REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 8 of 2009

(From the original Conviction and Sentence in the Criminal Case No. 1681/2008 of the Chief Magistrate's Court at Mombasa: R. Kirui – PM)

BORRIS KEN SOLOMON……..……....……APPELLANT
VERSUS
REPUBLIC……..……..RESPONDENT

JUDGMENT

The appellant **BORRIS KEN SOLOMON** has filed this appeal challenging his conviction by the learned Principal Magistrate sitting at the Mombasa Law Courts. The appellant was first arraigned in court on 6th June, 2008 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.** The particulars of the charge were that:

"On the 2nd day of June, 2008 at Kaa Chonjo area in Mombasa District within the Coast Province jointly with others not before court and while armed with dangerous weapons namely rungus, bows and arrows robbed JOSEPH MUTHIANI of three tyres valued at Kshs. 40,000/= and at or immediately before or immediately after such robbery injured the said JOSEPH MUTHIANI."

The appellant entered a plea of *'Not Guilty'* to the charge and his trial commenced on **21st July, 2008**. The prosecution led by **CHIEF INSPECTOR KITUKU** called a total of seven (7) witnesses in support of their case.

PW1 JOSEPH MUTHIANI told the court that on the night of 2nd June, 2008 at about 4.00 a.m. he was on duty as a night guard in the compound of **PW2 RECHO MASHA**. At the material time the appellant whom **PW1** says he knew well came into the compound with another man. They assaulted **PW1** and tied him up. They then stole three (3) tyres from the vehicle of **PW2** registration number **KAY 227B** which was parked outside the house**. PW1** called out for help and some neighbours came to his aid. The matter was reported to police. The following day the appellant was arrested and taken to the police station. Upon completion of investigations police charged the appellant with the present offence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charge. On 30th December, 2008 the learned trial magistrate delivered his judgment in which he convicted the appellant on the charge of Robbery with Violence and thereafter sentenced him to death. Being dissatisfied with both his conviction and sentence the appellant filed this appeal.

The appellant who was unrepresented during the hearing of this appeal relied on his written submissions which had been filed in court. **MR. MUREITHI** learned state counsel who appeared for the respondent state opposed the appeal.

We have considered the written submissions filed by the appellant as well as the brief oral submissions which the appellant in support of his appeal. The appellant raised the following grounds for his appeal:

- Defective charge sheet

- Insufficiency of Evidence

- Failure to consider his defence.

On the first ground the appellant argues that failure to cite

section 295 of the Penal Code and the citation of only section 296(2) of the Penal Code renders the charge sheet fatally defective. Whilst it is true that the charge sheet only referred to section 296(2) which provides for the penalty for the offence of Robbery with Violence, this omission does not render the charge sheet fatally defective. This was the ruling of the Court of Appeal in the case of **DENNIS OBUYA –VS – REPUBLIC [2006] eKLR**. We find that the charge and particulars were clearly read out to the appellant and he could not have been in any doubt whatsoever of the charge which he faced. We have carefully perused the charge sheet and found that it was proper in all other respects. Thus this ground of the appeal fails and is dismissed.

We shall now proceed to analyze the evidence on record. **PW1** told the court that the incident occurred at 4.30 a.m. It was night time and therefore dark. However, **PW1** told the court that the area in which he sat was well lit and thus he was able to see and recognize one of the robbers. He states that there were electric security lights which enabled him to see. **PW1** gives a very clear and graphic narration of the events of that night. He states that the appellant came armed with a bow and arrow and the appellant even spoke to the witness thus granting him ample opportunity to see and identify the appellant. The appellant was not a stranger to **PW1**. He was a person whom he knew very well and whom **PW1** referred to as *'Ken'*. It is indeed a fact and the charge sheet confirms that the appellant is known as *'Ken'*. Thus aside from visual identification there is evidence of recognition. Recognition was held to be more satisfactory, more assuring and more reliable than identification of a stranger [see **ANTONONI & OTHERS –VS – REPUBLIC (1980) KLR 59**].

PW1 told the court that the robbers stole three (3) tyres from the vehicle of **PW2** which was parked outside. Photographs were taken of the vehicle minus the tyres which photographs were produced as exhibits in court **Pexb2**. The evidence of **PW1** is corroborated by the testimony of **PW4 MARY NAFULA WEKESA** who told the court that on the material day at around 4.00 a.m. she was walking home. She told the court that she came across the accused and two other men each carrying a vehicle tyre. The witness was able to identify the accused whom she knew as Ken**. PW3** states at page 9 line 22:

"I recognized all of them. I knew the accused even by name before and I used to see the others around."

She goes on to state that she was able to see them due to the electric lights in the area. Here again there is evidence of recognition since the witness had known the appellant before. We find that the evidence of identification given by the two witnesses is reliable and squarely places the appellant at the scene. It cannot be a mere coincidence that the appellant is spotted with a vehicle tyre hardly minutes after tyres had been stolen from the vehicle of **PW2.**

The question of whether this incident amounted to a Robbery with Violence as envisaged by section 296(2) of the Penal Code is fairly straight forward. The robbery was perpetrated by more than one person. The appellant was armed with a bow and arrow and **PW1** was attacked and injured in furtherance of the robbery. **PW1** stated at page 4 line 26:

"Then the one behind me hit me on my mouth breaking some of my teeth. I then rolled over and he hit me on my face……."

PW3 STEPHEN MBAYA who rushed to the aid of **PW1** confirms that he found **PW1** bleeding from the mouth. Further corroboration of the injuries sustained by **PW1** is provided by the evidence of **PW6 DR. LAWRENCE NGONE** who examined and treated **PW1.** He noted injuries on the face and lips of **PW1**. He filled and signed the P3 form which was produced as an exhibit **Pexb1**. We are satisfied that all the elements of robbery with violence are proved to have existed.

Contrary to the claim by the appellant that the trial magistrate failed to consider his defence we find that the court did examine and consider his defence. The appellant is his defence claimed that his tribulations arose from a grudge he had with the officers who arrested him. This would not explain why **PW1**, **PW2** and **PW4** would testify against him. This defence has no merit and the trial court was correct to dismiss it.

On the whole we find that the prosecution mounted a water tight case against the appellant. The charge of Robbery with Violence was duly proved to the standard required in law – i.e. beyond a reasonable doubt. We have no hesitation in confirming the conviction of the appellant. The death sentence being the penalty provided for in law is similarly upheld. Finally, this appeal fails in its entirety and is hereby dismissed.

Dated and delivered in Mombasa this 16th day of April, 2013.

…….. **……**

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:
Appellant in person
Mr. Jami for State
Court Clerk