PW1** stated **"I saw his face. He was a stranger to me".** He further testified that when police picked him later that evening he saw the suspect who had been arrested in the same vehicle and therefore he was able to recognize him. We have considered the circumstances under which **PW1** was operating. He had just woken up from sleep, he was using a torch, he chases a man whom he found outside his house and who he believed was the same man who had been inside his house. Were these circumstances favourable for positive identification? Can these circumstances pass the test of the guidelines as laid down in **R. v. Turnbull [1976] 3 All ER?** This case has been cited with approval in many cases in this country.

22. Before considering the guidelines in the **Turnbull case above** and in order to put the entire issue of identification into perspective, we wish to discuss whether the suspect who was inside **PW1's** house, the person who was found standing outside **PW1's** house and the suspect who was finally cornered and arrested are one and the same person. We find the evidence unconvincing that a suspect who has just been found inside someone else's house stealing could go outside that house and just stand there fully aware that the owner of that house has seen him. Even assuming the suspect could act in that manner, we have considered that **PW1** did not have an opportunity to see the suspect while inside his house. The person he found outside his house with a covered face started running after **PW1** asked him who he was. When the man fell he **"instantly removed a knife which he aimed at me".** To our minds, the events happened so fast for **PW1** to have a good opportunity to observe the face of the person.

23. Our considered view is that **PW1** spent a very short time with the suspect. Although at the time the suspect was stabbing **PW1** he must have been close, the evidence of the light being used is very poor. It is not possible in our view for someone under attack with a knife and trying to save himself to keep the torch trained on the suspect who was a stranger to **PW1** and see him well enough to an extent that the witness is able to recognize him later. There is also no description of any particular features to remember the suspect by.

24. We are alive to the evidence that after **PW1** was stabbed, he shouted for help and people responded. At the time the people arrived at the spot where **PW1** was, the suspect had escaped. **PW1** showed them the direction the suspect had taken. This raises questions as to who the pursuers arrested; how did they

know which person to pursue and what informed their decisions? This evidence raises doubts that the suspect who was found inside **PW1's** house may not be the one **PW1** found standing outside his house, and may not be the same one cornered and arrested by the mob. The appellant was arrested by the mob but as evidence will show no particular witness told the court what informed the decision to pursue and arrest the appellant. To settle this issue therefore, it is our considered view that the evidence on identification of the appellant as the suspect found in PW1's house has not met the threshold of proof set out in the **Turnbull case**.

25. We wish to consider the issues of invocation of the doctrine of recent possession and discrepancies in evidence together. Our reading of the entire evidence on the sequence of events does not reveal any witness who was around when the appellant was arrested. PW1 had been injured and his call for help attracted a crowd of people who went in pursuit of the suspect. As we have stated in this judgement the crowd did not have the description of who they were pursuing. PW2 heard shouts of 'thief' 'thief' and went out of his house, saw some people running and believed they must have been pursuing the alleged thief. He does not say how many these people were. He went back to his house and later went out after confirming some items had been stolen from his house. He stated that he found the appellant brandishing a knife and surrounded by the crowd. PW3 arrived at the scene one hour later, at 4.00am, and found the appellant badly injured and unconscious. PW6 identified the appellant as the man who was flashed from a room by the crowd. None of these witnesses or the remaining ones was part of the crowd that chased and arrested the appellant.

26. The house from where the stolen items were recovered from is alleged to belong to the appellant. The evidence touching on that issue was adduced by PW3 who stated as follows: **"we asked around and were shown a house which we were told is his (appellant's) residence. It was 3 blocks away from where he had been beaten. We went to search that house. We found a wallet with Kshs 200 and an identity card in the name of Hussein Allim Robo inside. We found a toy pistol, a maroon belt made of canvas and on which are 2 pockets. In one pocket we got Kshs 1'000, in 2 denominations of Ksh 500, we also got mobile phones and 6 bottles of body creams".** We note discrepancies in this evidence. The person who identified the house as belonging to the appellant did not testify; the identity card recovered from that house bears the names Hussein Allim Robo. We are not able to confirm to whom these names belong since there is no evidence to show they are the names of the appellant whose names we have confirmed from the court records to read Hussein Affiere Robo. The identity card that was produced as evidence was not availed to us. The record of the trial magistrate does not dwell on the issue of the identity card and the discrepancies in the names.

27. We have also noted that the appellant was searched and found with nothing. PW3 said in his evidence, **"I saw police search him but nothing was recovered from his pockets".** We need to point out that PW5 did not say anything about the appellant being searched. He stated that "**a mzee**" who knew the appellant showed them a partly completed house where the appellant lived. It has not escaped us that the "**mzee"** mentioned here was not identified by name and was not called to testify.

28. We have also considered and found the evidence wanting on the issue of sequence of events. It is our view that the person who stole from PW2's house must have taken those items to the house from where they were recovered. For the appellant to be the thief/robber he must have stolen and taken the items to his alleged house first before he went to PW1's house. The knife alleged to have been recovered from the house where the appellant was cornered and arrested in our view could have belonged to anyone. We have stated above that no one from that crowd became a state witness at least to testify as to whether when they cornered the appellant he had a knife with him. At the end of this analysis, it is our view that without evidence leading to the conclusion that the house from where the items were recovered from belonged to the appellant, it would be a waste of this court's time to discuss the doctrine of recent possession. Our reading of the judgement of the lower court reveals that the trial magistrate did not invoke that doctrine. It would have been worth considering that doctrine in our judgement had we found existence of evidence implicating the appellant.

29. We have addressed our minds to the issue of death sentence being harsh and being against the law. We have taken into account the provisions of Article 26 (1) and (3) of the Constitution that guarantees

every person the right to life and reassures that no one should be deprived of life intentionally except to the extent authorised by the Constitution or other written law. We have understood this to mean that death sentence is still in our statute books, the Constitution allows deprivation of life in circumstances authorised by written law. Such law is section 296 (2) of the Penal Code which prescribes death as the sentence to impose where one is convicted of robbery with violence. We agree that death sentence is harsh but it is also mandatory. We take judicial notice that the debate is still out there on death sentence. Actually our view is that it cannot be defined as 'sentence capable of being served' *per se* since the convicted person's life is terminated.

Conclusion

30. We have thoroughly reconsidered all the evidence adduced in the lower court and evaluated the same. In our view the trial magistrate was in error in his findings that the appellant robbed PW1 and stole from PW2's and PW4's houses respectively. There is no evidence to support such finding as we have shown in our judgement. The trial magistrate was in error in finding that the evidence of the complainants (PW1, PW2 and PW4) was corroborated by the evidence of the remaining witnesses. The trial magistrate ought to have thoroughly examined all the evidence. We are confident that had he given all the evidence much thought and looked at the relevant law, he would have arrived at a different conclusion. The trial magistrate did not address his mind to the essential ingredients of the offence under section 296 (2) of the Penal Code or the numerous discrepancies in the evidence.

31. We have shown elsewhere in this judgement that as conceded by the state counts two (2) and three (3) cannot stand due to deficiencies in the way those charges were drawn. Having found that the evidence does not support count one (1), it is our duty to find that the conviction of the appellant was based on faulty evidence and is therefore not safe. In view of this finding we hereby quash the conviction, set aside the sentence in each of the counts (count 1, 2 and 3) and order the release of the appellant from custody unless he is being held for any other lawful cause. We order accordingly.

Florence N. Muchemi **Stella N. Mutuku**

Judge **Judge**

Signed, dated and delivered this 30th January 2013